



As the law is in a constant state of evolution - any discussion relating to changes in the law involves simply an assessment of how the law delineates the interests of the various elements of society.

those who make their living from the land have special interests and special difficulties that others do not have. The law attempts to meet these interests in many different ways. What follows is an attempt to summarise the special burdens and special benefits as they affect the primary producer.

The Neighbour Principle

It is important at the outset to recognise that the criminal law is concerned largely with punishing a wrongdoer for wrongful acts. Conversely, the Law of Torts is concerned largely with compensating the person injured or damaged by a wrongful act or omission.

An area of the law which has developed significantly in recent years is the Tort of negligence. In a negligence action, a person must prove:-

- a) that the defendant owed him a duty to take care for his safety in the circumstances;
- b) that the defendant breached that duty;
- c) that, by reason of the breach, he suffered injury, loss or damage; and
- d) that the injury, loss or damage suffered would have been foreseen as a possible result of the breach of the duty by a reasonable man placed in the position of the defendant at the time when the duty was breached.

The leading case on the duty of care is that of *Donoghue v. Stevenson* [1932]. The question that arose in that case might be broadly stated as this: Did the manufacturer of soft drinks owe a duty of care to members of the public who drank them? A woman alleged that she had suffered shock and some sickness - the shock when she saw a decomposing snail in the soft drink she had partly consumed, and the sickness as a result of consuming the foul soft drink. Lord Atkin's judgement contained the following passage:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question. "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

The underlying duty which the law imposes is the fundamental duty to show some consideration towards ones fellow man. To ignore such considerations may result in liability in negligence. As can be seen, the concept has an affiliation to almost every activity undertaken. Once the existence of a duty is established, the most effective indemnity available is to observe a standard of care which in a particular situation is that which an ordinary prudent man would observe.

The Tort of negligence now regulates the duties of occupiers to all person who enter onto premises and the duties of employers to employees to employers.

Recovery for negligently given advice is a fairly recent development. The scope of duty extends to government authorities, accountants, real estate agents, doctors, solicitors, valuers, surveyors and inspectors.

Liability is attracted where:-

- (1) the circumstances are such as to have caused the speaker or be calculated to cause the speaker to realise that he is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access.
- (2) The subject matter of the information or advice must be of a serious business or nature.
- (3) The speaker must realise or the circumstances be such that he ought to have realised that the recipient intended to act upon the information or advice; and
- (4) The circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker.

Dealing with Government

Administrative law is concerned with the controls exercisable by the law over the decisions of government or some government agencies and officials.

What has been described as the 'Administrative law package' comprises the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1975, the Administrative Decisions (Judicial Review) Act 1977, the Freedom of Information Act 1982 and the Privacy Act 1988.

The Ombudsman's primary function is to investigate complaints about cases of maladministration or faulty administration by government officials or organisations.

The Administrative Appeals Tribunal conducts a 'review on the merits' of a decision made by a government official or organisation and may substitute its own decision for that of the original decision maker. Familiarity with the relevant legislation under which the decision was made is essential.

The Administrative Decisions (Judicial Review) Act is a statutory codification that streamlines many of the prior common law mechanisms of judicial review of decisions made pursuant to government enactments. It has however gone beyond the common law by including for example, "abuse of power" as a ground of review.

The courts role under the Administrative Decisions (Judicial Review) Act is to examine whether the decision under review conforms to law and not to consider whether it was "the correct or preferable decision" i.e., a review of the legality of a decision, not its merits.

The Freedom of Information Act is neither free nor about information. The Act may be used as a vehicle for gathering information. Companies or persons who are contemplating negotiating with the Commonwealth Government for contracts may wish to utilise the Freedom of Information Act. For example, an F.O.I. request to the appropriate department calling for tenders for the supply of equipment to a particular government department, can be requested seeking access to:-

- a) The conditions relating to the tender;
- b) The conditions under which such tender shall be granted; and
- c) Criteria which shall be taken into account in assessing these respective tenders.

Other examples include an F.O.I. request seeking access to documents such as log books, service and repair records effected during the life of plant and equipment can be obtained prior to a Commonwealth auction. A taxpayer whose claim for a tax deduction has been disallowed may make an F.O.I. request to the Australian Taxation Office seeking access to those documents relating to the decision made to disallow the deduction.

The Privacy Act 1988 prescribes measures necessary to give effect to the right of persons not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence by a government agency. The Act contains 11 "Information Privacy Principles" which regulate the manner in which personal information is collated, stored, accessed, altered, utilised and disclosed by a government agency. The Act created a Privacy Commissioner whose function is to investigate and conciliate an act or practice that may breach an Information Privacy Principle. The Commissioner is also required to undertake research and monitor developments in relation to the privacy of individuals.

The Australian States have not followed the federal lead. In fact it is only in respect of the ombudsman legislation that the States have all acted. With the exception of the ombudsman the foregoing comments are applicable only to dealings with Federal Government agencies or officials. The significant role in the community played by the public sector and the level of everyday decisions made by government officials which affect peoples lives make an understanding of administrative law increasingly important.

Nuisance

There are two types of nuisance recognised by the law - public nuisance and private nuisance. Public nuisance is concerned with the interference with some right enjoyed by

the general public resulting in particular damage to an individual different from the damage suffered by the public at large (i.e., obstructions/barricades). Private nuisance is concerned with the interference with some right enjoyed by a particular person, usually being a right relating to the use and enjoyment of his land resulting in damage or loss.

Interferences that are commonly alleged to constitute private nuisances are such things as the causing of physical damage to land, building or goods or land through vibrations, floodings or fire or the disturbing of the health and comfort of an occupant of land by offensive smell, noise, smoke, dust and the like. In relation to nuisance by water, it seems that a person is not liable for damage caused by surface water that runs off his land unless he interferes with the natural flow of the water, for instance, by redirecting it in the course of building operations. However, where a person constructs banks or drainage channels in the ordinary pursuit of farming activities, he may not be liable for nuisance said to result from the altered flow of waters.

For an action in private nuisance to succeed, the plaintiff must prove that the defendant has caused the plaintiff substantial and unreasonable annoyance and discomfort. In determining whether an interference is reasonable or unreasonable, the court considers whether it would be unreasonable for a normal person of ordinary habit and idiosyncrasies.

Defences to a nuisance action include:

- a) Statutory authority (authorised by legislation);
- b) Prescription (a person may after a considerable number of years creating a nuisance, acquire a right to its continuance);
- c) Unreasonable use of the land by the plaintiff.

Remedies include:

- a) Damages;
- b) Injunction (an order restraining the nuisance); or
- c) Abatement - where a person suffering a nuisance takes action to terminate the nuisance. Advice should be sought before resorting to abatement as a method of remedying a nuisance.

Conclusion

Every primary producer necessarily has a number of roles including:

1. **The land Owner** - Along with the benefits of owning broadacres, there are many responsibilities of ownership including rates and taxes and troubles with tenants and trespassers.
2. **Custodian of the Natural Environment** - There are laws for the protection of native animals, native birds and native plants; laws requiring the destruction of noxious

animals and noxious plants and some legal controls concerning the use of water from rivers and lakes; preventing soil erosion and felling trees near rivers and on steeply sloping land.

3. The Battle with the Elements - As if the climate and the seasons did not have enough oscillations, there are the extremes of weather to handle as well; rain, hail and snow; bushfire, flood and drought.

4. The Farmer - There can be problems with every part of the process; ploughing, planting, poisoning, reaping, picking, packing and so on.

5. The Employer

6. The Marketer - There are many marketing schemes for primary products and these bring with them controls that are not completely accepted as well as welcome exemptions under the Trade Practices Act.

There is an interesting parallel pattern in the laws that affect primary producers, in these laws, as well as in their lives, they take the "good with the bad", that is to say, they accept the laws that impose special burdens as well as those that provide special benefits.

In relation to these special burdens and benefits, I commend to you a publication of the Law Society of New South Wales entitled "Legal Guide for the Primary Producer".