Some State bodies can flout the law

It's time that the law applied to governments as well as the rest of us, argues **Steven Churches.**

It was recently reported in this newspaper that various NSW government departments and instrumentalities have been claiming in the course of litigation that they do not have to comply with Occupational Health and Safety legislation.

These departments are large-scale employers: why shouldn't they have to comply with important legislation designed to promote employee safety?

Then followed news that a NSW government-owned electricity company, Transgrid, had clear-felled many kilometres of land under transmission lines, in contravention of as many as 13 NSW statutes on environmental matters.

The Premier, Bob Carr, waxed eloquent that he would "throw the book" at Transgrid, and it would be treated, and fined, as if it were a private company.

How is it that some State bodies thumb their noses at the law, while the Premier is anxious that others be seen to be bound by legislation?

The answer lies in an obscure and ancient presumption of statutory interpretation that the Crown is not bound by legislation unless the act in question says so, and many acts don't.

Even if they do, as in the case of the Occupational Health and Safety Act, a second problem arises: the common law we've inherited from England has trouble accepting that the Crown can ever be prosecuted, because "the King can do no wrong", no matter how wrong some departments patently are.

The presumption that the Government (in Australia, the State and federal governments) does not have to comply with statutory requirements drives a huge breach through community assumptions about the equal application of the law to all.

Those government bodies unlucky enough to attract the Premier's boot and be left out of statutory cover are always those at the bottom of the food chain.

In 1996 it was Aborigines in the Kimberley, told by the West Australian Supreme Court that the mandatory provisions of the Health Act requiring a landlord to provide running water and waste removal did not apply when the Crown was the landlord.

Down on two strikes: Aboriginal and tenants.

And this was despite the attempt by the High Court in 1990 in Bropho's case to demystify this area of the law.

In that case the court found that the WA Government did have to comply with Aboriginal heritage legislation, and the instruction to subordinate courts was to look to the policy of legislation to see if it could be inferred that Parliament meant to bind the Crown.

But Australian courts have ever since remained insubordinate.

They are conditioned to look to the bare lettering of statutes for meaning, not to the policy behind statutes. The policy of the WA Health Act was obvious, but the judge never referred to it.

If the law works this presumption against the interests of the community's less well endowed members, then readers will not be surprised that the other side of the presumption is used to exempt the big end of town from the coils of statutory restraint.

The beneficiaries of this process begin with the "Big Australian", which in 1978 got the High Court to rule that if the Queensland Government wasn't bound by the Trade Practices Act, then neither could BHP in contract with the Government (in a restraint of trade) because otherwise the Government would be prejudiced.

This doctrine has since been used to great effect by the likes of Alan Bond. The report of the WA Inc Royal Commission shows that Bond colluded with a WA Crown body, SGIC, to avoid the restraint of the Acquisition of Shares Code, so that he was able to get control of 40 per cent of the shares in Bell Group without an embarrassing public offer.

The Code limited him to less than 20 per cent.

It was all downhill from there, leading to his plundering $1.2 billion of Bell's assets.

Recently, judgements have revealed that WA loggers are immune from wildlife conservation legislation when in contract with the Crown and, in litigation arising from the Patrick Stevedores wharfside imbroglio of 1998, Ministers of the Crown are free to implement policy in defiance of the Trade Practices Act, because the Crown is not bound, so the ministers must be at large.

This is, of course, an anathema, as ministers, like all of us, must remain under the law no matter what the government policy is.

"The Crown is not bound by legislation unless the act in question says so, and many acts don't."

If the Government cannot live with the legislation as it is, it must go to Parliament to change it, and that has been the law ever since James II was sent packing in 1688, and the Bill of Rights entered English (and later Australian) law.

Lawyers have proved incapable of addressing a situation which gives huge powers to government to advantage the powerful and leave the weak without even the protection intended by legislation.

It is now up to the community to demand a coherent structure in its relationship with the State, a relationship that must deprive government of the discretion as to whom legislation will and won't apply.

■ *Dr Stephen Churches is a Sydney-based barrister.*