IMMUNITY OF THE CROWN FROM STATUTE AND SUIT

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I INTRODUCTION – THE POSITION OF THE CROWN IN LAW

The legal position of what we call the Crown[1] has been considered over many centuries, spanning periods during which the notion of the Crown evolved from the monarch to something much broader, and the role of the monarch in law-making greatly minimised. The issue of the extent to which the Crown is bound by statute has been contentious. As we will see, various formulations of the immunity have found favour with the judges. For the sake of simplicity, I will refer to two main formulations; (a) a narrow view of Crown immunity, confining the immunity to legislation affecting what we call Crown prerogatives;[2] and (b) a broader view of Crown immunity, meaning an immunity from all kinds of legislation. A separate but related question is the extent to which the Crown could be subject to civil actions, most especially claims in contract and tort. The issue of Crown immunity remains a live one, considered (in the context of derivative Crown immunity) by the High Court of Australia in the 2007 decision *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited*.[3] I will focus this article on the broader question of Crown immunity rather than the offshoot question of derivative Crown immunity.

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[1] A precise definition of the Crown is elusive – Tom Cornford calls the concept of the Crown 'deeply ambiguous': 'Legal Remedies Against the Crown and its Officers' in Maurice Sunkin and Sebastian Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 233; George Winterton states that in the monarchies of the British Commonwealth, the Crown is shorthand for executive government: *Parliament, The Executive and The Governor-General* (Melbourne University Press, 1983) 207; Nick Seddon in 'The Crown', (2000) 28 *Federal Law Review* 245 says the concept is abstract but could be used (in Australia) to describe ten bodies politic as legal entities (247-248).

[2] These will be defined later – however there is a great divergence of views on the meaning of 'prerogative' in this context – the so-called Wade or Blackstone 'minimalist' view, that these powers mean only those powers peculiarly applicable to a sovereign, and the broader conception advanced by Dicey that it means powers exercisable by the executive government (see for example *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 409-410). Evatt's categorisation of prerogatives into three types (*The Royal Prerogative* (Law Book Co, 1987) 30-31) is discussed later in the paper.

[3] (2007) 232 CLR 1; derivative immunity is the extent to which bodies dealing with the Crown are entitled to the same immunities and privileges as the Crown enjoys. More detailed discussion of derivative immunity appears in Robertson Wright, 'The Future of Derivative Crown Immunity – With a Competition Law Perspective' (2007) 14 *Competition and Consumer Law Journal* 240 and, by the same author, 'Derivative Governmental Immunity: Lessons from Baxter and the *Trade Practices Act*' (2008) 16 *Competition and Consumer Law Journal* 114.

In this article, I will firstly outline the historical development of the position of the Crown, in terms of immunity from statute and liability in civil law. The two are related and it would be artificial to deal with only one of them. I will then consider the reception of these doctrines in Australian law, including the extra complication provided by a federal system in discussing these issues. I will then consider various formulations that might be used in future, including broad and narrow conceptions of immunity, in an attempt to make the law in this area as coherent as possible while recognising the realities and requirements of modern governance.

I will eventually conclude that a different approach should be taken to the question of Crown liability in Australia in future than is currently the law. The 'new insights' in this article include that the general test of Crown immunity from statute must be expressed in terms which include the distinction between prerogatives and the exercise of prerogatives, and that a coherent position on Crown immunity from statute must be consistent with the approach taken to the question of Crown liability more generally. It is considered artificial to separate them. I conclude that Crown immunity from statute should be given a much more restricted scope than is the current position. The historical foundations for Crown immunity are also more shaky than is often supposed.

II EARLY HISTORY

A *Crown Immunity from Statute?*

These issues are complex and have been considered over many centuries. Some royalists believed that subjects could not question, let alone attempt to overrule, the King's actions. The King could voluntarily submit to the law but could not be coerced by it.[4] Not surprisingly, James I advocated Crown immunity from statute in strong terms:

[4] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) 80-83; David Smith, *Constitutional Royalism and the Search for Settlement c 1640-1649* (Cambridge University Press, 1994) 244-245; Margaret Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645* (Octagon Books, 1949) 200; Johann Sommerville, 'English and European Ideas in the Early Seventeenth Century: Revisionism and the Case of Absolutism' (1996) 35 *Journal of British Studies* 168.

> Kings are properly judges, and judgment properly belongs to them from God; for Kings sit in the throne of God, and thence all judgment is derived. In all well settled monarchies … judgment is deferred from the King to his subordinate magistrates; not that the King takes it from himself, but gives it unto them … As Kings borrow their power from God, so judges from Kings: and as Kings are to account to God, so judges unto God and Kings … It is the King's office to protect and settle the true interpretation of the law of God within his dominions: And it is the judge's office to interpret the law of the King, whereto themselves are also subject … Keep you therefore all in your own bounds … As for the absolute prerogative of the Crown, that is no subject for the tongue of a lawyer, nor is lawful to be disputed … Rest in that which is the King's will revealed in his law.[5]

It is, as Goldsworthy notes, not surprising that the Stuart Kings felt so strongly about this issue, since in order for James I to succeed Elizabeth I (contrary to the terms of the will of Henry VIII, which was implemented by a 1536 Act), it was necessary to find that the issue of succession was governed by some other law than that statute.[6]

Bracton in his 1235 *Laws and Customs of England* wrote '*Quod Rex non debet esse sub homine, sed sub Deb et Lege*' (That the King should not be under man, but under God and the law). Coke is said to have quoted Bracton in response to claims by James I that he governed as of divine right, and thus it was treasonous to suggest the monarch be subject to law.[7] John Bradshaw, who presided over the trial at which Charles I was sentenced to death, is said to have relied on Bracton's comments to justify the proceedings.[8] Significant historical documents, including the *Bill of Rights* 1689 (Eng) and the United States *Declaration of Independence* in 1776, suggest that the monarch is subject to legislation.[9]

In 1561 in *Willion v Berkley*,[10] the Court of King's Bench found that the statute *De Donis Conditionalibus*, restricting the alienation of land, bound the Crown, in the

[5] Speech in the Star Chamber, 20 June 1616: see John Kenyon, *The Stuart Constitution 1603-1688: Documents and Commentary* (Cambridge University Press, 1986) 84-86.
[6] Goldsworthy, above n 4, 91.
[7] *Case of Prohibitions* [1607] EWHC KB J23 (Lord Coke).
[8] Lord Denning, *What Next in the Law*? (Butterworths, 1982) 6.
[9] Both documents point out alleged infractions by the monarch (James II and George III respectively) against the law. The *Magna Carta* 1215 established the possibility that the will of the monarch could be overturned by others but for various reasons this was not enforced until much later.
[10] *Willion v Berkley* (1561) 1 Plowden 223, 75 ER 339 (K.B.).

absence of express words or necessary implication. Brown J concluded it was a 'difficult argument to prove that a statute, which restrains men generally from doing wrong, leaves the King at liberty to do wrong'. Dyer CJ found 'that which is necessary and useful to be reformed requires to be reformed in all, and not in part only'.

Further consideration occurs in the 17th century, a time of great upheaval in British history, characterised by the fraught relations between the monarch and Parliament, with some revolutionary results. In 1601, in the *Case of Ecclesiastical Persons*, it was said that 'in divers cases the king is bound by act of Parliament although he not be named in it, not bound by express words; and therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King'.[11] Of course, these comments occurred even before the Glorious Revolution, when the supremacy of Parliament over the monarch was established.

In the 1615 *Magdalen College* case, the court found that Crown immunity from statute was confined to laws that derogated from 'any prerogative, estate, right, title or interest of the Crown'.[12] Lord Coke in that case claimed that the King was bound by Acts for the suppression of wrong, holding that the 'King cannot do a wrong'.[13] This statement can of course be read and interpreted in different ways, including literally opposite ways – that no court was competent to declare that the monarch had committed a wrong, or that a court could adjudicate on the legality of the actions of a monarch. Acts made for the public good were also binding on the King, as were laws for the advancement of religion. Similarly in the *Case of Proclamations*, Coke held the Crown had no inherent power to make or alter the law of the land.[14] The strong links between the judiciary and the monarchy in these and earlier times have been

[11] Co Rep 14a, at p14b (though the case cannot be regarded as of strong authority as it was apparently heard in Parliament).
[12] (1615) 11 Co Rep 66, 72a, 77 ER 1235, 1243; see also *Attorney-General v Allgood* (1734) 4 Parker 1, 3-5; 145 ER 696, 697. This is the 'narrow' conception of Crown immunity from statute.
[13] *Solum Rex hoc non potest facere, quod non potest injuste agree*; adopted by Griffith CJ in *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 338,365; Barton J to like effect (370). The full quote (to provide context) is: 'The King shall not be exempted by construction of law out of the general words of an act made to suppress wrong, because he is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong … And though a right was remediless, yet the Act which provides a necessary and profitable remedy for the preservation of right and to suppress wrong shall bind the King' (72a).
[14] (1611) 12 Co. Rep 63.

noted, and the suggestion made that it was understandable that judges should show great deference to the royal prerogative given that judges were considered to be royal servants.[15]

Subsequent to these initial statements, and perhaps as Street says influenced by the trend towards a literal interpretation of statutes generally,[16] judges in England began to take the view that the Crown was not bound by statute unless there were express words to that effect.[17] Subsequently, a further gloss to this was added; that statutes, though not binding the Crown expressly, could do so by 'necessary implication'.[18] These subsequent developments are purely judicial add-ons, and cannot find support in the original statements in the 17th century cases.[19] These glosses continue to be applied today, at least in England.[20] The Privy Council in the *Bombay* case established a very strict test as the basis for which a necessary implication could be made, requiring that the beneficent purpose of the Act be wholly frustrated if the Crown were not bound, in order that the Crown be bound.[21]

[15] Theodore Plunknett, *Statutes and Their Interpretation in the Fourteenth Century* (Lawbook Exchange Limited, 1922) 167; Harry Street, 'The Effect of Statutes Upon the Rights and Liabilities of the Crown' (1947) 7 *University of Toronto Law Journal* 357.
[16] Street above n 15, 367.
[17] For example Lord Kenyon in *R v Cook*: 'generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect' (1790) 3 T.R. 519, 521; see also *Attorney-General v Donaldson* (1842) 10 M & W 117, 124 (Alderson B); *Ex Parte Postmaster General ; In re Bonham* (1879) 10 Ch D 595, 601 (Jessel MR).
[18] See for example Story J in *US v Hoar* (1821) 2 Mason 311: 'where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed, or the language used, that the Government itself was within the contemplation of the legislature, before a court of law would be authorised to put such a construction on any statute. In general, Acts of the legislature are meant to regulate and direct the different, and often contrary force to the government itself. It appears therefore to be a safe rule founded on the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the Act' (314-315); other American cases include *Lewis v United States* (1875) 92 US 618, *Guarantee Co v Title Guaranty Co* (1912) 224 US 152; and *United States v United Mine Workers of America* (1946) 330 US 258. Wills J referred to necessary implication in *Attorney-General v Edmunds* (1870) 22 L.T.R. 667, 667; as did Cotton L.J. in *In re Henley and Co* (1878) 9 Ch D 469, 482; Lord Watson in *Coomber v Berks Justices* (1883) 9 App Cas 61, 76; *Gorton Local Board v Prison Commissioners* [1904] 2 KB 164. Kirby J cast doubt on the continued correctness of the remarks of Story J, given the growth of the regulatory state, in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* (2007) 232 CLR 1, 55.
[19] Street, above n 15; Peter Hogg *Liability of the Crown* (Law Book Co, 2nd ed, 1989) 243.
[20] *Province of Bombay v Municipal Corporation of the City of Bombay and Another* [1947] AC 58, 61; *Lord Advocate v Dumbarton District Council* [1990] SC (HL) 1; *M v Home Office* [1994] 1 AC 377. This is the broader view of Crown immunity from statute.
[21] [1947] AC 58, 63.

B *Is the Crown Subject to Suit?*

A related issue was the extent to which the Crown could be subject to a civil suit. As others have noted, these often took the form of suits against the officers or agents of the king personally where no consent was necessary.[22] Some of them were suits against the king himself where the king granted a petition of right, rather than an action in the form of a writ. The petition of right was an assertion that the king had acted contrary to law. They reflected the notion that a subject should achieve redress from the Crown in cases where redress would also be available against a private citizen.[23] Mostly, petitions of right were confined to real actions, although some related to contracts generally.[24] Equitable remedies were also available against the Crown, with or without consent.[25]

Otherwise, an immunity existed, apparently because it was considered a logical anomaly that the king would enforce a writ against themselves.[26] In the *Case of Prohibitions*, the court found that a party could not have a remedy against the monarch.[27] In some cases, the king actually presided in the court. This immunity was reformed in the United Kingdom in 1860[28] and eventually abolished in 1947.[29]

[22] In many of these cases, the action would have the same effect as a petition of right would, because the Crown would usually defend the officer and meet any compensation awarded: George Robertson, *The Law and Practice of Civil Proceedings By and Against the Crown and Departments of the Government* (Stevens, 1908) 351.
[23] William Holdsworth, *A History of English Law*(Methuen, 3rd ed, 1944) 40-42; 'The History of Remedies Against the Crown' (1922) 38 *Law Quarterly Review* 141.
[24] *Windson and Annapolis Railway Co v The Queen and the Western Countries Raliway Co* (1886) 11 App Cas 607; Thomas v The Queen (1874) LR 10 QB 31.
[25] *Pawlett v Attorney-General* (1688) Hardres 465; 145 ER 550; see Bradley Selway, 'Of Kings and Officers – the Judicial Development of Public Law' (2005) 33 *Federal Law Review* 187, 205-208; James Pfander, 'Sovereign Immunity and the Right to Petition: Towards a First Amendment Right to Pursue Judicial Claims Against the Government' (1997) 91 *NorthWestern University Law Review* 899.
[26] Walsh J in *Byrne v Ireland* [1972] IR 241, 265-266.
[27] [1607] EWHC KB J23.
[28] *Petition of Rights Act* 1860 (UK). A similar New South Wales statute was found not to be merely procedural in *Farnell v Bowman* (1887) 12 App. Cas. 643 (Privy Council).
[29] *Crown Proceedings Act* 1947 (UK).

III POSITION IN AUSTRALIA[30]

A *Crown Immunity from Statute*

Conflicting positions are evident in the early High Court of Australia decisions where the question of Crown immunity from statute was raised.[31] There is difference of opinion as to whether the immunity is broad or narrow. When I refer to a broad immunity, I mean a general Crown immunity from statute. When I refer to a narrow immunity, I mean Crown immunity only from statutes that affect the prerogative.

In the first case *Roberts v Ahern*,[32] speaking for the court, Griffith CJ declared the general rule to be that the Crown is not bound by a statute unless it appeared on the face of the statute that it was intended that the Crown should be bound, declaring the immunity was based on the royal prerogative. Griffith CJ then went on to acknowledge authority suggesting that the Crown could be bound if it were necessarily implied that it was intended it be bound.[33]

In *Sydney Harbour Trust Commissioners v Ryan*,[34] a different view was apparent. Griffith CJ appeared to suggest a narrow version of the prerogative, stating that laws not specifically naming the Crown could bind the Crown, but any law that stripped the Crown of its ancient prerogative would have to specifically name the Crown.[35] Griffith CJ found that the Government of New South Wales was subject to the same laws as individuals, at least in its commercial operations.[36] Barton J took a similar position. Citing some English works, he concluded that if the intention of the Act was

[30] I believe that the divergence of views taken by various judges on these issues in Australia's legal history justifies a fuller discussion of past cases than I would otherwise pursue.
[31] On the position of the Crown generally in Australia, see George Winterton, 'The Evolution of a Separate Australian Crown' (1993) 19 *Monash University Law Review* 1; George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421; Michael Stokes, 'Are There Separate State Crowns?' (1998) 20 *Sydney Law Review* 127.
[32] (1904) 1 CLR 406.
[33] 417-418.
[34] (1911) 13 CLR 358.
[35] 'The doctrine that the Crown is not bound by a Statute unless specifically named or included by necessary implication has been sometimes misunderstood and extended beyond the purposes for which it was laid down … It does not mean that the King, looked upon as a mere individual, may not be in certain cases precluded by statutes, which do not specifically name him, of such inferior rights as belong indifferently to the King or to a subject such as the title to an advowson or a landed estate; what it does mean is that the King cannot .. be stripped by a statute, which does not specifically name him, of any part of his ancient prerogative' (365). Griffith CJ cited the comment of Lord Coke in the *Magdalen College* case that 'the King cannot do a wrong'.
[36] 367.

to provide for the public good, or the advancement of religion or justice, or to provide a remedy against a wrong, prevent fraud, or tortious usurpation, the Crown would be bound. He then referred to the legislation then existing in New South Wales allowing civil claims against the government. Defining the issue as a question of the intention of Parliament[37] rather than a general immunity, Barton J concluded that if Parliament had wished to exempt the Crown from the legislation being considered, it could and would have done so expressly.[38] As a result, no immunity existed on the facts.

In the context of the immunity of one level of government from the laws of another level of government in Australia's federal system, the High Court early in its life had adopted a principle of implied immunities.[39] However, that doctrine was abolished in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*Engineers*).[40]

A narrower conception of Crown immunity from statute also appears in the High Court decision of *Minister for Works (WA) v Gulson.*[41] There was support for the proposition that the Crown is not bound by any statute in the absence of express words or necessary implication (the broad immunity),[42] but Latham CJ (dissenting) refused to apply a presumption that the Crown (in right of a State) not be bound by Commonwealth law.[43] Williams J (with whom Rich J agreed) would confine the immunity to cases involving 'the prerogative, right or property of the Crown' were affected; in such cases, the statute would need to apply to the Crown expressly or by necessary implication before the Crown would be bound.

As indicated earlier, in 1947 the Privy Council decision in *Province of Bombay* adopted the broad immunity doctrine,[44] divorcing the immunity from the question of the impact of the law on the prerogative. This broad immunity view was accepted by the High Court in *Commonwealth v Rhind*. In that case, Barwick CJ stated:

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[37] The importance of intention of Parliament in assessing whether immunity exists was also emphasised by Knox CJ, Isaacs Rich and Starke JJ in *Amalgamated Society of Engineers v Adelaide Steamship Co* Ltd (1920) 28 CLR 129, 154.
[38] 371.
[39] *D'Emden v Pedder* (1904) 1 CLR 91.
[40] (1920) 28 CLR 129, 145 (Knox CJ, Isaac Rich and Starke JJ).
[41] (1944) 69 CLR 338.
[42] Rich J (356), Starke J (358), McTiernan J (362).
[43] 353.
[44] [1947] AC 58, 61.

> There seems to have been some uncertainty as to the true rule of construction to be applied to modern statutes in this connexion. The relevant rule has developed over a period of time and, in my opinion, ought not now to be expressed in terms or with limitations, which on occasions may have appeared appropriate in earlier times. In my opinion, the rule to be applied universally as of this time in the construction of statutes, is that the Crown is not included in the operation of a statute unless by express words or necessary implication. Where the Crown is not expressly mentioned, the implication will be found, if at all, by consideration of the subject matter and of the terms of the particular statute.[45]

Again, a narrower view was evident by some members of the Court in *Downs v Williams*.[46] There Gibbs J noted the view that the maxim the King could do no wrong could cause more injustice in Australia than England due to differing conditions.[47] Windeyer J referred back to the comments of Brown J in *Willon v Berkley* then added:

> I believe that the common law can in the twentieth century continue to keep pace with the public interest and meet changing needs of men. Governments are today entering more and more into fields that used to be left to private enterprise. Directly or by their agencies, Governments engage today in a variety of commercial and industrial undertakings. Modern statutes ought I think to be read with that, as well as ancient dogmas, in mind. In an era of increasing state socialism, I do not think that the Crown, if it conducts a factory, is necessarily to be regarded as exempt from the responsibilities for the safety of persons employed there which the Parliament imposes upon subjects of the Crown who conduct factories. If it be said that these are illegitimate considerations, I can only say that I do not think so. I consider that they accord with matters that have influenced the interpretation and application of Acts of Parliament in the past and which can properly do so still, and that such considerations have promoted the progress and development of the common law from the Middle Ages until today.[48]

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[45] (1966) 119 CLR 584, 598; see also *Wynyard Investments Pty Ltd v Commissioner of Railways* (NSW)(1955) 93 CLR 376; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172.
[46] (1971) 126 CLR 61.
[47] 97.
[48] 71-72. Similar sentiments appear in the Canadian decision *R v Eldorado Nuclear Ltd* [1983] 2 SCR 551: 'Why that presumption (of Crown immunity) should be made is not clear. It seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject' (Dickson J, 558); and Wilson J in the same case: 'We might ask in this case whether Parliament ever contemplated that the respondents would go about the implementation of their statutory purposes by means of an illegal

In a subsequent case *Bradken*,[49] the High Court continued with the *Bombay* approach in a case involving the so-called 'federal complication' of a law from one level of government in the federal system purporting to bind the Crown in right of another jurisdiction, although some members of the High Court noted dissatisfaction with the approach.[50]

The High Court re-assessed the *Bombay* position in the landmark *Bropho v Western Australia* decision.[51] The Court noted:

> 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 (ie the narrow view of immunity) … or was said to be subject to very broad exceptions (where) … 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 … It has however been clearly accepted in more recent cases in the court that the rule is of general application.[52]
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> 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 … Whatever force such considerations may continue to have in

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conspiracy with others, counting on the protection of their Crown immunity and leaving their co-conspirators to the full rigours of the law' (592).

[49] *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

[50] Gibbs ACJ noted Professor Hogg's claim there was no clear rationale for a broad immunity, and that the history of the presumption was an example of communis error (122); Stephen J referred to academic commentary of Hogg and Street doubting the antecedents of the rule and claiming they were not authoritative as claimed, but concluded that only statute could now alter the position (127).

[51] (1990) 171 CLR 1; see for discussion Duncan Berry, 'Crown Immunity from Statute: *Bropho v State of Western Australia*' (1993) 14 *Statute Law Review* 204; Greg Taylor, '*Commonwealth v Western Australia* and the Operation in Federal Systems of the Presumption that Statutes do not Apply to the Crown' (2000) 24 *Melbourne University Law Review* 77.

[52] Mason CJ, Deane Dawson Toohey Gaudron McHugh JJ (joint reason), 14.

> 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, 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 … 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.[53]

The High Court did not however reverse the presumption that an Act did not bind the Crown or its instrumentalities.[54] It re-affirmed that the question was one of intention to be gleaned from the object of the Act and statutory circumstances.[55] The court applies the new *Bropho* approach to acts enacted after the decision and prior to the *Bombay* decision, and the *Bombay* approach to the interpretation of statutes passed between 1947 and 1990.[56] This was on the basis that Parliaments may have relied on the *Bombay* precedent in crafting their legislation, and it was considered to be unfair and productive of unforeseen consequences if the rules were changed retrospectively so that legislation passed on the assumption that it did not bind the Crown (given the

[53] (joint reasons), 18-19.
[54] (joint reasons), 22; however it clarified that the presumption was merely one of statutory interpretation and should not be elevated to any higher status: joint reasons (15) and Brennan J (28). The presumption was formulated in slightly different terms in *Commonwealth v Western Australia* (1999) 196 CLR 391, 410 as a presumption that a statute which regulates the conduct of rights of individuals does not apply to members of the executive government of any of the polities in the federation, government instrumentalities and authorities intended to have the same legal status as the executive government, their servants or agents (Gleeson CJ and Gaudron J).
[55] (joint reasons), 23; including the content and purpose of the particular provision, and the identity of the entity in respect of which the question of applicability of the provision arises. The test was applied by the High Court of Australia recently in *NT Power Generation v Power and Water Authority* (2004) 219 CLR 90 and *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2007] HCA 38. See for discussion Robertson Wright SC 'The Future of Derivative Crown Immunity – With a Competition Law Perspective' (2007) 14 *Competition and Consumer Law Journal* 240.
[56] (joint reasons), 23; *Jacobsen v Rogers* (1995) 182 CLR 572.

Bombay precedent) suddenly became applicable to the Crown following the *Bropho* ruling.

Immunities questions also arise in Australia in the context of considering the question of immunities in relation to the ability of one level of government to bind (with legislation) a government instrumentality at another level of government in Australia. Of course, this does not occur in the United Kingdom. In a recent case in this context, a majority of the High Court made a distinction (which had not previously been made in such cases, at least in these terms) between:

> The capacities of the Crown on the one hand, by which we mean its rights, powers, privileges and immunities, and the exercise of those capacities on the other … The purpose in drawing a distinction between the capacities of the Crown and the exercise of them is to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities.[57]

A majority of the High Court used this distinction to test the constitutionality of laws relating to the prerogative – in other words laws which changed the prerogative itself would not be allowed, but laws that merely sought to regulate activities undertaken in the exercise of the prerogative were legitimate.[58] In the view of the majority, a State law that changed the prerogative would be offensive to s61 of the *Constitution*.[59] The majority[60] adopted comments in earlier decisions[61] confirming that State laws 'of general application' could, however, apply to the Commonwealth.

[57] *Re Residential Tenancies Tribunal of New South Wales and Henderson and Another; Ex Parte The Defence Housing Authority* (1997) 190 CLR 410, 438-439 (Dawson Toohey and Gaudron JJ); in terms with which Brennan CJ agreed (424); see Igor Mescher 'Whither Commonwealth Immunity?' (1998) 17 *Australian Bar Review* 23 and Catherine Penhallurick 'Commonwealth Immunity as a Constitutional Implication' (2001) 29 *Federal Law Review* 151.
[58] The Court did re-affirm the presumption that the Crown not be bound by the general words of a statute: Dawson Toohey Gaudron JJ (444).
[59] 426 (Brennan CJ).
[60] Brennan CJ, Dawson Toohey Gaudron JJ; McHugh Gummow and Kirby JJ dissenting on this point.
[61] Eg *Commonwealth v Bogle* (1953) 89 CLR 229, 259-260 (Fullagar J, with whom Dixon CJ, Webb, Kitto and Taylor JJ agreed); *Commonwealth v Cigamatic Pty Ltd (In Liq*)(1962) 108 CLR 372, 378 (Dixon CJ), *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 308 (Dixon J), *In Re Foreman and Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 528.

B *Crown Immunity from Suit*

Crown immunity from suit was abolished by the Australian Government and by each State in Australia by legislation.[62] Australia was something of a pioneer in this regard.[63] This legislation aimed to provide a remedy in cases to which a petition of right did not extend.[64] State legislation to this effect existed in all states except Victoria by 1902, and at the Commonwealth level by 1903. An immunity from liability in the context of so-called highway liability (applying mainly to local authorities, creatures of State legislation) lasted much longer, finally being abolished by the High Court of Australia in 2001.[65]

The question of immunity of the Crown was also considered by the High Court in *Commonwealth of Australia v Mewett*,[66] in the context of a question whether a claim in tort could proceed against the Commonwealth. The joint judgment of Gummow and Kirby JJ most extensively reviewed the question of Crown immunity, noting the practice of a petition of right against the Crown. The joint reasons suggested that Australia's constitutional arrangements and the acceptance of judicial review fundamentally limited any general principle of Crown immunity, citing s75 of the *Constitution* as evidence of an intention to abolish the doctrine as it had been applied in England:[67]

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[62] *Judiciary Act* 1903 (Cth) s 64; *Claims Against the Government and Crown Suits Act* 1912 (NSW) s 4; *Crown Proceedings Act* 1980 (Qld) s 8; *Crown Proceedings Act* 1958 (Vic) s 23; *Crown Proceedings Act* 1972 (SA) s 10; *Crown Suits Act* 1947 (WA) s 5; *Supreme Court Civil Procedure Act* 1932 (Tas) s 64.

[63] Seddon, above n 1, 257; Paul Finn, 'Claims Against the Government Legislation' in Paul Finn (ed) *Essays on Law and Government Vol 2: The Citizen and the State in the Courts* (Law Book Co, 1996); Paul Finn *Law and Government in Colonial Australia* (Oxford University Press, 1987) ch 6. All States had abolished Crown immunity by the time the Commonwealth had legislated: Susan Kneebone *Liability of Public Authorities* (Law Book Co, 1998) 338. Greg Taylor traces this history back to an 1853 South Australian Act: 'John Baker's Act: The South Australian Origins of Australian Claims-Against-the-Government Legislation' (2004) 27 *University of New South Wales Law Journal* 736.

[64] *Farnell v Bowman* (1887) 12 App. Cas 643, 648-650.

[65] *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

[66] (1997) 191 CLR 471; see Nick Seddon, 'The *Commonwealth v Mewett* (1997) 191 CLR 471: Common Law Actions, Commonwealth Immunity and Federal Jurisdiction' (1999) 27 *Federal Law Review* 165.

[67] Section 75 provides the High Court with original jurisdiction to hear matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. In *Johnstone v The Commonwealth* (1979) 143 CLR 398, Murphy J had pointed out that in Australia the federal courts were not the sovereign's courts as they were in the United Kingdom. Judicial power was not vested in the Queen (406).

> The fourth class of controversy concerns litigation by which an individual or corporation seeks redress for tortious injury to private or individual rights by government action in administration of a law which the plaintiff asserts was not authorised by the *Constitution* but upon which the defendant relies for justification of the alleged tortious conduct. To deny such a claim on the footing that, in the absence of enabling legislation, the Crown can do no wrong and cannot be sued in its own court would be to cut across the principle in *Marbury v Madison*. It would mean that the operation of the Constitution itself was crippled by doctrines devised in other circumstances and for a different system of government.[68]

Later they concluded

> The liability is created by the common law. In respect of that liability, the *Constitution* applies to deny any operation to what otherwise might be doctrines of Crown or executive immunity which might be pleaded in bar to any action to recover judgment for damages in respect of that common law cause of action.[69]

Their Honours did not make great use of s64 of the *Judiciary Act* 1903 (Cth), requiring that as a general rule in any suit to which the Commonwealth or State is a party, the rights or the parties shall as nearly as possible be the same as in a suit between subject and subject.[70] For the court in *Mewett*, s64 merely reinforced the constitutional denial of the doctrine of Crown immunity.[71]

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[68] 548.

[69] 551; Brennan CJ agreed with the reasoning of Gummow and Kirby JJ (491), and Gaudron J reached the same conclusion that the Constitution denied immunity from suit (531). Dawson J (495-503), with whom Toohey (513) and McHugh (532) JJ agreed, concluded the right to proceed against the Commonwealth derived from laws enacted under s78 of the Constitution, including s56 and/or s64 of the Judiciary Act 1903 (Cth); refer also to comments by Isaacs Rich and Starke JJ in *Commonwealth v New South Wales* (1923) 32 CLR 200 confirming the constitutional basis of the right to sue the Commonwealth (216); see also Dixon J in *Werrin v Commonwealth* (1938) 59 CLR 150, 167-168 and Latham CJ in *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 509, 521.

[70] These kinds of sections have been interpreted to govern both procedural and substantive issues (*Maguire v Simpson* (1976) 139 CLR 362). They have been used to justify the application of statute law of the State to the Commonwealth (*Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254); and the statute of one State to another (*Commissioner for Railways v Peters*)(1991) 24 NSWLR 407.

[71] 552 (Gummow and Kirby JJ), (with whom Brennan CJ agreed, 491); see also Dixon CJ McTiernan and Williams JJ in *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397, who found the combination of ss75 and 78 of the *Constitution*, and ss56 and 64 of the *Judiciary Act* 1903 (Cth) meant the Commonwealth had a substantive liability in tort ascertained as nearly as possible as if the matter were between subject and subject (417), apart from a possible difference in treatment of matters 'peculiar to government' (417); to like effect Kitto J (428). The Australian Law Reform Commission noted in its report *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC 92/2001) that s64 was ambiguous and controversial (22.35).

Section 64 of the *Judiciary Act* has been, however, considered pivotal in other cases involving Crown immunity, both in cases involving civil claims against the Commonwealth,[72] and involving questions whether an Act binds the Crown.[73] For example, the High Court relied on it in *Commonwealth v Evans Deakin Industries*[74] Ltd to justify the application of a State law to a Commonwealth body. In *Strods v Commonwealth* where the plaintiff sued for breach of statutory duty, the court found the relevant New South Wales statute bound the Commonwealth.[75] Although an exception to s64 has been recognised in the sense of peculiar government functions, the trend is to minimise (but not completely abandon) this protected area.[76] Past immunity enjoyed by highway authorities has also been abandoned.[77] To the extent that civil proceedings against the Crown were problematic in England was problematic because the King often exercised judicial power themselves, this was never an issue in Australia – section 71 of the *Constitution* which vests judicial power does not refer to the Crown in any capacity.

In respect of claims against a State, the High Court has decided that the plaintiff's right to proceed against a State was derived from the conferral of federal jurisdiction on a State court.[78]

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[72] Section 64 may also apply to the States*: Peters* (1991) 24 NSWLR 407; Graeme Hill, 'Private Law Actions Against the Government – Part 2 Two Unresolved Questions About Section 64 of the Judiciary Act' (2006) 29 *University of New South Wales Law Journal* 1, 23-30.

[73] Susan Kneebone, *Tort Liability of Public Authorities* (Law Book Co, 1998) 340-342; Susan Kneebone, 'Claims Against the Commonwealth and States and their Instrumentalities in Federal Jurisdiction: Section 64 of the *Judiciary Act*' (1996) 24 *Federal Law Review* 93.

[74] (1986) 161 CLR 254.

[75] [1982] 2 NSWLR 182.

[76] *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30; *Taudevin v Egis Consulting Australia Pty Ltd (No 1)*(2001) 131 IR 124; *Victorian WorkCover Authority v Commonwealth* (2004) 187 FLR 296. See for further discussion Hill, above n 72.

[77] *Brodie v Singleton Shire Council* (2001) 206 CLR 512. Some may question the inclusion of this case, given that it involves the question of immunity of (typically, at least) a local government authority, and it is true that traditionally references to the Crown are primarily confined to Federal and State Governments. However, local government authorities are creatures of state statute, and in applying the control test (used to establish whether or not a body is entitled to the shield of the Crown), State Governments can remove Councils (eg s164 *Local Government Act* 1993 (Qld) and s255 *Local Government Act* 1993 (NSW)), and to revoke laws made by Councils (s123 *Local Government Act* 1989 (Vic)), and Councils report directly to a State Minister, so it is submitted that the inclusion is warranted. De jure control rather than actual control is relevant: *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584, 617 (HL), *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282. Further, the question of the immunity of highway authorities arose in the context of the exercise of their functions under State law.

[78] *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, per McHugh Gummow and Hayne JJ (52), (with whom Callinan J agreed); Gleeson CJ (46) and Kirby J (87) found that the right to proceed (in constitutional cases) was derived from the Commonwealth *Constitution*. The Mewett and British American Tobacco cases are discussed in detail in Hill, above n 72 and

C *Summary of Possible Views on Crown Immunity*

It seems then that on the question of Crown immunity from statute, there are five main possibilities:

(a) The Crown is only bound by legislation that expressly refers to it.[79]

(b) There is a presumption that the Crown is not bound by legislation, and express words or necessary implication (in terms of the 'wholly frustrated' test) are required to overturn the presumption.[80]

(c) The Crown is entitled to no special treatment, and is bound by all legislation.[81]

(d) There is a presumption that the Crown is not bound by legislation, and express words or necessary implication (in terms of legislative intention given the statutory circumstances) are required to overturn the presumption.[82]

(e) The Crown is entitled to special treatment in relation to its prerogatives such that no law can interfere with them, but otherwise the Crown is prima facie bound by all legislation (perhaps, subject to evidence of contrary intention)[83]

On the related question of Crown liability more generally, either the Crown has an absolute immunity from suit, has qualified immunity,[84] or has no immunity and can sue and be sued like everyone else.[85]

Graeme Hill, 'Private Law Actions Against the Government (Part I) – Removing the Government's Immunity from Suit in Federal Cases' [2006] *Melbourne University Law Review* 23; Mark Leeming, 'The Liabilities of Commonwealth and State Governments Under the Constitution' (2006) 27 *Australian Bar Review* 217.

[79] This was the view taken in the English decisions referred to above such as *R v Cook* (1790) 3 T.R 519; *Attorney-General v Donaldson* (1842) 10 M & W 117, 124; and *Ex Parte Postmaster General; In re Bonham* (1879) 10 Ch D 595, and that of the Chief Justice in *Roberts v Ahern* (1904) 1 CLR 406.

[80] This is the *Province of Bombay* approach, accepted in Australia in cases such as *Commonwealth v Rhind* (1966) 119 CLR 584, but later (prospectively) overturned in *Bropho v Western Australia* (1990) 171 CLR 1.

[81] This is supported by the early English cases such as *Willion v Berkley* (1561) 1 Plowden 223, 75 ER 339 (KB); and (in effect) in *Magdalen College* (1615) 11 Co Rep 66 and *Case of Ecclesiastical Persons* (1601) Co Rep 14a; I say 'in effect' because these cases said the Crown would be bound by laws for the public good and laws to suppress wrong respectively. It is hard to imagine a statute that could not be categorised as having been passed for the public good and to suppress wrong. Kirby J in Baxter suggested at least that the concepts of governmental immunities and prerogatives from the United Kingdom required 'significant adjustment', without elaborating (48).

[82] This has been the approach taken in Australia since *Bropho v Western Australia* (1990) 191 CLR 1.

[83] Confinement of the immunity to Crown 'prerogatives' appears in the *Magdalen College* case (1615) 11 Co Rep 66; and derives support from the High Court's decision in *Re Residential Tenancies Tribunal of New South Wales and Henderson and Another; Ex Parte The Defence Housing Authority* (1997) 190 CLR 410; see also Williams J (with whom Rich J agreed) in *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 363.

[84] The monarch enjoyed an immunity from tort actions until Petition of Rights legislation was introduced, and in other areas, a suit against the monarch could only be brought with the monarch's consent.

I will now critically consider each of these possibilities.

(a) The Crown is Only Bound by Legislation That Expressly Refers to it

This assertion has questionable historical foundations. It seems to have emanated from the comment of Lord Coke that 'the King can do no wrong'. Some have taken this to suggest that the Crown enjoys some kind of broad immunity from statute and from civil liability. However, this is not universally held - others have suggested that Lord Coke's comments can be read as in fact asserting that the sovereign was under the same obligations as their subjects; rather than that they warranted some kind of special treatment.[86] As Walsh J, speaking of Crown immunity, noted in *Byrne v Ireland*:[87]

> There is some authority for believing that this phrase (the King can do no wrong) originally meant precisely the contrary to what it now means, and that its original meaning was that the King must not, and was not allowed to, and was not entitled to, do wrong.

Gummow and Kirby JJ also observed in *Commonwealth of Australia v Mewett* that the generalised immunity that developed may have been based on a misunderstanding of historical legal writers.[88]

This seems correct, when the comment 'the King cannot do a wrong' in context – where in the previous sentence, Coke had stated that the king should not enjoy immunity, because as the fountain of justice and as God's representative, he was expected to uphold high standards of behaviour and provide a role model for others.[89] In fact, on one view if that were the king's role it would be essential for them to be

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[85] This was the view taken by the High Court in *Commonwealth of Australia v Mewett* (1997) 191 CLR 471.

[86] Cornford, above n 1; Ludwik Ehrlich, 'Proceedings Against the Crown 1216-1377' in Paul Vinogradoff (ed) *Oxford Studies in Social and Legal History* (Oxford University Press, 1974) vol 6 42-44, 127-131. As Joseph Chitty put it, 'the splendour, rights and powers of the Crown were attached to it for the benefit of the people, and not for the private gratification of the sovereign': *A Treatise on the Law of the Prerogatives of the Crown* (1820) 4.

[87] [1971] IR 241, 265.

[88] (Bracton was the one named); (1997) 191 CLR 471, 544.

[89] *Magdalen College Case* (1615) 11 Co Rep 66, 77 ER 1235: 'The King shall not be exempted by construction of law out of the general words of an act made to suppress wrong, because he is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong … And though a right was remediless, yet the Act which provides a necessary and profitable remedy for the preservation of right and to suppress wrong shall bind the King' (72a, 1243).

bound by statute, to make sure they did act in a way that was appropriate to this role. Others read the comments to mean that the sovereign had no power to authorise wrong.[90] There is also the issue, regardless of what the comments mean, of whether they should be transplanted over to the executive.[91]

Such a broad-brushed immunity would also abrogate principles of equality before the law. Gaudron McHugh and Gummow JJ in the *Brodie v Singleton Shire Council*[92] gave as one of their reasons for abolishing a past legal immunity enjoyed by highway authorities that the rule 'denied equal protection of the law'; Kirby J used a similar concept of 'equality before the law' in justifying his position.[93] In the context of Crown immunity from statute, the Supreme Court of Canada has noted that the presumption of immunity conflicts with basic notions of equality before the law.[94]

(b) Broad Crown Immunity – Bombay Approach?

Several features combine to suggest that past thinking in relation to the privileged position of the Crown needs to be revised. These include the evolution of the Crown from an individual to a large group, changes in the role that the Crown plays in society, and a blurring in the lines of demarcation between private individuals or organisations and the Crown, in terms of activities and identity.

The 'wholly frustrated' approach to necessary implication has been subject to criticism on the basis that it is disconnected with an approach to statutory interpretation based on intention, which is the approach typically taken to the interpretation of Acts of Parliament.[95]

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[90] Adam Tomkins, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne (eds) *The Nature of the Crown* (Oxford University Press, 1999) 60.
[91] Seddon, above n 1, 256.
[92] (2001) 206 CLR 512, 572.
[93] 594.
[94] [1989] 2 SCR 225, 291 (*AGT v CRTC*); see also the Canada Law Reform Commission's Working Paper No 40, 1987, concluding the immunity was 'directly contrary to the principle of equality under the law … it is therefore obviously necessary to move towards a solution which is more in accordance with the rule of law and the principle of equality': *The Legal Status of the Federal Administration*, 16; *The Presumption of Crown Immunity*, Alberta Law Reform Institute, Report No 71, 1994, 67; Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1960): 'every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals', 193. No exception was made for the Crown. See also Berry, above n 51, 219.
[95] Street, above n 15; *The Presumption of Crown Immunity*, Alberta Law Reform Institute, Report No 71, 1994, 42.

There is a world of difference from the question whether an individual monarch should or not be bound by legislation or should or should not be able to be sued, to a question whether a large entity comprising thousands of individuals and conducting a broad range of activities, including commercial and industrial activities should be entitled to the same privilege.[96] A private organisation, subject to relevant laws, would be justifiably concerned if one of their competitors, who happened to be entitled to the shield of the Crown, was not subject to the same laws. Why should a factory owner only be legally liable for workplace health and safety breaches if they happen to be a private individual? Private organisations who supply to the Crown have even tried to secure the privileges of the Crown through the concept of 'derivative immunity'.[97] A perception would be created of an unlevel playing field. The Crown is involved in business activities of such a grand scale that inequities exist if it is given preferential treatment in terms of compliance with regulation.

As an example of this occurring, one could rely on *R v Eldorado Nuclear*.[98] There price fixing was alleged against a number of corporations, including two Crown corporations. Since these two were Crown bodies, they were not bound by the relevant legislation and could not be prosecuted. The private participants in the cartel could be subject to liability, but the government took the view that since the Crown players had been the instigators of the cartel, it would be unfair to prosecute only the private players. It is said that this example shows how the presumption can defeat the public policy goals of legislation.[99]

As the Australian Law Reform Commission pointed out, Crown immunity began in a context where, and may have been suitable to, a time when governments engaged in only a narrow range of activities. Its impact on citizens was modest. However, nowadays the Crown is involved in a much broader range of activities.[100] The High

[96] *Bropho*, 18-19.
[97] *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1.
[98] [1983] 2 SCR 551.
[99] Alberta Law Reform Institute *The Presumption of Crown Immunity*, Report No 71, 1994, 49.
[100] *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Australian Law Reform Commission 92/2001) [22.39].

Court made the same point in *Bropho*.[101] The doctrine may not suit the realities of the Crown in 21st century Australian life.

In terms of which entities qualify to obtain the shield, the boundary between what are 'government' functions and what are not has become blurred, evidenced by the prevalence of concepts such as public-private partnerships. Would such a body be entitled to the shield of the Crown with all that it entails? Blurring of the lines between government and private industry is also shown by the fact that some entities that were 'public' have become 'private', yet carry out the same functions and activities, and bodies that were 'private' have in some cases become 'public'. This has led to the breakdown of a test formerly used as a basis for establishing whether or not a body was entitled to the shield of the Crown.[102]

Others have commented that even if Crown immunity were ever justified in England, it was never justified in Australia given the needs of the colonies subsequent to white settlement, when the government was required to perform many functions that in England would have been conducted by private enterprise.[103] Australia's constitutional arrangements are of course also apposite in this regard.[104] As Kirby J noted recently in *Baxter*:

> The specificities and juxtapositions in the Australian *Constitution* concerning the part played in its governmental institutions by the Queen and the Crown, and particularly the provisions made (necessary to a federation) for the integrated judicature, made it inapposite to import into our constitutional institutions, without significant

[101] *Bropho v Western Australia* (1990) 171 CLR 1, 19 '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 endeavours and where it is a commonplace for governmental, commercial, industrial and developmental instrumentalities and their servants and agents … to compete and have commercial dealings on the same basis as private enterprise'.

[102] Functions test (*Townsville Hospital Board v Townsville City Council*)(1982) 149 CLR 282).

[103] *Bropho,* 18-19.

[104] *Commonwealth of Australia v Mewett* (1997) 191 CLR 471; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* (2007) 232 CLR 1, 48: 'The specificities and juxtapositions in the Australian Constitution concerning the part played in its governmental institutions by the Queen and the Crown, and particularly the provisions made (necessary to a federation) for the integrated judicature, made it inapposite to import into our constitutional institutions, without significant adjustment, notions of governmental immunities and prerogatives that earlier existed in the United Kingdom' (Kirby J).

> adjustment, notions of governmental immunities and prerogatives that earlier existed in the United Kingdom.[105]
>
> It is a basic mistake of constitutional doctrine in Australia to treat the Commonwealth, the States and the Territories as manifestations of the Crown. It follows that it is an equal mistake to derive uncritically the applicable law of the governmental immunities of those polities from notions of the English common law or the royal prerogatives. This is because the new polities take their character from their creation and acceptance by the Australian people … it should not be assumed that this change in the source, origin and character of the Australian constituent polities did not affect the ambit and content of such immunities. It was thus an error to import into the new constitutional arrangements for Australia, without modification, all of the law on Crown immunities and Crown prerogatives apt to a different country, in different times, reflecting different constitutional purposes and values.[106]

Seddon has labelled the immunity a 'stain on the rule of law'.[107] Academics and law reform agencies[108] tend not to favour Crown immunity from statute – there has been a chorus of criticism of the concept of Crown immunity from statute, on the basis that it lacks historical foundation,[109] and leads to greater complexity.[110] Hogg and Monahan in the leading treatise *Liability of the Crown* suggests that the presumption should be reversed, with a general rule that the Crown is subject to statute, subject to statutory override,[111] as did Glanville Williams,[112] who puts the survival of the doctrine down to *vis inertiae*.[113] Seddon reaches the same conclusion, as do others.[114]

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[105] 48.
[106] 49.
[107] Seddon, above n 1, 260.
[108] See for example *The Presumption of Crown Immunity*, Report No 71, 1994 of the Alberta Law Reform Institute recommending the reversal of the presumption of Crown immunity, 1; Ontario Law Reform Commission *Report on the Liability of the Crown* (1989) also recommended reversal of the presumption, as did the British Columbia Law Reform Commission in its 1972 *Report on Civil Rights*, which led to reforms in that province. The Canada Law Reform Commission concluded the presumption of Crown immunity was an anachronism: *Working Paper 40: The Legal Status of the Federal Administration* (1987), 2.
[109] Street, above n 15, 384.
[110] Peter Hogg and Patrick Monahan, *Liability of the Crown* (Carswell, 3rd ed, 2000) 325.
[111] Ibid, 326-328. Greg Taylor, 'The Presumption That Statutes Do Not Apply to the Crown' (2000) *Melbourne University Law Review* 77 criticises the notion that the presumption should be weaker in respect of 'commercial activities' and stronger in other areas due to the uncertainty created by different ideas of what are traditional government functions (118).
[112] Glanville Williams, *Crown Proceedings* (Stevens, 1948) 48-58.
[113] Williams: 'the rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but the vis inertiae. The chief objection to the rule is its difficulty of application. Consider how much clearer the law would be if the rule were that the Crown is bound by every statute in the absence of express words to the contrary' Ibid, 53-4.

For these reasons I am not in favour of a broad interpretation of Crown immunity from statute.

(c) The Crown is Not Entitled to any Special Treatment, and is Bound by All Legislation

While this approach has some intuitive appeal in terms of the rule of law and equality of all, no Australian judge has ever stated that this is the position, and acceptance of it would require the overrule of a number of High Court decisions. The closest has been the comment of Barton J in *Ryan* that if the Parliament wished for the Crown to be exempt from legislation, it must state so expressly.[115] Kirby J in the recent *Baxter* case claimed that the doctrine of Crown immunity and royal prerogative should not have been imported into Australia's constitutional arrangements 'without significant adjustment', without stating what it might be.[116]

Kirby J quoted extensively from some Irish decisions however, including *Byrne v Ireland*.[117] He concluded in *Baxter* that 'one day the error of the current approach of this Court to these questions will be understood. The starting point for the enlightenment will be a reading of the reasons of Walsh J in *Byrne v Ireland'*. As a result, I will now consider the judgment of Walsh J to see whether comments made there might support an argument in Australia that Crown immunity from statute be abolished entirely. Perhaps the key passage from Walsh J is this one:

> The basis of the Crown prerogatives in English law was that the King was the personification of the State. Article 2 of the *Constitution* of the Irish Free State declared that all the powers of government and all authority, legislative and judicial, in Ireland were derived from the people of Ireland, and that the same should be

[114] Seddon, above n 1, 261; Steven Churches, *An Historical Survey of the Presumption in the Common Law that General Statutes Do Not Bind the Crown* (PhD thesis, University of Melbourne, 1988)(favours abolishing the presumption); Steven Churches, 'The Trouble With Humphrey in Western Australia: Icons of the Crown or Impediments to the Public? (1990) 20 *University of Western Australia Law Review* 688; Colin McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (University of Toronto Press, 1977). PP Craig concluded the present state of the law was unsatisfactory: *Administrative Law* (Sweet & Maxwell, 1989) 525-26; Steven Price, 'Crown Immunity on Trial – the Desirability and Practicability of Enforcing Statute Law Against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213: 'th(e) presumption is difficult to justify, is uncertain in its application, and has the potential to create injustice', 241.
[115] *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358, 371.
[116] 48-49 ; note the joint reasons declare that Crown immunity is a rule of statutory interpretation and not some prerogative power (27). There is debate about this because Evatt previously in his discussion of prerogatives had included Crown immunity from statute as one: Evatt, above n 2, 3031.
[117] [1971] IR 241.

> exercised in the Irish Free State through the organisations established by or under or in accordance with the *Constitution*. The basis of the prerogative of the English Crown was quite inconsistent with the declaration contained in that Article.

It is submitted that the above rationale in the Irish context cannot be directly applied to the Australian constitutional context. The preamble to the Australian *Constitution* refers to the people of the colonies uniting 'under the Crown of the United Kingdom'; and Section 1 vests legislative power in the Federal Parliament, including the Queen. Section 2 provides for the appointment of the Queen's representative in Australia. It is, with respect, an error then to equate Australia's constitutional arrangements with those of republican Ireland. We should not replace one inappropriate borrowing with another.

In my view it is too late in the day now to claim that Crown immunity does not apply at all in Australia. A contrary position has been taken in every High Court decision on point since 1904 and references to the Crown appear constantly in the *Constitution*, rendering comparisons with republican systems of government questionable. All of the English cases that have considered this issue have identified some form of Crown immunity exists, argument being confined to its true scope.

(d) Presumption that the Crown is Not Bound, Subject to Intention of Parliament and Consideration of Purpose of the Act and Statutory Circumstances

This is the status quo, and reflects the positive reform to this area of the law undertaken by the High Court in the *Bropho* decision.

However, the rule is not considered ideal. It retains a presumption that the Crown is not bound by the statute, largely due to reasons of precedent. However, as indicated the presumption is of dubious origins, and is ill-suited given the growth in the role of the Crown over the years, and the difficulties in identifying which bodies might be entitled to its protections. While I understand the rationale for such a suggestion, two difficulties are apparent:

(a) The test is potentially uncertain – there could well be differences of opinion as to the intention of Parliament given the subject matter of the law, in the absence of

express words one way or the other; for all the difficulties with the *Bombay* approach, at least it provided certainty in application; the facts of *Bropho* might have shown quite easily an intention to bind the Crown; many other cases will not be so clear cut. The Australian Law Reform Commission recognised this difficulty:

> The uncertain state of the law impose(s) significant costs on individuals and governments … (partly) because the tests for determining immunity are fact-sensitive and their application requires a case-by-case assessment, often by the judiciary in legal proceedings, and in part because the underlying uncertainty of the legal principles themselves invite(s) legal challenge, irrespective of the application of these principles in particular circumstances.[118]

(b) the *Bropho* approach might be suggesting a differential approach to 'commercial' and 'traditionally governmental' type activities, when such a line is inherently difficult to draw and necessarily subjective, and which has already been abandoned in the context of deciding whether a body is entitled to the shield of not;[119]

(c) as indicated, the *Bropho* decision introduced a differential test depending on when legislation was passed, with the *Bombay* approach applicable to statutes passed between 1947-1990, and the *Bropho* approach applicable to statutes passed before 1947 or after the decision was given. While I understand the rationale for such a suggestion, it can lead to difficulties. What of a statute, for example, passed in 1989 but amended in 2008? Does the *Bombay* test apply to the original provisions, and the *Bropho* approach to the amendment?

(d) the formulation in *Bropho* regarding Crown immunity does not accommodate the prerogative/exercise of prerogative dichotomy explained by the High Court in the later *DHA* case. Given that both High Court decisions deal with the question of

[118] *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Australian Law Reform Commission, 92/2001) [22.41].
[119] Similarly, Greg Taylor believes the *Bropho* decision might be heralding a move towards a tiered approach, with a presumption of immunity for 'really' government activities, and no presumption for 'more commercial activities'; he is critical of this on the basis of the American experience with a similar rule – the diverse views, to some extent reflecting different political beliefs, as to what is a 'government' type activity and what is not; above n 51, 118. Writing of the similar Canadian test of 'logical implication' that the Crown be bound, Hogg and Monahan criticise the test due to uncertainty caused by the fact that 'judges differ as to the force of oblique indications': Hogg and Monahan, above n 110, 291.

whether the Crown is bound by legislation, it is submitted they must be reconciled. I submit the *Bropho* test as currently applied by the High Court does not reconcile with the *DHA* synopsis. There is only a very brief reference to *Bropho* in *DHA* and no discussion of their interplay. Nor has it been considered in subsequent cases like *NT Power Generation Pty Ltd v Power and Water Authority and Another*.[120]

(e) other authors have noted that the absence of an express provision stating that the Crown is bound is far more likely to be caused by inadvertence than a conscious desire that the Crown not be bound.[121]

While it is accepted that no rule is perfect, it is submitted that these weaknesses in the current approach might suggest that a better rule could be developed.

(e) Crown Immunity Confined to Prerogatives Only; No Presumption that Crown is not Bound; Crown is Bound in respect of laws not altering prerogative unless legislation provides otherwise?

There is precedent support for the argument in favour of what I call a 'narrow' Crown immunity from statute – that it be confined to Crown prerogatives only. For example, Lord Coke in the *Magdalen College*[122] case confined the immunity to laws that 'derogated from any prerogative of the Crown'. Equally, Williams J in *Minister for Works (WA) v Gulson*[123] confined the immunity to cases involving the prerogative of the Crown, as did Griffith CJ in *Sydney Harbour Trust Commissioners v Ryan*,[124] at least in the absence of express words.

As indicated, this is the distinction that a majority of the High Court itself made in the context of intergovernmental immunities in the *DHA* Case. The majority found that State laws could operate on the exercise of the prerogatives and capacities of the Commonwealth Crown, but not the prerogatives themselves:

[120] (2004) 219 CLR 90.
[121] *The Presumption of Crown Immunity*, Alberta Law Reform Institute Report No 71, 1994, 5.
[122] (1615) 11 Co Rep 66.
[123] (1944) 69 CLR 338, 363.
[124] (1911) 13 CLR 358, 365.

> The purpose in drawing a distinction between the capacities of the Crown and the exercise of them is to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown –its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities. In Cigamatic, it was held that a State legislature had no power to impair the capacities of the Commonwealth executive, but at the same time it was recognised that the Commonwealth might be regulated by State laws of general application in those activities which it carried out in common with other citizens.[125]

By parity of reasoning, it is suggested that the new rule in the context of Crown immunity generally should involve a distinction being made between (a) laws that alter the Crown prerogative – in which case express words binding the Crown would be needed, otherwise a general presumption of immunity would apply;[126] and (b) laws that merely regulate its exercise – in which case the Crown would enjoy no special immunity, and would be presumed to be bound. It would be able to immunise itself with express words.[127] This is defensible on the basis that the basic test remain one of Parliamentary intention, consistent with the courts' approach to statutory interpretation more generally on ambiguous questions.[128] One of the leading academics in this field has expressed support for some presumption in such cases.[129]

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[125] 439 (Dawson Toohey and Gaudron JJ); the joint reasons referred to comments of Dixon J in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 308 where his Honour maintained a distinction between the general law of a State which may incidentally affect Commonwealth administrative action, and governmental rights belonging to the Federal executive as such.

[126] This is consistent with the view that Crown prerogatives are part of the common law, and liable to be varied by legislation: *Attorney-General v De Keyser's Royal Hotel Ltd [*1920] AC 508, 567 (HL). It is consistent with the High Court's approach in *Barton v Commonwealth* (1974) 131 CLR 477, where Barwick CJ held that 'the rule that the prerogative … is not displaced except by a clear and unambiguous provision is extremely strong' (488); Mason J in the same case required a 'clearly expressed intention' to abrogate the prerogative (501).

[127] This reversal of the presumption has occurred in two Australian jurisdictions (S20 *Acts Interpretation Act* 1915 (SA) and s7 *Interpretation Act* (ACT); in Canada in British Columbia (R.S.B.C (1996) c238, s14(1) and Prince Edward Island (R. S.P E.I (1998) c I-8 , s14, and was recommended by the Parliament of the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs *The Doctrine of the Shield of the Crown* (1992) [10.3]; New Zealand Law Reform Commission, the Ontario Law Reform Commission (*Report on the Liability of the Crown)*(1989) and the *Alberta Law Reform Institute Presumption of Crown Immunity* (1994). Similarly the Australian Law Reform Commission concluded that 'considerations of transparency and accountability require that in circumstances in which the government determines that it should not be bound by the same law as citizens, the extent of its immunity should be expressly stated [22.47]: *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (92/2001).

[128] S15AA *Acts Interpretation Act* 1901 (Cth).

[129] George Winterton concluded that 'in determining whether legislation impliedly intends to alter, regulate or abolish a prerogative power, the courts should apply the general approach to statutory

One argument against this approach might be that we have taken a test and comments in the context of inter-governmental immunity and sought to apply it to a different context. This is true, but clearly they are related contexts – both involve the extent to which the Crown should be bound by legislation. Should the approach when the issue happens to involve an intergovernmental aspect be so different? And, as indicated, some earlier cases where Crown immunity has been confined to alteration of prerogatives have not occurred in the context of an intergovernmental situation.[130]

It would be logical then to define here what we mean by Crown prerogatives. Dr Evatt divided them into three categories:

(a) those of an executive nature, under which the monarch had power to do several acts, including execute treaties, declare war, make peace, coin money, incorporate bodies by Royal Charter, pardon offenders, confer honours;
(b) immunities and preferences (excluding immunity from statute),[131] including the right to priority in payment, immunity from court processes, freedom from distress in rent, costs, and discovery of documents; and
(c) proprietary rights, including entitlement to the royal metals, treasure trove, escheat, ownership of the foreshore, seabed and subsoil within territorial limits.[132]

There has also been a difference of opinion as to whether prerogatives are confined to the monarch's unique powers,[133] or extends to those powers which the Crown has at

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interpretation outlined in *Bropho*. There should, at most, be a mild presumption against such intention: above n 31, 443.

[130] Further, as indicated above, Winterton suggested a Bropho-type approach to the question whether legislation is considered to have altered a prerogative power: above n 31, 433.

[131] Herbert Evatt included this as a prerogative but it has come to be seen as a mere principle of statutory interpretation: *Bropho v Western Australia* (1990) 171 CLR 1, 15 (Mason CJ, Deane Dawson Toohey Gaudron McHugh JJ).

[132] Herbert Evatt *Certain Aspects of the Royal Prerogative* (unpublished LLD thesis, University of Sydney, 1924), 30-31, 39-41, 72-73; Winterton, above n 1, 48.

[133] Sir William Blackstone, writing of the prerogative, states: 'it must be in its nature singular and eccentrical … it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects, for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer: *Commentaries on the Laws of England* (17th ed, 1830) 239; these comments were applied in cases such as *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 56 ALJR 506, 522 (Stephen J), 552 (Wilson J) and 559 (Brennan J); *Uther v Commissioner of Taxation* (1947) 74 CLR 508, 525; *Clough v Leahy* (1904) 2 CLR 139, 156.

any particular time.[134] I lean towards a narrower conception of 'prerogative' in this context, to mean the bundle of common law rights and privileges traditionally accorded to the Crown because of its perceived 'special' position, and not applicable to activities conducted by non-Crown entities. This is similar to Evatt's categories (a) and (c) above and to the Blackstone/Wade conception.

So it would be assumed that legislation did not intend to alter any of the prerogatives mentioned above, unless the legislation expressly stated that the intention was to do so. However, legislation of all other kinds would bind the Crown, unless it specifically stated it was not to do so. This would accord with notions of equality of treatment, and recognise the changed position of the Crown. It would still recognise, as Blackstone did, that the Crown has some special features that are unique to it. Historically this has been recognised and some immunity is still appropriate as a result. Such a development would harmonise the position in respect of intergovernmental Crown immunity and Crown immunity more generally, seen to be a positive jurisprudential development.

It is expected that most laws that did alter, regulate or abolish Crown prerogatives would be laws purporting to apply cross-jurisdictionally, because it would be an unusual case where one level of government passed legislation altering its own prerogative. However, the possibility exists, and the same rules would apply in each situation in terms of the effect of the statute.

D *The Federal Complication*

Having declared this to be my preferred position, the next question is whether different treatment should apply in relation to what we call the 'federal complication'; in other words the situation where the laws of a government at one level in our federal system might apply to a government at another level of our federal system. I will call this situation the 'cross-jurisdictional binding' situation. I will refer to the situation where a government might be bound by its own legislation as the 'simple' situation.

[134] Albert Dicey described the prerogative as 'the name for the residue of discretionary power left at any momene tin the hands of the Crown': above n 94, 425; *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73, 93-94; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 29 CLR 129, 143. This debate is discussed in Winterton, above n 1, 111-12.

(a) Arguments That No Special Rule Should Apply

Since the *Bropho* decision, the High Court has suggested that its new approach should be applied regardless of whether the dispute involves the cross-jurisdictional binding situation or the 'simple' situation. In *Jacobson v Rogers*,[135] it applied *Bropho* to a case involving the application of a State law to the Commonwealth. In *Bass v Permanent Trustee Co Ltd*, it agreed that in *Bropho*, the court found 'the presumption discussed in Bradken was no longer to be treated as an inflexible rule involving a stringent test of necessary implication'.[136] In *Registrar, Accident Compensation Tribunal (Vic) v Federal Commissioner of Taxation*, the court applied *Bropho* to a cross-jurisdictional binding case.[137] None of the Canadian Law Reform Commission reports advocating reform in this area include a recommendation that different rules should apply in cross-jurisdictional cases.[138]

Of course, unless one wishes to overturn the *Engineers* decision, on which 90 years of Australian constitutional law have been based,[139] it cannot be argued that there is some kind of 'implied immunity' of one level of government from the laws of another level of government. Nor can it be argued that the otherwise broad powers of the Commonwealth should be read down to preserve the position of the States. The twin doctrines of implied immunities and reserved powers were overruled in *Engineers*, and the High Court continues not to accept them as relevant in determining constitutional issues.[140]

While one advocate of a continuing presumption in cross-jurisdictional cases explicitly claims that it is not an attempted resurrection of reserved powers reasoning,[141] when it is claimed the presumption against cross-jurisdictional binding

[135] (1995) 182 CLR 572.
[136] (1999) 198 CLR 334, 346.
[137] (1993) 178 CLR 145.
[138] Alberta Law Reform Institute, *The Presumption of Crown Immunity* Report No 71, 1994; Ontario Law Reform Commission *Report on the Liability of the Crown* (1989); and Canada Law Reform Commission – Working Paper No 40 *The Legal Status of the Federal Administration* (1987).
[139] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[140] A recent example is *New South Wales v Commonwealth (WorkChoices*)(2007) 231 ALR 1; Charles Parkinson, 'The Early High Court and the Doctrine of the Immunity of Instrumentalities' (2002) 13 *Public Law Review* 26.
[141] Leslie Katz, 'The Test for Determining the Applicability to the States of Federal Statutes Which Do Not Expressly Bind Them' (1994) 11 *Australian Bar Review* 222, 228.

will 'protect one government from another'[142] and that the presumption 'protects the States' autonomy',[143] one could be forgiven for thinking that this was reserved powers reasoning in another guise.[144]

In its submission to the Australian Law Reform Commission, the Law Council of Australia argued that for reasons of equality and the rule of law, no special rule should be applied in respect of cross-jurisdictional binding situations.

Nick Seddon reached the same conclusion:

> The issue of Crown immunity from statute is one which has generated a great deal of difficulty in Australia, often because of the federal system where it is necessary to ascertain whether the Crown of one polity is bound by the legislation of another polity … The solution to these problems should not be found in an ancient template that is made up of mystical axioms. This template should not be used, for example, to hold that a State bank trading in another jurisdiction is not bound by the latter's fair trading statute, nor that a tenant of the Federal Airports Corporation is able to claim immunity, deriving from Crown status, from Victorian planning laws. Instead, the problem of immunity from legislation would be better solved by a principled approach that really does consider when it is, and when it is not, appropriate to bind the government to the law of the land. A starting point would be toe state that all legislation binds the Crown unless there is specific provision to the contrary … Such a provision would concentrate the minds of the legislative draughtsmen to make a considered decision about the applicability of the legislation to the government.[145]

(b) Argument That a Special Rule Should Apply

On the other hand, the Australian Law Reform Commission in its Report *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation,*[146] recommended that 'A Commonwealth statute should not bind the executive of a State unless the Commonwealth Parliament expressly states that the

[142] Taylor, above n 51, 78.
[143] Ibid, 83.
[144] Greg Taylor claims a trend in the United States towards 'using techniques of statutory construction rather than constitutional doctrines properly so called, in order to achieve constitutional goals relating to the promotion of federalism': Ibid, 94.
[145] Seddon, above n 1, 261.
[146] ALRC 92, 2001 [27.24]; the suggested rule would also apply in respect of the Executives of the Northern Territory and Australian Capital Territory.

statute is to do so'. The Commission had received submissions arguing for a separate rule in respect of cross-jurisdictional binding situations on the basis that it would encourage the enacting legislature to specifically consider the impact of the change on Crowns in other jurisdictions, which otherwise may not occur. It relied on comments to similar effect by Gibbs CJ in *Bradken*.[147] It concluded that 'one does not normally expect one legislature to make laws regulating the conduct of the executive of another polity in the federation'.[148] Some academics have taken this position – Taylor, for example, claims that the rule 'can and should be used to protect one government from another': 'The presumption (would) protect the States' autonomy by ensuring that they are not thoughtlessly subjected to all sorts of far-reaching controls by the Commonwealth'.[149]

Here is perhaps not the place to get into a debate about the merits or otherwise of federalism; I suggest that consistently with the High Court's rejection for many years of the argument that Commonwealth heads of power not be read down having regard to a subjective notion of 'federal balance' or to the position of the states, the court should not now accept a presumption of statutory interpretation with the stated purpose of preserving States' autonomy, particularly when it is inconsistent with the rule of law and re-introduces complications in an area which has been accepted to be already extremely complex. As other authors in the field have noted, more often than not a failure to expressly state in legislation that the Crown is intended to be bound reflects an error of omission rather than a conscious intention. Surely, in considering whether a law is cross-jurisdictionally binding, the overriding question should be one of legislative intent rather than arguments about federalism.

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[147] *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 121-122.

[148] [27.26]. This may have been lifted from a dicta comment of Dixon J in *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529 that '(i)n a dual political system you do not expect to find either government legislating for the other'. However, as was pointed out by the High Court in *Jacobson v Rogers* (1995) 182 CLR 572, 590-591, Dixon J had followed this remark with the observation that supremacy belonged to the Commonwealth. Further, in many cases since 1920 (*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129) too numerous to list here, but including *Re Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410 (State law applying to the Commonwealth) *and Re Australian Education Union and Australian Nursing Federation; ex parte Victoria* (1995) 184 CLR 188 (Commonwealth law applying to the States) the legislative ability of one level of government to bind another has been confirmed. It is far too late in the day, with respect, for the Australian Law Reform Commission to declare that one does not normally expect one legislature to make laws binding the conduct of an executive of another level of government.

[149] Taylor, above n 51, 83. Taylor concedes that the Commonwealth needs to be able to bind the States if it is to make effective use of its granted powers, 84.

The expressed concern of these authors, and the Australian Law Reform Commission, is that Commonwealth legislation should not be applied to the State without first considering their position.[150] However, if the rule which I favour were to be introduced, which is that the Crown generally is bound in the absence of express words, it might be expected that governments would consider more carefully at the drafting stage the extent to which the Act was intended to bind the Crown, and this would naturally tend to include consideration of Crowns in various jurisdictions. I also note that the States enjoy the protection of the *Melbourne Corporation* principle, denying the Commonwealth power to legislate so as to discriminate against states or subject them to special burdens or disabilities that affect their ability to function as a government.[151] The existence of such a principle arguably undermines the suggested need for a presumption against cross-jurisdictional binding.

E *Links between Crown Immunity from Statute and Immunity from Suit*

I believe that these issues are linked and a broadly consistent view should be taken in respect of them.[152] Support for my belief that the issues are linked can be gleaned from the classification by Evatt of both of them in the same category of immunities and preferences of the Crown.[153] Seddon has commented on the two issues as 'twin propositions'.[154] Further, the joint reasons in the *DHA* case (a case concerning intergovernmental immunity from statute) make the link:

> Fullagar J in *Bogle* sought to support his view by observing that 'it is surely unthinkable that the Victorian Parliament could have made a law rendering the Commonwealth liable for torts committed in Victoria'. That, however, is to disregard the distinction, which is fundamental to the decision in *Cigamatic*, between the capacities of the executive government and the exercise of them. The immunity of the Crown from liability in tort, however dubious its origins, is a prerogative of the Crown operating at common law to define the relationship between the Crown and its

[150] Taylor, above n 51, 84. Similar sentiments are expressed by Katz, above n 141; Australian Law Reform Commission *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC, Report 92, 2001) para 27.28.
[151] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Re Australian Education Union and Australian Nursing Federation: Ex Parte Victoria* (1995) 184 CLR 188; *Austin v Commowealth* (2003) 195 ALR 321.
[152] An argument that they are not linked would consider the basis for the original Crown immunity from being sued, that the courts were the monarch's, or that writs were issued in the name of the monarch.
[153] Evatt, above n 132, 30-31.
[154] Seddon, above n 1, 256.

> subjects in a manner analogous to the Crown entitlement to priority in the payment of debts. In that way it involves the capacities of the Crown.[155]

On the basis, then, that the two are linked, what effect could the abrogation of Crown immunity from suit, which was one of the first legislative actions of the Commonwealth Parliament, and which had occurred in all colonies except Victoria, have on Crown immunity from statute?

Section 64 of the *Judiciary Act* 1903 (Cth) has been interpreted to apply to both matters of substance and procedure.[156] Substance here means the relevant law to be applied. Thus substance could potentially include statute law, so one reading of s64 and its State equivalents (together with s75(iii) of the Commonwealth *Constitution* in respect of matters against the Commonwealth) is that they could have intended to abolish Crown immunity from statute, at least in respect of some claims. I must concede that on its terms s64 applies to 'suits' or civil claims, which may reduce the extent to which it relates to statutory provisions,[157] but there is still scope for it to apply to statute.

For example, let us consider a claim for breach of statutory duty, a civil suit against the Commonwealth Crown. Here there is conflict between s64 of the *Judiciary Act* 1903 (Cth), allowing the claim against the Crown if it would be allowed against a private individual, and any suggestion that the Crown should have immunity from the statute because of some special status. Given that Crown immunity is a creature of the common law, surely that common law principle would have to yield to the inconsistent statute. And to the extent that the law of tort has become the creature of statute, difficult questions might arise if the statute does not specifically state that it binds the Crown.[158] Does it bind the Crown because of the intent behind the crown proceedings legislation, or does it not bind the Crown because of Crown immunity from statute? Again, it is submitted that the inconsistency should be resolved in favour of the statute. These questions could also be asked in terms of workers'

[155] 447 (Dawson Toohey Gaudron JJ), with whom Brennan CJ agreed (424).
[156] *Maguire v Simpson* (1976) 139 CLR 362.
[157] This is because criminal proceedings often are based on statutory provisions.
[158] For example, s 6 of the *Civil Liability Act* 2003 (Qld), s 4 of the *Civil Liability Act* 2002 (NSW) and s 2 of the *Civil Liability Act* 1936 (SA) provide that those Acts bind the Crown, but the Victorian position is more equivocal, with the Act only stating that the Crown is bound by the legislation in terms of occupiers' liability: s 14C *Wrongs Act* 1958 (Vic).

compensation actions or motor vehicle accident-based civil actions against the government.

This leaves us with some difficult questions. We could reconcile these principles, by for example confining the operation of s64 of the *Judiciary Act*[159]and equivalent State provisions to application of non-statutory law to the Crown. However, this gloss is not supported by the plain words of these sections. We could create an exception to Crown immunity from statute where it relates to a civil claim involving a statute against the Crown. This would create further complexity and perhaps uncertainty in what is already a complex area of the law.

In the end, I cannot conceptually justify why the Crown should generally be liable at common law but not statute. There are numerous areas of law involving both common law and statute, in some cases they deal with the same or substantially similar subject matter, and some matters that were in the past a creature of common law have become creatures of statute, and vice versa. As I have indicated above, negligence principles have increasingly become a creature of statute in recent years. Mostly these Acts expressly bind the Crown, but let's assume for a moment they did not do so. Could it be seriously argued that while negligence was a common law principle, the Crown was bound by its rules, but as soon as it became incorporated into a statutory rule, these rules did not apply to it? And what of statutes dealing with negligence that incorporate the common law into the new statutory law? The idea that a clear line can or should be drawn between common law and statutory law in this context is spurious.

IV CONCLUSION – NARROW CONCEPTION OF CROWN IMMUNITY

Though the High Court has narrowed the immunity in recent years, I believe that further reforms are required in this area. The law should now start with a general rule that statutes are presumed to be intended to bind the Crown. This will apply unless:

(a) there are express words that suggest the Crown is intended to be exempt

[159] Together with, in some cases, s75(iii) of the *Constitution*: *Commonwealth of Australia v Mewett* (1997) 191 CLR 471.

(b) the Act alters Crown prerogatives, in which cases express words are required in the Act to have this effect.

The advantages of this approach are that it aligns well with some of the historical basis of the immunity and precedent, as well as recognising that the role of the Crown has evolved substantially in the intervening centuries. It reflects egalitarian values and is consistent with the rule of law, and enjoys support from the academy. Philosophically it aligns the approach to statutes, regardless whether they have an inter-jurisdictional aspect or not. It is more consistent with developments in the position of the Crown at common law, and avoids some uncomfortable questions involving the overlap of common law and statutory law in this context.