
THE EXTENT TO WHICH THE PREROGATIVE RIGHT OF THE CROWN TO PRINT AND PUBLISH CERTAIN WORKS EXISTS IN AUSTRALIA

JOHN GILCHRIST*

ABSTRACT

This article follows the preceding article on the analysis of the origins and scope of the prerogative right of the Crown to print and publish certain works in England. This article explores the extent to which those works are presently subject to the prerogative right of the Crown to print and publish in Australia. The prerogative right is expressly preserved by s 8A(1) of the Copyright Act 1968 (Cth).

There is clear case law authority in Australia for the recognition of the prerogative right of the Crown over the printing and publication of statutes. The article explores the scope of the right in Australia, the interrelationship of the rights in a federal system such as the extent to which the prerogative right is enforceable in other jurisdictions and the impact of the introduction of s 8A(2) of the Copyright Act on the prerogative right.

I INTRODUCTION

If an uninhabited country be discovered and peopled by English subjects, they are supposed to possess themselves of it for the benefit of their Sovereign, and such of the English laws then in force, as are applicable and necessary to their situation, and the condition of an infant colony; as for instance, laws for the protection of their persons and property, are immediately in force.¹

Chitty's description of the legal principle applicable to the reception of English law into those British colonies acquired by settlement, as distinct from conquest, applied in respect of the Australian colonies at the time of their establishment.² In the case of the eastern colonies of Australia this principle was supplemented by the Act to provide for the *Administration of Justice in New South Wales and Van Dieman's Land* (9 Geo. IV, c.83) section 24 of which provided that 'all laws and Statutes' in force in England at the time of the passing of the Act in 1828 'shall be applied ...so far as the same can be applied within the said Colonies'. 'The laws so brought to Australia', said Griffith C.J. in *The King v Kidman*, 'undoubtedly included all

* Senior Lecturer in Law, University of Canberra

¹ J. Chitty, *A Treatise on the Law of the Prerogative of the Crown* (London, 1820) 30. Refer also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, at 34 - 38, 79- 80.

² Refer *The King v Kidman* (1915) 20 CLR. 425, 435 where Griffith CJ reiterates this principle. Also *Cooper v Stuart* (1889) 14 App Cas. 286, 291 (PC.).

the common law relating to the rights and prerogatives of the Sovereign in his capacity as head of the Realm and the protection of his officers in enforcing them... When the several Australian Colonies were erected this law was not abrogated, but continued in force as the law of the respective Colonies applicable to the Sovereign as their head'.³ The law applicable to the prerogatives of the Crown continued as the law of the respective States at the time of the establishment of the Australian Commonwealth and in respect of the Commonwealth the Crown in that capacity succeeded to all those prerogatives subsisting at the time the Commonwealth came into being as were appropriate to a federal government of limited competence and which were not inconsistent with provisions of the Commonwealth Constitution.⁴ Some of those prerogatives, of course, came into being to the exclusion of the rights of the Crown in right of the several States where, on the construction of the *Constitution Act 1900* the Crown's prerogatives were to be exclusively enjoyed and exercised by the Governor-General on the advice of his federal advisers, such as, for example, certain prerogatives related to defence: *Joseph v Colonial Treasurer of New South Wales*.⁵

As Evatt has pointed out,⁶ the question of the exercise of prerogative rights in the nature of executive powers as between the Commonwealth and the States is largely dependent on the division of legislative powers in the Australian federation. Those prerogative proprietary rights, however, generally remain with the States, subject to the effect of valid Commonwealth legislation. But the nature of the proprietary right of the Crown to print and publish certain works, which is derived from the Crown's position as head of a self-governing territorial unit, itself suggests that it vests in both the Crown in right of the Commonwealth and in right of the several States.

The existence and exercise of the prerogatives of the Crown from the time of the establishment of the Colony of New South Wales have been demonstrated both by judicial decisions recognising such rights⁷ and by governmental practice, but it would be a mistake to

³ *The King v Kidman* (1915) 20 CLR 425, 435.

⁴ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 230; *New South Wales v The Commonwealth* (1975) 135 CLR. 337,497-498. It is not meant to be implied that all those prerogatives inherited by the Crown in right of the various Australian colonies, or in right of the Commonwealth, were exercisable solely by the Crown in those capacities. Some prerogatives, such as those external prerogatives, remained for some time exercisable by the Crown on the advice of its Imperial ministers. Refer generally, L. Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' and JE. Richardson, 'The Executive Power of the Commonwealth' in L. Zines (ed.), *Commentaries on the Australian Constitution* (Sydney, 1977) 1, 14-15, 42-43, and 50, 56-57. (1918) 25 CLR 32.

⁵ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 203-205. Refer prerogatives in the nature of proprietary rights *ibid* at 209. This work at pp 1-268 contains HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 344, 389-391, and *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd.* (1940) 63 CLR 278, 321-323.

⁷ For example, in *Woolley v Attorney-General of Victoria* (1877) 2 App. Cas. 163, the Privy Council recognised that the prerogative right of the Crown existing in England to gold and silver found in mines was introduced as part of the common law of England into the colony of Victoria (166). Also *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 (prerogative of the King as owner of wastelands in the colonies); *Toy v Musgrove* (1888) 14 VLR 349 and [1891] AC 272 (prerogative right to exclude aliens).

assume that all the prerogatives were necessarily inherited by the colonies as both the common law and statutory principles referred to deem only those prerogatives applicable to the condition of the colonies to be in force. Evatt maintains in his thesis on the prerogative entitled 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' that 'the only exception which is indicated by the Courts so far as the prerogatives of the King are concerned in their application to the Australian Colonies, either on the settlement or the passing of 9 Geo. IV, is the prerogative in relation to the Church'⁸ and later in the same work, that '...those prerogatives [of the King as head of the Church] never came into existence at any stage in the history of the Commonwealth'.⁹ His view, which was consistent with authority at the time he wrote his work, must, however, be regarded with some doubt in the light of more recent judicial authority. The implications of this as far as the prerogative right to print and publish certain works is concerned are discussed below.

II NATURE AND SCOPE OF THE PREROGATIVE RIGHT TO PRINT AND PUBLISH CERTAIN WORKS IN AUSTRALIA

It is clear law that the prerogatives of the Crown cannot be curtailed except by express words in a statute or by necessary implication arising from a statute.¹⁰ By necessary implication it is meant that it is manifest from the very terms of the statute that it was intended by the legislature that the Crown was to be bound.¹¹ The nature of the prerogative right to print and publish certain works has not, in any part of Australia, been the subject of any express or implied legislative limitation, either Imperial, Federal or State in the history of Australian settlement, until the passage of the Commonwealth *Copyright Amendment Act 1980*. Indeed the Commonwealth *Copyright Acts* passed in 1912 and 1968 expressly and fully preserved the prerogative rights of the Crown in this respect including those rights held by the Crown in right of the Commonwealth and of the several States.¹²

It follows from what has been said that the nature of the Crown's prerogative right over certain works in Australia, as distinct from its scope, was, at least until the limitations imposed by the *Copyright Amendment Act 1980*, the same as the right which exists in the Crown in England and which was described in the previous issue of the Canberra Law

⁸ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 140 or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 225.

⁹ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 141 or HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 228. In the same work at 141 (227) he states '...the only qualification we need to make on the statement that all the King's prerogatives which exist or have existed in respect of England exist or have existed with respect to the Colonies, is that the King's rights as head of the Church never came into existence in the Commonwealth of Australia at all'. His view is based on the view that 'the mode of maintenance of the Established Church' is neither necessary nor convenient for the colonies and the prerogative rights are not therefore in force (refer 140 (226)).

¹⁰ Refer, for example, to *Woolley v Attorney-General of Victoria* (1877) 2 App. Cas. 163, 167, 168 (PC.); *The Odessa* [1916] 1 AC 145, 162 (PC.).

¹¹ *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58, 61.

¹² Refer to the discussion following.

Review.¹³ The changes brought about by the *Copyright Amendment Act* are discussed later in this article.

A Religious Works.

The scope of works subject to the prerogative right in Australia would, however, appear to differ from that in England. It is clear on the basis of evidence as well as judicial opinion¹⁴ that there is no established church in Australia and it should be borne in mind that the Crown's right to print and publish certain religious works in England is based on a duty which emanates from the Crown's position as head of the Church of England. As previously described this duty arises by virtue of the Crown's position as head of state and church because the church is the established church, and is not derived from any spiritual function.¹⁵ The Crown either in right of the Commonwealth or of a State could not have this duty in Australia and in principle it follows, to use the words of one Australian commentator, that 'the Royal Prerogative in relation to the printing of the Bible and the books of the established religion in England would not exist in the Crown in right of the Commonwealth or a State'.¹⁶

The accuracy of this statement is nevertheless not as self-evident as it would seem. There is some judicial authority which suggests that the Church of England was the established church in the early colonial beginnings of Australia. As Dixon J. stated in *Wylde v Attorney-General for New South Wales*,

notwithstanding several judicial statements of a contrary tendency, the better opinion appears to be that the Church of England came to New South Wales as the established church and that it possessed that status in the colony for some decades.¹⁷

Although Dixon J. did not define what he meant by 'established church' it is clear that he used the expression to mean the church by law established as the public or state recognised form of religion and not in any general sense. According to Lord Selborne, the establishment of the church by law 'consists essentially in the incorporation of the law of the Church into that of the realm, as a branch of the general law of the realm, ...in the public recognition of its Courts and Judges, as having proper legal jurisdiction; and in the enforcement of the sentences of the Courts, when duly pronounced, according to law, by the civil power'.¹⁸ It also connotes, at

¹³ John Gilchrist, 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England', (2011) 10 (3) *Canberra Law Review* 139.

¹⁴ The Commonwealth is prohibited under the *Constitution Act 1900* from making any law establishing any religion (s 116). In all States the churches are governed by the law relating to voluntary associations or corporations and the courts will not interfere in their internal affairs except on that basis: refer *Ex parte Hay* (1897) 18 LR (NSW) 206, 209 (SC.); *Macqueen v Frackleton* (1909) 8 CLR 673 (particularly at 696, 697, 704, 705).

¹⁵ *Manners v Blair* (1828) 3 Bli. NS. 391, 404 (4 ER 1379, 1383) (HL).

¹⁶ JC. Lahore, *Intellectual Property Law in Australia: Copyright* (Butterworths, Sydney, 1977) 12 (para 115) and Lindgren K, Lahore J and Rothnie WA, *Copyright and Designs* (LexisNexis/Butterworths, Sydney, 2004-) vol 1, 20,209 (para 20,200).

¹⁷ *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 284. (contra, *Ex parte The Rev George King* (1861) Legge 1307).

¹⁸ Quoted in JT. Ross Border, *Church and State in Australia 1788-1872: A Constitutional Study of the Church of England in Australia* (London, 1962) 52.

least in England, broad state support for, and control of, the Church, including the involvement of the Sovereign as head of the Church in the appointment of its great officers, as well as the state's recognition of the Church's institutions and doctrine.¹⁹

There is a range of evidence which supports Dixon J's view that the Church of England was the established church in the early colonial development of New South Wales. Evidence of broad state support for the Church is apparent from the beginnings of the Colony. In particular, the first chaplain, the Rev. Richard Johnson, who arrived with the first British settlers in the first fleet, and all the early chaplains formed part of the civil establishment and were supported from the public purse.²⁰ With very few exceptions, the early chaplains were all clergymen of the Church of England who were officers of the Colony appointed in the initial period, by Commission from the King, and subsequently by nomination of the

'The process of establishment means that the state has accepted the church as the religious body which in its opinion truly teaches the Christian faith, and has given to it a certain legal position and to its decrees, if given under certain legal conditions, certain legal sanctions. What is called the 'establishment' principle in relation to the church is the principle that there is a duty on the civil power to give support and assistance to the church, though not necessarily by way of endowment, and where this principle prevails a church is said to be established when it receives such support and assistance. In the fullest sense a church is said to be established when all the provisions constituting the church's system or organisation receive the sanction of a law which establishes that system throughout the state and excludes any other system.' *Marshall v Graham* [1907] 2 KB 112,126.

¹⁹ The Crown itself is held on condition that the holder should be in communion with the Church of England as by law established. The Convocations of the Church are summoned, prorogued, and dissolved by the Crown; they cannot enter on ecclesiastical legislation without royal permission, nor make canons without the royal licence and assent. The royal assent must be given to the Church Measures passed by the Church Assembly and approved by Parliament. The Crown appoints the great officers of the Church, and of these the Bishops are not only administrators and judges of ecclesiastical law, but constitute the Lords Spiritual in the House of Lords'. (WR. Anson, *The Law and Custom of the Constitution*, (4th ed. AB. Keith) Vol. II, Part II, (Oxford, 1935) 250).

In England the Church of England is an institution of the state and the Sovereign is its supreme head by virtue of the Act of Supremacy 1558 (1 Eliz. I, c.1. see s. xix particularly). The Church's ecclesiastical laws are part of the law of England and its courts derive their authority from the Crown and have power to enforce their decisions. Those tribunals set up by churches which are merely voluntary associations are not courts, their jurisdiction entirely depending on the agreement of the members of the association (see discussion in *Long v Bishop of Cape Town*(1863) 1 Moo. PC. NS. 411, 460 : 15 ER 756, 774 (PC)). The state's recognition of the Church's institutions and doctrine is evidenced by, amongst other things, the confirmation by statute (13 Eliz. I, c.12 (1571)) of the Thirty Nine articles of faith agreed by the convocation of 1562 setting the standard of doctrine and practice of the Church of England, and the ratification by the Act of Uniformity in 1662 of the Prayer Book presented by the Convocations of Canterbury and York (13 and 14 Car. II, c.4 (1662); the three earlier Books of Common Prayer were also the subject of legislative ratification.

²⁰ Johnson was the only clergyman allowed to travel with the First Fleet. An application from two Roman Catholic priests was refused, even though they offered to pay their passage and work without charge to the Government: E C. Rowland, *A Century of The English Church in New South Wales* (Sydney, 1948) 17.

As to state support refer *Attorney-General v Wylde* (1948) 48 S R (NSW) 366, 381 (SC.) and *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 284 and *Historical Records of Australia* (hereinafter referred to as *HRA*) Series I, Volume xi, 370-371 (Bathurst to Brisbane, 24 September 1824) and Volume xiii, 771-778 (Darling to Goderich and Scott to Darling, 11 February 1828 and 2 August 1827 respectively).

Governor.²¹ In 1824 the privileged position of the Church of England became further entrenched when an Archdeaconry of New South Wales was established subject to the jurisdiction of the Bishop of Calcutta. The Archdeaconry was constituted by letters patent of the Crown and it took over responsibility for the administration of the Church of England chaplains in the Colony. The letters patent established the Archdeacon as a corporation sole and provided that he,

... shall be within the said Archdeaconry assisting to the Bishop of Calcutta in the exercise of his Episcopal Jurisdiction and Function according to the duty of an Archdeacon by the Ecclesiastical Laws of our Realm of England - and in as full and ample manner as the same are or may be lawfully exercised by any Archdeacon within our Realm of England save as hereinafter excepted. And we do further will, ordain, and declare that the said Archdeacon shall, within his Archdeaconry be and be taken to be without further appointment the Commissary of the said Bishop and his Successors and shall exercise Jurisdiction in all matters as aforesaid, according to the duty and function of a Commissary by the said Ecclesiastical Laws.²²

The excepted jurisdiction referred to was jurisdiction over testamentary and matrimonial causes. No matrimonial jurisdiction was conferred on any court in Australia until 1858.²³ Testamentary jurisdiction had however been conferred on the Court of Civil Jurisdiction under the First Charter of Justice,²⁴ and subsequently in the Supreme Court by the Second and Third Charters of Justice of 1814 and 1823.²⁵ The Act 4 Geo.IV, c.96 (1823) which gave the Supreme Court a statutory basis, provided in section 10 that the Supreme Court was a court of ecclesiastical jurisdiction with such 'Ecclesiastical Jurisdiction and Authority' as might be committed to it by His Majesty. Furthermore, the letters patent constituting the Archdeaconry provided that the Archdeacon had power to appoint a Registrar for his Court and that in respect of proceedings before the Court, 'the Supreme Court of Jurisdiction in New South Wales shall have such and the like Jurisdiction and power of interfering by writ of prohibition or mandamus subject to the same laws, restrictions and rules of practice as is or

²¹ As to other appointments refer *HRA*, I, x, 204 (Bathurst to Macquarie, 20 October 1819). In 1825, assistance was extended to the Presbyterian Church *HRA*, I, xii, 62-68 (Bathurst to Darling, 1 October 1825).

²² The letters patent are reprinted in R. A. Giles, *The Constitutional History of the Australian Church* (London, 1929) 198-200.

²³ The earliest legislation was enacted in South Australia 'An Act to amend the Law relating to Divorce and Matrimonial Causes in South Australia' known as the *Matrimonial Causes Act 1858* (SA) (22 Vic 1858, No 22). Other colonies followed soon after: *Matrimonial Causes Act 1860* (Tas), *Divorce and Matrimonial Causes Act 1861* (Vic), *Ordinance to Regulate Divorce and Matrimonial Causes 1863* (WA), *Matrimonial Causes Jurisdiction Act 1864* (Qld), *Matrimonial Causes Act 1873* (NSW). All the colonial Acts were modelled on the English *Matrimonial Causes Act of 1857* (20 and 21 Vic., c.85).

Refer also to Dr. C. H. Currey, 'The Law of Marriage and Divorce in New South Wales (1788-1858)' 41 *Royal Australian Historical Society Journal* 97 and P. Toose, R. Watson and D. Benjafield, *Australian Divorce Law and Practice* (Sydney, 1968) xcvi, xcix, c, where it is pointed out that despite local suggestions and a recommendation by J. T. Bigge that the Supreme Court should have a matrimonial jurisdiction the lack of such a jurisdiction resulted from a deliberate policy of the British Government, which was apparently later followed by the Legislative Council of New South Wales.

²⁴ *HRA*, IV, i, 6,7 'And Wee do further Will, Ordain and Grant to the said Court full power and Authority to Grant probates of Wills and Administration of the personal Estates of Intestates dying within the place or Settlement aforesaid'.

²⁵ *HRA*, IV, i, 77, 90-91 (Second Charter); *HRA*, IV, i, 509, 514-516 (Third Charter).

has been exercised by our Court of Kings Bench at Westminster in regard to proceedings in the Ecclesiastical Courts of England regard being had nevertheless to any special provisions or exceptions contained in these our Letters Patent or to any other laws and regulations specially applicable to ... our Colony or Settlement of New South Wales ...'.²⁶ This evidence suggests the Archdeacon's Court was regarded as an integral part of the Colony's court system.

The later history of the Church's ecclesiastical jurisdiction is described by Dixon J. in *Wylde's* case:

In 1825 an Act in Council of New South Wales recognized and made use of this jurisdiction by requiring that the registers of baptisms, marriages and burials should be transmitted to the Archdeacon's Court of the Colony: 6 Geo. IV., No. 21, s.5 and s.8. In 1835 the Colonies of New South Wales and Van Dieman's Land were dis-severed from the Diocese and See of Calcutta and shortly afterwards those colonies and that of Western Australia were by letters patent under the great seal constituted a bishop's see or diocese to be styled the Bishopric of Australia under the authority of the Archiepiscopal See of the province of Canterbury. The letters patent granted the Bishop ecclesiastical jurisdiction according to the ecclesiastical laws of England lawfully made and received in England in the several causes or matters specified and no others. Among the matters specified were the behaviour in their stations of chaplains, ministers, priests and deacons in holy orders and their correction and punishment. The letters patent gave to persons aggrieved by any judgment or sentence pronounced by the bishop or his commissary an appeal to the Archbishop of Canterbury: ... In 1836 an Act of Council of the Colony dealing with clandestine marriages referred to suits in an Ecclesiastical Court (7 Wm. IV., No. 6, ss. 3 and 4) and in 1839 another Act of Council recited that the Archdeacon's Court had been discontinued since the establishment of the Archbishopric of Australia and directed that register books of baptisms etc. be sent to the registrar of the Bishop instead of that court (3 Vic. No. 23, s.2.).²⁷

Dixon J. concluded in *Wylde's* case that it appeared that an ecclesiastical jurisdiction did exist in New South Wales, 'the duty of the Ecclesiastical Court [being] ... to administer the ecclesiastical law for the correction of ecclesiastical offences and for the enforcement of the discipline of the clergy' although there was no information as to how the jurisdiction was exercised.²⁸

Further evidence of the position of the Church of England in the new Colony not adverted to by Dixon J., but touched on by Roper C.J. in *Wylde's* case at first instance, lies in the practice of disposing lands for the support of the clergy of the established church and for the building of churches and schools of that church.²⁹ A substantial proportion of the land in fact granted

²⁶ Giles, op.cit. 199-200.

²⁷ *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 284, 285. The Acts referred to may be found in Public Statutes of New South Wales 1824-1837 and Public Statutes of New South Wales 1838-1846 (Sydney, 1861).

²⁸ *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 285.

²⁹ Governor Phillip in his Additional Instructions was directed to set apart land in or near each town for the building of a church and to allot four hundred acres adjacent thereto for the maintenance of a minister and two hundred acres for the maintenance of a schoolmaster. *HRA*, I, i, 124, 127.

The same direction was inserted in the royal Instructions issued to Governors Hunter (*HRA*, I, i, 520, 526) King (*HRA*, I, iii, 391, 397) Bligh (*HRA*, I, vi, 8, 14) Macquarie (*HRA* I, vii, 190, 196) and Brisbane (*HRA*, I, x, 596, 602).

was intended to serve as glebe land.³⁰ There is also evidence that in addition to these grants, it was common for Colonial Governors to grant land to clergymen of the Church (as well as other settlers) for their personal use and benefit.³¹ This aspect of public support for the Church reached its zenith in the formation by Royal Charter in 1826 of the Clergy and School Estates Corporation (formally entitled the Trustees of the Clergy and School Lands in the Colony of New South Wales).³² The Corporation was established to '[make] provision for the maintenance of Religion, and the education of Youth in our Colony of New South Wales',³³ and it was intended to set aside sufficient lands in each district which would ultimately produce funds adequate for the maintenance of the clerical and school establishments of the Church of England.³⁴ The governing body of the Corporation consisted of the Governor (as President), the Archdeacon of New South Wales (Vice-President), the Chief Justice, the Secretary of the Colony, the Attorney-General, the Solicitor-General, the members of the Legislative Council and the nine senior Chaplains of the Church of England. No other denominations were represented or provided for in the activities empowered to the Corporation.³⁵ It appears that this rather ambitious project arose out of representations from the Church of England in the Colony,³⁶ and it faced local opposition by non-Church of England elements in the Colony from the time of its inception.³⁷ The Corporation was, however, short lived, due largely to the fact that the methods empowered to it under its Charter were not sufficient to meet the objects of the Corporation. This left the maintenance of the clergy and the schools to continue to be largely met from colonial revenue.³⁸

³⁰ Refer Surveyor-General Oxley to Archdeacon Scott *HRA*, I, xii, 392-396.

³¹ Refer *HRA*, I, i, 438; ii, 459-461; iii, 613; iv, 314, 498; v, 34, 606, 774; vi, 162; vii, 653; x, 561-564. Governor Darling outlined the extent of the provision of such grants of lands for the support of the clergy of the Church of England to Earl Bathurst 27 February 1827, *HRA*, I, xiii, 129-130. The ten clergymen of the colony together held between them a total of 17,731 acres, 10,931 of which had been acquired by Crown grant.

³² Refer *HRA*, I, xi, 434-454 particularly at 438-439 and 444-454 (Bathurst to Brisbane, 30 June 1825). It was also sometimes referred to as the 'Church and School Corporation', refer *HRA*, I, xxii, 537 and the 'Church and School Estates Corporation' refer *HRA*, I, xi, 444; xii, 250. A further but nearly identical draft charter of incorporation for the management of the Clergy and School Estates was attached to Additional Instructions to Governor Darling *HRA*, I, xii, 125, 126. The charter was sealed on March 9, 1826.

³³ *HRA*, I, xi, 444.

³⁴ It was announced in 1825 that the Corporation would receive one seventh of the lands in each county to be erected in the Colony as well as the glebes and the lands hitherto appropriated for the maintenance of the male and female orphanages. (*HRA*, I, xi, 434, 438, 452 (Bathurst to Brisbane, 1 January 1825)). It was empowered to manage, sell and lease lands vested in the Trustees and could appropriate up to twenty acres for the personal use of any Church of England minister and for the erection of churches, schoolhouses, cemeteries and parsonage houses and for the personal use of schoolmasters. Income from land sales and rents, as well as profits from the land, went to the Trustees who were in the first instance responsible for the salaries and wages of the Corporation and then for buildings and improvements on Corporation lands and the maintenance and support of clergy and schools under the control of the Church.

³⁵ Refer to draft Charter *HRA*, I, xi, 444-454.

³⁶ Particularly by Archdeacon Scott. Scott's views accorded with Lord Bathurst's declared policy on education and religious instruction. JT. Ross Border, *Church and State in Australia 1788-1872: A Constitutional Study of the Church of England in Australia* (London, 1962) 48.

³⁷ *Ibid* 72-73. See also E C. Rowland, *A Century of The English Church in New South Wales* (Sydney, 1948) 53, 54.

³⁸ *HRA*, I, xiv, 784, 787 (Murray to Darling, 25 May 1829); *HRA*, I, xvi, 80, 81 (Goderich to Darling, 14 February 1831).

Instructions purporting to revoke the Charter were issued in June 1830 a little over four years after the Corporation was established and only 16 months after the first grants of land had been made by the Governor to its Trustees.³⁹ Although it must be borne in mind that allowances were also paid to a small number of clergymen of other denominations during this period the evidence of state support of the Church of England suggests more than an Anglican ascendancy in the Colony. It is significant in this respect that there was a contemporary perception by the Home Government and in the Colony that the Church was the established church. This is evidenced by numerous descriptions in official despatches and instructions in this early colonial period to the Church of England as 'the established church'.⁴⁰

Accordingly, despite the fact that courts have accepted that the Act of Uniformity was never in force in New South Wales,⁴¹ there is considerable evidence to suggest that the Church of England was the established church for some time in the early settlement of Australia. The precise time at which the Church became disestablished and merely adopted the status of a voluntary association is difficult to ascertain. In Dixon J.'s view the chief reason for this change lay in the grant of representative government and the separation of the colonies.⁴² Roper C.J. took the view that 'clearly it was no longer an established church after the abolition of State aid to religion in 1862' and that 'probably it ceased to be the established church before the introduction of responsible government in 1850'.⁴³

Although it is difficult to determine the date with precision it is nevertheless clear that in New South Wales and the other Australian colonies, the Church of England ultimately became a voluntary association with the vesting and management of Church property being governed by various Colonial Acts. In New South Wales the Church itself recognized this status at its

³⁹ *HRA*, I, xv, 560 (Murray to Darling, 19 June 1830) (Instructions re revocation of letters patent for the Clergy and School Estates Corporation). The first grants had been made on 3rd February 1829, - see *HRA*, I, xii, 814 n. 37 for a list of all grants made to the Corporation.

⁴⁰ The occurrences are so frequent as to suggest that there was a contemporary perception that the Church had the status of an established church in the colony, and that the use of the term was not merely a customary one. Refer, for example, *HRA*, I, xi, 434, 438 (paragraph 18) (Bathurst to Brisbane, 1 January 1825); *HRA*, I, xii, 125, 126 (Additional Instructions to Darling); *HRA*, I, xiv, 784, 788 (Murray to Darling, 25 May 1829); *HRA*, I, xiii, 774, 777 (Scott to Darling, 2 August 1827). As to the question of establishment generally refer Border, op.cit. 47-62.

⁴¹ *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 296, also 276, 303, refer also *Attorney-General v Wylde* (1948) 48 S R (NSW) 366, 384.

⁴² *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224, 286.

⁴³ *Attorney-General v Wylde* (1948) 48 S R (NSW) 366, 381, 382. The disestablishment took place through a series of steps, including early dissolution of the Clergy and School Estates Corporation and the reversion of its lands to the Crown, Governor Bourke's Church Act of 1836 (7 Will. IV, No. 3) which gave State support 'on an equitable footing' to all the principal Christian churches in the colony and by judicial decisions in New South Wales in 1861 and in England in 1863, one of which recognised that the ecclesiastical law of England was no longer in force in the Colony and the other which decided that after constitutional government had been granted in a colony, the Crown, by letters patent appointing a bishop, could no longer grant any coercive ecclesiastical jurisdiction to him. The use of letters patent to appoint colonial bishops ceased after that date. (Refer *Ex parte The Rev George King* (1861) Legge 1307; also *Ex parte Ryan* (1855) Legge 876, 879 and *Re Howard* [1976] 1 NSWLR 641, 644, 645 (SC)); and refer *Long v Bishop of Capetown* (1863) 1 Moo. PC. NS. 411, 460 (15 ER 756, 744) (PC) and also *In re Lord Bishop of Natal* (1864) 3 Moo. PC. NS. 115, 148 (16 ER 43, 56) (PC)).

1866 General Conference in which a constitution was agreed to for the management of the Church in that Colony.⁴⁴ In other colonies which were founded later and in which evidence relating to the establishment of the Church is weak this same result was achieved.⁴⁵ Public funding of the major Christian churches in those colonies paralleled such funding in New South Wales⁴⁶ and later the withdrawal of state aid for religion by the New South Wales *Grants for Public Worship Prohibition Act 1862* heralded similar legislation in other colonies. The other principal churches also became governed by Colonial (and later State) Acts relating to the vesting and management of church property. The status quo in the colonies at the end of the 19th century was, in fact, reflected in the *Commonwealth Constitution*, section 116 of which prohibits the Commonwealth making 'any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion' and also provides that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

If the Church of England was the established church for sometime in the early colonial development of Australia, the Crown's duty and right to print and publish the Authorized Version of the Bible and other religious works would have existed in the Colony of New South Wales as a prerogative related to the established church. But, notwithstanding that the right cannot be lost by desuetude, it can no longer be said that the Crown has a right to print and publish those works in any of the States or the Commonwealth since the basis of the right does not exist, that is, the duty of the Crown as head of the established church to superintend the publication of the religious works of the established church. This conclusion is not, however, consistent with the decision in *Manners v Blair*⁴⁷ in which the House of Lords held that the Crown's duty extended to the Book of Common Prayer although that work was not the book of worship of the established church (Presbyterian) of which the Crown was head, but was the book of worship of the once established church (Episcopalian), which had at the time of the case long ceased to be established. It is nevertheless submitted that such a view cannot be satisfactorily sustained because the prerogative right of the Crown is dependent upon a duty and that duty can only relate to the works of the church which is established at any given time. In Australia, of course, there is no established church and the Crown in right

⁴⁴ Refer Giles, op.cit. 103-111 at 110-111 particularly and Border, op.cit. 254-255.

⁴⁵ In particular in relation to Victoria see *Church Constitution Act 1854* (18 Vic. No. 45), as to New South Wales refer *Church of England Property Management Act* (30 Vic. 1866), as to Tasmania refer *Church of England Act 1858* (22 Vic. No. 20).

Refer generally Rowland, op.cit., Chapters VI, VII and VIII, H W Nunn, *A Short History of the Church of England in Victoria 1847-1947* (Melbourne, 1947) 11-14 and A E. David, *Handbooks of English Church Expansion: Australia* (London, 1908) 10 - 63.

Note in relation to Van Dieman's Land *HRA*, I, xiv, 784, 789 (Murray to Darling, 25 May 1829) where Murray informed Darling he had not deemed it advisable to recommend to His Majesty to create in Van Dieman's Land a body corporate similar to that established in New South Wales (i.e. the Clergy and School Estates Corporation).

⁴⁶ Both the *Tasmanian Constitution Act* of 1855 (18 Vic. No. 17) and the *Victorian Constitution Act* of 1855 (Schedule I to the Imperial Act 18 and 19 Vic., c. 55) contained provisions reserving funds for 'Public Worship' (s.31 of the Tasmanian Act) or 'the Advancement of the Christian Religion' (s. LIII of the *Victorian Constitution Act*). These provisions were later repealed.

⁴⁷ (1828) 3 Bli. NS. 391, 404 (4 ER 1379, 1383) (HL).

of the Commonwealth or of the several States could not be under a duty to print and publish the works in question. No prerogative right over these works can therefore exist.

B Legal Works.

The Crown's right to print and publish certain legal works has nevertheless received judicial recognition in Australia. In *Butterworth's case*,⁴⁸ the Attorney-General for New South Wales sued the publishing firm of Butterworth and Company after it had printed and published copies of certain Acts and reprints of Acts passed by the Legislature of New South Wales in certain volumes entitled 'The Public Acts of New South Wales'. Long Innes C.J. in Eq. took the view that the prerogative right to print and publish the statutes of New South Wales was vested in the Crown in right of the Colony of New South Wales immediately prior to the confederation of the Commonwealth and neither by the confederation nor since confederation had this prerogative been affected, as there had been no exercise of the Commonwealth's legislative powers under section 51 pl. xviii and pl. xxxi of the *Constitution Act 1900*, and it had not been abridged or curtailed by the *Copyright Act 1911*, or lost by desuetude. This right therefore remained vested in the Crown in right of the State of New South Wales.

Although the decision directly related to Acts of Parliament dicta in the case suggests that Long Innes C.J. accepted the wider scope of the right⁴⁹ and notwithstanding the absence of direct authority in point, it is submitted that the rights of the Crown, as chief executive magistrate, in right of the Commonwealth and of the several States extend to print and publish all those legal works described in the previous issue of the Canberra Law Review.⁵⁰ These rights are proprietary in nature being derived from the position of the Crown as supreme executive authority of a particular self-governing territorial unit, and they are not referable to some head of legislative power as an executive power. As Evatt has said '... the ordinary rule is that the antecedent prerogatives [prior to the formation of the Commonwealth] in the nature of proprietary rights survive in the executives of the various States of the Commonwealth'.⁵¹ And while the Commonwealth may validly acquire this property of the States under the constitutional powers mentioned above,⁵² no legislation purporting to acquire this property has been passed. The grant of legislative powers to the Commonwealth in respect of the property of the States does not, of course, in itself deprive the States of their proprietary rights.

⁴⁸ (1938) 38 S R (NSW) 195.

⁴⁹ (1938) 38 S R (NSW) 195, 229, 236-238. Refer also case note at 11 ALJ 533.

⁵⁰ John Gilchrist, 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England', (2011) 10 (3) *Canberra Law Review* 139, 159-163, refer also 151-156.

⁵¹ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 209 or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 334. Evatt expresses the same view in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd.* (1940) 63 CLR 278, 322.

⁵² Refer to the later discussion in this article.

C The Interrelationship of Prerogative Rights.

The existence of the prerogative right to print and publish certain legal works in each of the jurisdictions named raises a number of hitherto unexplored issues relating to the interrelationship of the rights on which there is, unfortunately, little judicial assistance. First, the question arises as to whether the Crown's prerogative right to print and publish certain legal works in one State is enforceable in other States of Australia. If it is not so enforceable, a publisher would be entitled to publish in one State legal works in which the Crown in right of another State has a prerogative right, without infringement of that right. Secondly, when State courts exercise federal jurisdiction, the question arises as to whether the Crown in right of the State or of the Commonwealth or both may exercise the prerogative right to print and publish the written judgments produced in the exercise of that jurisdiction. Finally, there are numerous Imperial Acts which still apply in the States and Territories of the Commonwealth and the Commonwealth of Australia *Constitution Act 1900* is, of course, one such Act. Although these Acts are laws of the States, Territories or Commonwealth in the wider meaning of the expression, does the Crown in right of the United Kingdom, or the Crown in right of the Commonwealth or the several States have the right to control the printing and publication of these Acts in Australia?

Long Innes C.J. in Eq. accepted in *Butterworth's* case that the Crown in right of the State of New South Wales had established title to the statutes of New South Wales which were the subject of the dispute and that the Attorney-General for New South Wales was entitled to sue in respect of the prerogative right in question, as representative of the Crown in that right. He added on the question of title to the statutes: 'Should, however, the conclusion to which I have arrived be erroneous I am of [the] opinion that the present informant is competent to maintain this suit for the protection of His Majesty's prerogative proprietary right whether it belongs to the Crown in right of the United Kingdom or in right of the Commonwealth'.⁵³

In his view this principle followed the legal axiom that the Crown is one and indivisible and ubiquitous throughout the British dominions, although its power may be exercised in different localities by different agents:

... applying the legal axiom as stated, I can see no reason on principle why such proprietary right of the Crown should not be capable of being asserted by His Majesty's Attorney-General for that constitutional unit which has established the Court which has jurisdiction to entertain the appropriate action.⁵⁴

The obvious implication to be drawn from this statement is that while the proprietary right of the Crown derives from the Crown's position as supreme executive authority of a particular self-governing territorial unit it is capable of being asserted in any part of the British Commonwealth which has the Crown as its head of state and whose Courts have jurisdiction over the subject matter of the proceedings. Consequently, on this view the Crown's rights in

⁵³ (1938) 38 S R (NSW) 195, 249-250.

⁵⁴ Ibid 250.

Acts of the British Parliament or of a State Parliament or of the Commonwealth Parliament could be enforced in the courts of any jurisdiction in Australia.

Whether such a view would now be followed by a court in Australia is not clear. While clause 2 of the *Commonwealth of Australia Constitution Act 1900*⁵⁵ expresses the notion of the indivisibility of the Crown, indivisibility of the Crown has been described as inconsistent with the existence of autonomous governments within the Queen's dominions.⁵⁶ Notwithstanding the trend of more recent decisions has been to stress the divisibility of the Crown,⁵⁷ there is nothing in any of the cases on this prerogative which suggests a contrary conclusion to that put forward by Long Innes C.J. and in principle it would seem arguable that the proprietary right should be capable of being asserted in any jurisdiction in which it is recognized. Long Innes' view is not '... in any degree inconsistent with the fact that in certain classes of cases, where the rights of the Crown in right of one constitutional unit are opposed to its rights in respect of another constitutional unit ... it is necessary for procedural purposes that the Crown should be regarded as separate juristic entities'.⁵⁸

Long Innes C.J. also took the view in *Butterworth's* case that section 18 of the *Imperial Copyright Act* which was brought into force in the Commonwealth of Australia by the *Copyright Act 1912* did not abridge or curtail by necessary implication the Crown's prerogative with regard to statutes.⁵⁹ Section 18 of the Act provided,

Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

The word 'Crown' was not defined in that Act although it is implicit in Long Innes C J's judgment that he regarded the word 'Crown' as including the Crown in right of the United Kingdom.⁶⁰ The British Act of 1911 operated of its own force in Australia and not as an enactment in the exercise of Commonwealth legislative power.⁶¹ Its provisions applied throughout 'Her Majesty's dominions' including self-governing dominions that declared it to be in force. It created an Imperial copyright and not merely one limited to Australia. It is therefore suggested that the word 'Crown' in that Act, which is not defined, must be regarded in its widest sense and should be construed in its application to Australia as including the Crown in right of the United Kingdom. Any narrow view that the word 'Crown' must be

⁵⁵ 63 & 64 Vict. c12.

⁵⁶ Constitutional Commission, *Final Report*, (AGPS, Canberra, 1988) 76,79.

⁵⁷ Refer, for example, to *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others* [1982] 2 All ER 118 (CA).

⁵⁸ Ibid 252.

⁵⁹ Ibid 225, 226.

⁶⁰ Refer *Butterworth's* case (1938) 38 S R (NSW) 195, 224, 225 and 249, 250.

⁶¹ Refer *Gramophone Co. Ltd. v Leo Feist Inc.* (1928) 41 CLR 1, 11, 28, 29 and *Copyright Owners Reproduction Society Ltd. v E M I. (Australia) Pty. Ltd.* (1958) 100 CLR 597, 604, 612, 613, 616, 617.

construed as referring to the legislating government only cannot be satisfactorily advanced in relation to this Act.⁶²

Sub-section 8A(1) of the *Copyright Act 1968* also makes a proviso in similar broad terms to that of the 1911 Act,

Subject to sub-section (2), this Act does not affect any prerogative right or privilege of the Crown.

By virtue of sub-section 10(1), the meaning of the expression 'the Crown' is defined to 'include the Crown in right of a State and the Crown in right of the Northern Territory and also includes the Administration of a Territory other than the Northern Territory'. The Act is also expressed to bind the Crown. There is nothing in these words or in other provisions of the Act to suggest that rights of the Crown in right of the United Kingdom are excluded under the 1968 Act and the Act deals with rights which are international in character. The word 'includes' in definition sections normally suggests that the words following are intended to expand the natural and ordinary meaning of the defined word. If the narrow view of the word 'Crown' is adopted by a court the word would be construed to mean the Crown in right of the legislating government only and thus there would be no specified preservation of the rights of the Crown in right of the United Kingdom. But it is submitted that the word 'Crown' should be interpreted in the context of the rights dealt with by the legislation as a whole and its historical background, and as the definition is extensive rather than restrictive it is arguable that the nature of the right should not lead to a restrictive view of the word 'Crown', and that therefore rights of the Crown in right of the United Kingdom and other jurisdictions which were recognised under the 1911 Act should continue to be preserved under the 1968 Act. The adoption of the narrow view would, however, lead to the conclusion that all rights of the Crown in right of the United Kingdom and other foreign jurisdictions recognised under the 1911 Act must by necessary implication have been abolished by the 1968 Act because only certain rights of the Crown outside the rights of the legislating government are expressly preserved.

The argument which Long Innes C.J. advances in *Butterworth's case* on the enforcement of this prerogative proprietary right in other jurisdictions finds some support in decisions on other aspects of the prerogative of the Crown. These decisions show that some prerogative rights may be enforced in other jurisdictions. One particular example is the Crown's prerogative right to issue process and be paid in full in priority over all other creditors in respect of a debt due from a company in the course of liquidation. This right was one of the immunities and preferences described by Evatt in his classification of the prerogatives. In *re Oriental Bank Corporation*,⁶³ the question arose as to whether this right was barred by

⁶² Refer Peter W Hogg & Patrick J Monahan, *Liability of the Crown* (Carswell 3rd ed, Toronto, 2000) 12 - 13, 323-326. A proper interpretation of the scope of the word 'Crown' should have regard also to the greater acceptance by courts at the time of the coming into force of that Act, of what has been described as the 'verbally impressive mysticism' of the concept of the indivisibility of the Crown. Refer Latham C.J., in *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350 - 351.

⁶³ (1884) 28 Ch D 643.

statutory provisions in England. The Crown's claims against the banking company were in fact derived from both the Crown in respect of its Imperial right and the Crown in respect of various colonial rights including the Colonies of Victoria and Ceylon and the company had acted as bankers for the Crown in those Colonies. The Crown in both its Imperial right as well as its colonial rights was represented by the Attorney-General and Solicitor-General respectively. Chitty J. held in that case that the Crown was not barred and was therefore entitled to issue process and be paid in full in priority over other creditors. He commented in relation to the colonial claims:

No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies.⁶⁴

The same question arose between the States of Australia in *In re Commonwealth Agricultural Service Engineers Limited*.⁶⁵ In that case, the Supreme Court of South Australia held that the Governments of New South Wales and Queensland were entitled equally with the Government of South Australia to be paid in full in priority to the other simple contract creditors of a company which had gone into voluntary liquidation. Later, however, in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd*⁶⁶ in which the High Court held that in the winding up of an insolvent company under the *Companies Act 1899* (NSW) debts due to the Crown in right of the Commonwealth and debts due to the Crown in right of the State of New South Wales have priority, by virtue of the prerogative, over debts due to the subject, Dixon J expressed some doubts as to whether the *Oriental Bank* case was still good law:

In the self-governing dominions and colonies of the Crown the prerogative right of priority operates to entitle the treasury of the dominion or colony to payment of debts due to the government in priority to debts due to its subjects. In other words, the claims of the government of the country are preferred to those of its subjects in accordance with the modern understanding of the principle. But the claims of other parts of the Empire have been thought entitled to a like preference over the claims of the citizens of the part under whose laws the assets of the debtor are administered. Thus in a winding up in England payment has been ordered of a debt due to the Crown in right of the Colony of Victoria in priority to debts due to English creditors... The indivisibility of the Crown is said to be the justification for this conclusion... But the unity of the Crown does not mean that distinctions do not exist between the parts of the King's dominion for and in respect of which the rights of the Crown are exercised. A right or prerogative of the Crown in right of New Zealand, to take an example, and conferred by, or subsisting under, the law of New Zealand, by which debts due to the Crown in that right are to be preferred to debts due to subjects of the Crown, forms part of the governmental and fiscal system of New Zealand. If the Government of New Zealand, to pursue the example, proves its debt in a winding up in Newfoundland, why should the New Zealand treasury be preferred to ordinary creditors in Newfoundland? It is not in accordance with the division of the Empire into separate polities that a prerogative of government affecting the

⁶⁴ Ibid 649.

⁶⁵ (1928) SASR 342.

⁶⁶ (1940) 63 CLR 278.

treasury of one part of the Empire should be exercisable in another part and, moreover, exercisable to the prejudice of the citizens of that other part⁶⁷

Dixon J. considered the question in *Farley's* case differed from the question whether priority of Crown debts ran throughout the Empire:

... it is another and entirely different question how that priority operates in a federation like Australia, composed of Commonwealth and States, each with a separate treasury, but all combining to form one self-governing dominion.⁶⁸

He held as did the remainder of the court that debts due to the Commonwealth and a State took priority over those due to a subject and that as between these governments there were co-existing rights standing on an equality.

Evatt in his thesis on the prerogative expresses similar disquiet about the notion that other Dominions of the Empire or the Imperial Government are entitled in respect of the Commonwealth of Australia and in the Commonwealth to exercise the prerogative of preference or priority, although he does accept that the grant of immunity, which is an exercise of the prerogative, can be justified beyond territorial boundaries on the basis of comity.⁶⁹ He makes no reference to the prerogative right to print and publish certain works but states as a 'broad principle' that the only executives which are strictly entitled to exercise prerogative rights in the Commonwealth are the Federal and State Governments.⁷⁰

The prerogative in *Farley's* case is not a proprietary right and arguably the right to print and publish certain works does not raise concerns of national interest in the same way as the prerogative of preference or priority. Thus, there is no reason that the disquiet expressed by Dixon J is relevant to the prerogative right to print and publish certain works and although other proprietary prerogative rights of the Crown would normally all be held and exercisable by the States or the Commonwealth there is no reason that the proprietary right of the Crown held by the Crown in right of the United Kingdom over certain legal works, the nature and scope of which is recognized in Australia, should not be enforceable in any jurisdiction in Australia.

Although this area of the law is not free from doubt it is suggested that the prerogative right of the Crown in the nature of copyright is capable of being enforced in other jurisdictions; in principle and subject to relevant legislative enactment the Crown's right should be enforceable in all jurisdictions in which the Crown is head of state and the right is recognised even though the right arises by virtue of the Crown's position as supreme executive authority of a different territorial unit. Any suggestion that the right to print and publish certain legal works is one restricted to the jurisdiction to which the legal works relate is contrary to the

⁶⁷ Ibid 302.

⁶⁸ Ibid 303.

⁶⁹ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 237 or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 390.

⁷⁰ Ibid.

proprietary nature of the right and its recognition as a right in many jurisdictions of the British Commonwealth. In this regard it should be noted that it has been a frequent practice for the Crown to include in its grants of exclusive rights to print and publish works in England prohibitions on others printing or causing to be printed such works within 'our Kingdoms and Dominions', or 'any of our Realms or Domynions' or with words similar in effect.⁷¹

In the light of those views already expressed in relation to the recognition of the prerogative rights of the Crown in right of the United Kingdom and other foreign jurisdictions under the *Copyright Act 1968*, it is arguable therefore, though the subject of some doubt, that the prerogative right of the Crown in right of the United Kingdom to print and publish the Commonwealth of Australia *Constitution Act 1900* and other statutes of the British Parliament is enforceable in Australia. It is more strongly arguable, however, in view of the definition of the expression 'the Crown' in the *Copyright Act 1968*, that the prerogative rights of the Crown in right of a State or of the Commonwealth in certain legal works which are clearly recognised under the 1968 Act would be enforceable in all States and Territories of the Commonwealth.

Another aspect of the interrelationship of the prerogative rights in Australia is the question of the vesting of rights in respect of written judgments of State courts when exercising federal jurisdiction, or a federal court exercising appellate jurisdiction in relation to State law. Control over the printing and publication of all decisions of State courts has historically been exercised by Councils of Law Reporting or other semi-governmental or governmental bodies in the States. It follows from my discussion in the previous issue of the Canberra Law Review that the rights to judgments of courts should vest according to the source of power of those courts.⁷² In particular section 71 of the *Commonwealth Constitution* which vests the judicial power of the Commonwealth in the courts to which it refers including 'such other courts as it invests with federal jurisdiction' would imply, having regard to the terms of Part VI of the *Judiciary Act 1903* (Cth), that the rights of the Crown in right of the

⁷¹ Refer, for example, to the privilege granted to *John Christian Bach* for the sole printing of 'divers works consisting of Vocal and Instrumental Music' dated 15th December 1763, '...strictly forbidding all our subjects within our Kingdom and Dominions, to reprint, abridge, copy out in writing for sale, or publish the same...' reprinted in C S. Terry, *John Christian Bach* (2nd ed.) (London, 1967) 78; and the privilege granted to Henry Sibdale and Thomas Kenithorpe to print and publish various works written by William Fulke dated 4 April 1618 '... or fhall ymprint or caufe to be ymprinted either or any of the faid Booke or Bookes or Volumes before mentioned, or any part of them or either of them, within any of our Realms or Domynions...' in Thomas Rymer, *Foedera* (3rd ed., 10 vols.) (The Hague, 1739-1745) Vol. VII, Part III, 56 at 57; and the privilege granted to Richard Grafton and Edward Whitchurche to print primers in both English and Latin dated 28th May 1545, 'Wherefore, we wyll and streightly commaund and charge all and singuler our subjectes, as well printers as booksellers, and all other persons within our dominions, that they, ne any of them, presume to print or sel ... the sayd boke or any part thereof, contrary to the meanyng of this our present license and priuiledge...' in T.F. Dibdin's edition of Ames' *Typographical Antiquities* (4 Vols) (London 1810-1819) Vol. III, 430, 431.
Refer also to the full text of other privileges referred to in note 57 in John Gilchrist, 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England', (2011) 10 (3) *Canberra Law Review* 139, 150.

⁷² John Gilchrist, 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England', (2011) 10 (3) *Canberra Law Review* 139, 146-149.

Commonwealth extend to all judgments of judges exercising that jurisdiction whether the judges are those of a State court exercising federal jurisdiction or of a federal court.⁷³ Jurisdiction in respect of appeals from State courts to federal courts is governed by sections 71, 73 and 77 of the *Commonwealth Constitution* and provisions of the *Judiciary Act 1903* and other federal Acts. Federal courts acting in an appellate capacity are exercising the judicial power of the Commonwealth and rights in respect of the judgments should under the above analysis vest in the Crown in right of the Commonwealth. The Commonwealth has, in fact, historically exercised control over the printing and publication of all judgments of Commonwealth courts.

It is, however, common for State courts to exercise federal and State jurisdiction concurrently. This raises the question whether both the Crown in right of a State and the Crown in right of the Commonwealth may exercise concurrent rights to print and publish judgments of those courts written in the exercise of both federal and State judicial power. Evatt in his thesis on the prerogative of the Crown raises the question of the conflict of prerogative rights of the Crown in right of the Commonwealth and in right of a State and suggests that the meaning of 'law of the Commonwealth' in section 109 of the *Commonwealth Constitution* should be construed to cover common law rights.⁷⁴ Thus, when a State court exercises both federal and State jurisdiction in the one proceeding, the Crown in right of the Commonwealth would exercise, by virtue of the paramountcy given to Commonwealth laws by section 109 of the Constitution, the right to print and publish the written judgment of the court produced in that proceeding. The wide view of the expression 'law of the Commonwealth' under section 109 has not been adopted by the High Court nor indeed by Evatt himself as a judge of that Court. The High Court has interpreted the phrase which occurs in section 109 in such a way as to exclude common law rights⁷⁵ and *Farley's* case and the other mentioned debt priority cases are themselves authority for the proposition that such prerogative rights may exist concurrently and should be treated equally when both interact. In these circumstances therefore both the Crown in right of the Commonwealth and in right of a State should have concurrent rights to print and publish judgments produced in the exercise of both State and federal judicial power.

⁷³ It follows that to the extent to which the Council of Law Reporting in Victoria Act 1967 as amended, purports to control the printing and publication of judgments of State courts when exercising federal jurisdiction, the Act is invalid because it amounts to a purported acquisition by the State of the prerogative right of the Crown in right of the Commonwealth in those judgments: *Commonwealth v Cigamic Pty Ltd.* (1962) 108 CLR 372, 389.

⁷⁴ HV Evatt, *The Royal Prerogative*, (LBC, Sydney, 1987) 220 or refer HV Evatt's LLD thesis, 'Certain Aspects of the Royal Prerogative. A Study in Constitutional Law' (unpublished Doctor of Laws Thesis, Law Library, Sydney University, 1924) 362.

⁷⁵ *Re Colina; Ex Parte Torney* [1999] HCA 57 at paras 25, (Gleeson CJ and Gummow J, with whom Hayne J agreed) 37-41 (McHugh J) and contra 77-81 (Kirby J) *The Queen v Foster; Ex parte Commonwealth Steamship Owner's Association* (1953) 88 CLR 549, 556. See also *Sankey v Whitlam* (1978) 53 ALJA. 11, 42 (Mason J) *Spratt v Hermes* (1965) 114 CLR 226, 247 (Barwick CJ) and *The Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd.* (1922) 31 CLR 421, 431.

III IMPACT OF THE COPYRIGHT AMENDMENT ACT 1980 ON THE PREROGATIVE RIGHT OF THE CROWN IN AUSTRALIA

The prerogative right of the Crown to print and publish certain works was not mentioned in the early Imperial or Colonial Acts in force in the Colonies prior to the passing of federal legislation,⁷⁶ nor in the first federal Act, the *Copyright Act 1905*, but was specifically preserved in the *Copyright Acts of 1912 and 1968*. The 1912 Act was the first Act to eliminate entirely common law protection for literary works and the first Act to make provision for the vesting of ownership of copyright in the Crown for Government publications and the express saving of prerogative rights of the Crown therefore become prudent, if not necessary, for their continued existence.⁷⁷

Prior to the coming into force of the *Copyright Amendment Act 1980*, the *Copyright Act 1968* provided in sub-section 8(2) that the Act did 'not affect any prerogative right or privilege of the Crown'. The *Copyright Amendment Act 1980* repealed section 8 in its entirety and inserted section 8A in its stead. That section provides,

- 8A.(1) Subject to sub-section (2), this Act does not affect any prerogative right or privilege of the Crown.
- (2) Where a right or privilege of the Crown by way of copyright subsists in a work or published edition of a work, a person does not infringe that right or privilege by doing, or authorizing the doing of, an act in relation to the work or edition without the licence of the Crown if, assuming that that right or privilege of the Crown did not subsist in the work or edition, but copyright subsisted under this Act in the work or edition and was owned by a person other than the Crown, he would not infringe the copyright of that owner in the work or edition by doing, or by authorizing the doing of, that act without the licence of the owner.
- (3) Nothing in sub-section (2) shall be taken to limit the duration of the right or privilege of the Crown by way of copyright in a work or published edition of a work.

Sub-section 8A (2) purports to adopt a recommendation of the Copyright Law Committee on Reprographic Reproduction that the *Copyright Act* should make it clear that any act that is excluded from infringement of copyright under that Act should equally not be an infringement of any prerogative right of the Crown.⁷⁸ The sub-section enables the general

⁷⁶ Refer *Copyright Act 1842* (5 and 6 Vic., c.45) (the only Imperial Act relevant to the subject matter in question); *Copyright Act 1879* (NSW) 42 Vic. No. 20; *Copyright Act 1869* (Victoria) 33 Vic. No. CCCL; *Copyright Act 1890* (Victoria) 54 Vic. No. 1076; *Copyright Register Act 1887* (WA.) 51 Vic. No. 3; *Copyright Act 1895* (WA) 59 Vic. No. 24; *Copyright Act 1887* (Qld) 51 Vic. No. 2; and *Copyright Act 1878* (SA) 41 and 42 Vic. No. 95.

⁷⁷ The Commonwealth *Copyright Act 1905* did not expressly or by necessary implication abolish the prerogative right of the Crown to print and publish certain works. The Act did not bind the Crown and it made no particular provision for Crown publications. Without a special saving of prerogative rights the 1911 Act could have been regarded as repealing most, if not all, the prerogative by necessary implication.

⁷⁸ Australia. *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) (Canberra, 1976) 58, 59 (para 8.06). Refer also Australia. Parl., Senate, *Copyright Amendment Bill* (No. 2) 1979 *Explanatory Memorandum* 1, 2 (paras 2, 4) and Australia. Parl., Senate, *Parliamentary Debates*

principles of infringement of copyright law to be applied in respect of prerogative right works. It would not, for example, be an infringement of any prerogative right of the Crown in a work to print and publish an insubstantial part of that work.⁷⁹ Moreover the defences to infringement of copyright provided in the Act would be available to persons engaged in the printing and publication of those works. Accordingly, it would not be an infringement of any prerogative right of the Crown to print and publish more than a substantial part of a prerogative work in circumstances which would amount to a fair dealing with that work for criticism or review.⁸⁰ Other defences to infringement of copyright such as fair dealing with a work for the purpose of research or study⁸¹ and certain copying permitted by libraries or archives⁸² would also be available although it is arguable that the limited reproduction of works generally envisaged by the exceptions to infringement contained in Division 3 of Part III of the Act would not amount to 'printing' of a work in the sense understood by the right.

A small number of provisions inserted in the *Copyright Act*, originally by the *Copyright Amendment Act 1980* and since expanded, permit large scale reproduction of prerogative works. Those sections principally are 135ZG, 135ZMB, 135ZL, 135ZMD and 135ZP, 135ZS of the Act. In general terms they relate to copying and communication by educational institutions for the teaching purposes of those institutions. Sections 135ZG and 135ZMB enable copying or communication to be undertaken on the premises of an educational institution 'for the purposes of a course of education' (or 'course of study') provided by it of up to two pages of an edition of a literary (or dramatic) work or of works that include the work, or 1% of the total number of pages in the edition, whichever is the greater, provided a whole work is not copied. No further copying or communication of the same work can be undertaken in reliance upon these sections within fourteen days. In effect the section provides a fixed and easily determined allowance for the multiple copying or communication by educational institutions of insubstantial parts of a work, and it must be doubtful whether the multiple reproduction or communication of so small an amount of a prerogative work would in any circumstances be an infringement of the Crown's rights in that work.

Section 135ZP provides a statutory licence for institutions assisting persons with a print disability which enables the making of multiple copies of, inter alia, literary works in forms appropriate for use by these readers, two of which - large print and photographic versions of works - would clearly fall within the scope of the prerogative right in so far as the section may be relied on to copy works subject to the prerogative. A similar provision - s 135ZS - deals with institutions assisting persons with an intellectual disability. The most significant provisions in the Act from the point of view of their potential utilisation are sections 135ZL and 135ZMD which establish statutory licences permitting the multiple copying (s135ZL) and copying or communication (s135ZMD) of works by educational institutions for the

(*Hansard*) Vol. S 81(1 May - 8 June 1979) (Canberra, 1979) 2533 at 2534 (Second Reading Speech of the Commonwealth Attorney-General on the above Bill).

⁷⁹ Refer s 14 of the *Copyright Act 1968*.

⁸⁰ Refer s 41 of the *Copyright Act 1968*.

⁸¹ Section 40 of the Act.

⁸² Refer provisions of Part III, Division 5 of the Act.

educational purposes of the institution or another educational institution, which extends to multiple copying of whole works where the work is not commercially available within a reasonable time or is not separately published. The licence otherwise permits copying of reasonable portions of works which in general terms is up to 10% of the number of pages in an edition of a work or one chapter whichever is the greater.⁸³ By virtue of sub-section 8A(2) this provision applies to prerogative works and may be relied upon as a defence to an infringement action once the recording requirements of the provision are fulfilled.⁸⁴

The copying of prerogative right works under the statutory licence provisions would enable the Crown in right of the Commonwealth or a State, and perhaps the Crown in right of certain other jurisdictions, to claim remuneration in respect of that copying within the prescribed period of time. A claim may similarly be made against copying under the statutory licence sections 135ZP and s135ZS.

Although multiple copying of prerogative works under sections 135ZL, 135ZMD and in certain cases under sections 135ZP and s135ZS would infringe the prerogative right of the Crown since the reproduction would be regarded as printing in the commonly accepted meaning of the word. The issuing of copies of works made in these circumstances to students of educational institutions arguably would also amount to publication of the works.

One other provision inserted by the *Copyright Amendment Act 1980* of particular interest is section 182A which provides that it is not an infringement of copyright or any prerogative right or privilege of the Crown to make, by reprographic reproduction, one copy of the whole or part of a prescribed work 'by or on behalf of a person and for a particular purpose'. The prescribed works are defined by sub-section 182A(3) to mean:

- (a) an Act or State Act, an enactment of the legislature of a Territory or an instrument (including an Ordinance or a rule, regulation or by-law) made under an Act, a State Act or such an enactment;
- (b) a judgment, order or award of a Federal court or of a court of a State or Territory;
- (c) a judgment, order or award of a Tribunal (not being a court) established by or under an Act or other enactment of the Commonwealth, a State or a Territory;
- (d) reasons for a decision of a court referred to in paragraph (b), or of a Tribunal referred to in paragraph (c), given by the court or by the Tribunal; or
- (e) reasons given by a Justice, Judge or other member of a court referred to in paragraph (b), or of a member of a Tribunal referred to in paragraph (c), for a decision given by him either as the sole member, or as one of the members, of the court or Tribunal.

The section also provides that if a charge is made for the making and supplying of a copy, the section will not apply unless the amount charged does not exceed the cost of making and supplying the copy.

⁸³ Refer section 10(2) of the Act.

⁸⁴ Refer sections 135ZL(1) and 135ZMD(1) of the Act.

While the precise scope of those legal works subject to the prerogative is not clear, the prescribed works listed above, apart from those works listed relating to tribunals which do not exercise judicial power, arguably fall within the scope of works subject to the prerogative right of the Crown. Nevertheless, the general effect of the section is to do little more than clarify the right of an individual to make a single copy of a Commonwealth, State or Territory statute, judgment or other prerogative work without infringing the prerogative right since, as described in the previous article, there has been no suggestion in any of the cases that the right is a right of reproduction in the broad sense and for the reasons there advanced would not include the right to make a single copy of a prerogative work. The section may, nevertheless, have a wider impact since the copying permitted can be undertaken on behalf of a person. The section was amended from a clause in the Copyright Amendment Bill (No. 2) 1979 which referred to the right to make by or on behalf of a person 'a copy of the whole or of a part of' a prescribed work. Apart from the use of the indefinite article, 'a' instead of 'one', there was no requirement that the copying had to be 'for a particular purpose'.⁸⁵ The clause did, though, make provision for charging for the supply of a copy to a person in the same terms as the 1980 Amendment Act. The clause purported to implement a recommendation in paragraph 8.07 of the Report of the Copyright Law Committee on Reprographic Reproduction that,

The Act should be amended to make it clear that a person is entitled to make reprographic reproductions of a statute or an instrument made under the authority of a statute, an order, judgment or award of a court or other tribunal, or of the reasons for decision of a court or other tribunal. The sale of a copy so made should not be permitted, except that this should not prevent the cost of making the copy being recovered from a person to whom the copy is supplied.

The Committee added, 'a provision to this effect would enable an organisation to make copies for distribution to its members'.⁸⁶

The changes adopted in section 182A appear to prevent more than one copy of a prescribed work being made by a person for himself or for another in any single copying instance, although it is difficult to appreciate what, if anything, is achieved by the addition of the requirement that the copying be undertaken 'for a particular purpose', as these words may be broadly construed. The question arises whether the section would permit the making of more than one copy of a prescribed work where the person doing the copying does so as agent for more than one person. A liberal interpretation of the section would appear to render it capable of applying to large scale reproduction situations which would unquestionably lead to infringement of the prerogative right of the Crown in circumstances where prerogative works were so reproduced. The section has not yet been judicially considered, but it should be pointed out that the encroachment evidenced by sections 8A and 182A in particular upon the prerogative right of the Crown not only affects the Crown in right of the Commonwealth, but also the Crown in right of the several States.

⁸⁵ Refer Copyright Amendment Bill (No. 2) 1979, clause 23.

⁸⁶ Australia. *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) (Canberra, 1976) 59 (Parl. Paper No. 408, 1976).

While the Commonwealth Parliament has the capacity to reduce by enactment the scope of the prerogative right of the Crown in right of the Commonwealth, the adoption of a liberal interpretation of section 182A would have the effect of reducing the scope of the prerogative right of the Crown in right of the several States, which would amount to an acquisition of property within the terms of placitum xxxi of section 51 of the Commonwealth Constitution. It should also be observed that multiple copying of State prerogative works under sections 135ZL, 135ZMD, 135ZP and 135ZS would, of course, have the same effect.

In *Butterworth's* case, Long Innes C.J. suggests that placitum xviii - the legislative power with respect to copyrights, patents of inventions and designs, and trade marks - read with placitum xxxi of section 51 of the Constitution, enabled the Commonwealth 'to take away a prerogative of the Crown in right of the State in the nature of a proprietary right, if on the true construction of the legislation it purports so to do'.⁸⁷ Placitum xxxi of section 51 empowers the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth with respect to 'the acquisition of property on just terms from any State ... for any purpose in respect of which the Parliament has power to make laws'. A law purporting to be a law with respect to copyright, which reduced the scope of the prerogative right of the Crown in right of the various States in the nature of copyright, would, it is suggested, be a valid exercise of legislative power under placitum xviii of the Constitution having regard to the general principles of interpretation of heads of power which have been established in such cases as *Bank of New South Wales v Commonwealth*,⁸⁸ *Lansell v Lansell*,⁸⁹ *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas.)*,⁹⁰ *Western Australia v Commonwealth*,⁹¹ *In re Adamson*; *Ex parte WA National Football League*,⁹² *Commonwealth v Tasmania*,⁹³ *Nintendo Company Limited v Centronics Systems Pty Ltd*⁹⁴ and *Grain Pool of WA v Commonwealth*.⁹⁵ Long Innes CJ's view of the scope of placitum xxxi is also plainly correct since the terms 'acquisition' and 'property' in that placitum have been interpreted broadly to include any compulsory taking of any interest in property, including the acquisition of prerogative rights of the Crown in the nature of proprietary rights under the *Lands Acquisition Act 1906* (Cth) which was passed in pursuance of this constitutional power.⁹⁶ It is irrelevant that the acquisition of property by the printing of State prerogative

⁸⁷ *Attorney-General for New South Wales v Butterworth and Co.(Australia) Ltd.* (1938) 38 S R (NSW) 195, 248-249. Long Innes C.J. clearly regards, at 247 and 249, the prerogative right as 'Crown copyright' or the 'proprietary right of the Crown in the nature of copyright' and thus the subject of valid Commonwealth legislation under placitum xviii although this view is necessarily implicit in his discussion of the two placita, and is not a view he directly expresses.

⁸⁸ (1948) 76 CLR 1, 332-333.

⁸⁹ (1964) 110 CLR 353, 366-367, 370.

⁹⁰ (1964) 113 CLR 207, 225.

⁹¹ (1975) 134 CLR 201, 245-246.

⁹² (1979) 53 ALJR 273, 279, 281 and 289 but cf. the majority view in *Attorney-General for the State of New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR. 469.

⁹³ [1983] HCA 21, 51, (1983) 158 CLR 1, 107 (per Mason J.), 226 (per Brennan J.), and 265 (per Deane J.)

⁹⁴ (1994) 181 CLR 134, 160.

⁹⁵ (2000) 202 CLR 479, 492-495, 501.

⁹⁶ *Commonwealth of Australia v State of New South Wales* (1923) 33 CLR 1. Refer generally *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285; *Western Australia v Commonwealth* (1975) 134 CLR 201, 245-246, *Commonwealth v*

works may be carried out under section 182A or sections 135ZL, 135ZMD and 135ZP and 135ZS by persons other than the Commonwealth, since the placitum has been held by the High Court not to be limited to a law with respect to the acquisition of property by the Commonwealth, but extends to any nominee of the Commonwealth.⁹⁷ In addition, it has been held that the placitum does not require the Commonwealth or the Commonwealth alone to be the user of the property acquired.⁹⁸ Notwithstanding the above considerations, section 182A does not provide 'just terms' as required by the placitum, because there is no right to claim remuneration or a provision for compensation as there is in relation to copying under the statutory licence provisions section 135ZL, 135ZMD, 135ZP and s135ZS.⁹⁹ Those provisions clearly meet the requirements of 'just terms' under the placitum.¹⁰⁰

Because section 182A is capable of more than one interpretation, a court should, however, adopt a construction of that section which will ensure its validity: *Davies and Jones v State of Western Australia*,¹⁰¹ *R. v Director -General of Social Welfare for Victoria; Ex parte Henry*.¹⁰² As Rich J stated in *Ex parte Walsh and Johnson; In re Yates*, 'an Act of Parliament must always be read as within the Constitution unless its language makes that impossible.'¹⁰³ This approach finds statutory form in s15A of the *Acts Interpretation Act 1901* (Cth).¹⁰⁴

This principle of interpretation would oblige a court to read down the scope of section 182A so that it would be confined in its application within the limits allowed by the Constitution, that is, to the making under section 182A of a copy or a few copies on behalf of the copier or other persons but not to permit large scale reproduction of prerogative works so as to amount to a clear infringement of a prerogative right of the Crown, and an acquisition of proprietary rights held by the Crown in right of a State.

Tasmania [1983] HCA 21, per Mason J at 51, per Brennan J at 21, 90, *Nintendo Company Limited v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160 and *Grain Pool of WA v Commonwealth* [2000] HCA 14, 41-42, 130-136, (2000) 202 CLR 479, 492-495, 501.

⁹⁷ *McClintock v Commonwealth* (1947) 75 CLR 1, 36; *P J. Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 401- 402, 422- 423, 429 - 430; *Commonwealth v Tasmania* [1983] HCA 21, (1983) 158 CLR 1, 107 (per Mason J.), 226 (per Brennan J.), and 265 (per Deane J.).

⁹⁸ Refer *Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213, 235-236, *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, and *Andrews v Howell* (1941) 65 CLR 255; but cf. *Attorney-General of the Commonwealth v Schmidt* (1961) 105 CLR 361, 372, 373.

⁹⁹ This right of 'just terms' also exists under the Crown use provision (s183) of the *Copyright Act 1968* (Cth), and similar provisions in the *Patents Act 1990* (Cth) (s163) and the *Designs Act 2003* (Cth) (s 96).

¹⁰⁰ Refer *Johnston Fear and Kingham and the Offset Printing Co. Pty Ltd. v Commonwealth* (1943) 67 CLR 314, 323 where Latham C.J. took the view that 'just terms' involved full and adequate compensation for the compulsory taking. Starke J. in *McClintock v The Commonwealth* (1947) 75 CLR 1, 24 stated, 'the Court should not hold legislation invalid on the ground that the terms provided are unjust unless they are such that a reasonable man could not regard the terms of the acquisition as being just'.

¹⁰¹ (1904) 2 CLR 29, 43. Refer also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, Sydney, 2006) 62 (para 2.38).

¹⁰² (1975) 8 ALR 233, 237 (HC).

¹⁰³ (1925) 37 CLR 36, 127.

¹⁰⁴ 'Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power' (*Acts Interpretation Act 1901* (Cth) s 15A).

In practice, both Commonwealth and State governments have licensed the multiple reproduction and communication of works subject to their prerogative rights, normally without copyright charge, unless the official government version was reproduced.¹⁰⁵ The policy approaches across governments have not been entirely consistent. In 1982 the Commonwealth issued standing licences to publishers and to educational users allowing publication and multiple reproduction respectively of Commonwealth legislative material, which were royalty free, largely unlimited and required no notification. In all circumstances no publication was to claim it was the authorized version.¹⁰⁶ In 1995 and 1996 the State of New South Wales issued public waivers of copyright in judgements and legislation citing in the published waivers ‘that is in the interests of the people of New South Wales that access to such [decisions, legislation and extrinsic materials] should not be impeded except in limited special circumstances. Limited conditions were imposed including the publication must not directly or indirectly indicate that it is an official version of the material.’¹⁰⁷ More recently the adoption by Commonwealth and a number of State governments of Creative Commons BY licenses and other open content licences for public sector information has facilitated free and wide public access to legal works the subject of the prerogative right of the Crown in the nature of copyright.¹⁰⁸ There are strong public policy reasons for free and open access to the law, which lie at the basis of the prerogative right, and it is hoped that this approach will be adopted consistently across all jurisdictions. It is important that the duty on the Crown to disseminate the laws of the land should not be used to impede wider dissemination of, and access to, the law.



¹⁰⁵ In 2004, that did not preclude some governments charging for the supply of electronic data.

¹⁰⁶ Australia. (1982) 7(49) *Commonwealth Record* 1782: JC Lahore, *Intellectual Property in Australia: Copyright Law* (1988) looseleaf 4.12.90.

¹⁰⁷ New South Wales. ‘Notice: Copyright in judicial decisions’ *NSW Government Gazette* no 23 (1995) 1087 (The Hon John Hannaford); ‘Notice: Copyright in legislation and other material’ *NSW Government Gazette* no 110 (1996) 6611 (The Hon JW Shaw).

¹⁰⁸ Australia, Attorney-General’s Department, *Statement of Intellectual Property Principles for Australian Government Agencies* <http://www.ag.gov.au/www/agd/agd.nsf/Page/CopyrightStatement_of_Intellectual_Property_Principles_for_Australian_Government_Agencies>.

11(a) Agencies should encourage public use and easy access to material that has been published for the purpose of:

- *informing and advising the public of government policy and activities;*
- *providing information that will enable the public and organisations to understand their own obligations and responsibilities to Government;*
- *enabling the public and organisations to understand their entitlements to government assistance;*
- *facilitating access to government services; or*
- *complying with public accountability requirements*

...

11(b) Consistent with the need for free and open re-use and adaptation, public sector information should be licensed by agencies under the Creative Commons BY standard as the default.