THE CROWN

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"*...the concept of the Crown is...deeply ambiguous.*"[1]

INTRODUCTION

The ambiguity surrounding the concept of the Crown stems from the very many functions that it has been required to perform. One tends to forget that it is merely a type of hat, as Maitland and Lord Simon have observed,[2] so bound up in the symbolism of that headgear has the word become. So important was this symbolism that Oliver Cromwell ordered that the regalia should be totally broken. This symbolism, in its turn, metamorphosed from representing the person of the king or queen to the artificial person of a corporate body, though it was not clear whether the Crown was a corporation sole or corporation aggregate. This corporate manifestation was needed to explain how it was that government continued without being dependent on the person of the sovereign. The Crown was the government occupying a role not dissimilar to the Holy Trinity, being the executive, judicial and legislative arms of government in one.[3] Each of these arms to this day, both in England and Australia, does things in the name of the sovereign.[4]

> In formal terms, it is the Queen's fiat which makes laws, it is her sentence which condemns and it is her judgments which determine the rights and liabilities of her subjects. The Queen, as head of the executive, appoints her ministers; these ministers are the Queen's servants and certainly do not stand in any legal relation to Parliament. Further, this Parliament, which assembles in the Royal Palace at Westminster, is summoned, prorogued and dissolved by the Queen. Justice is said to emanate from Her Majesty. All jurisdiction is exercised in her name, and all judges derive their authority from her commission. Every breach of the peace is a transgression against the Queen. She

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1 T Cornford, "Legal Remedies Against the Crown and its Officers" in M Sunkin and S Payne (eds), *The Nature of the Crown* (1999) at 233.

2 F W Maitland, *The Constitutional History of England* (HAL Fisher ed 1980) at 418. See also *Town Investments Ltd v Department of the Environment* [1978] AC 359 at 397 where Lord Simon referred to the crown as "a piece of jewelled headgear under guard at the Tower of London". In *Sue v Hill* (1999) 163 ALR 648 at 671 Gleeson CJ, Gummow and Hayne JJ referred to the Crown as part of the "regalia" of the Sovereign.

3 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152 per Knox CJ, Isaacs, Rich and Starke JJ.

4 An exception to this statement arguably is the High Court of Australia. Murphy J pointed out in *Johnstone v Commonwealth* (1979) 143 CLR 398 at 406 that the judicial power under the Constitution is, unlike the legislative and executive powers, not vested in the Queen.

> alone has authority to prosecute criminals; when sentence is passed, she alone can remit the punishment. And as the fountain of honour, the Queen maintains the power of dispensing honours and dignities.[5]

Then, the Crown came to represent not just a symbolic focal point for the concept of the state—"the key of the constitutional arch"[6]—but, as well, the powers that could be exercised in its name. The prerogatives and immunities exercised and enjoyed by the Crown became all important and the boundaries and limits of those powers are still very much the subject of debate and judicial determination today.

In this essay I intend to examine how the concept of the Crown has been treated and what its modern role, if any, is in Australia. I will draw on material from the United Kingdom by way of comparison. It will be seen that the concept of the Crown is not just deeply ambiguous but also deeply troubling. It is probably the case that the troubling aspect is more of a problem in England than it is in Australia.

To the ordinary Australian the use of the expression "the Crown" seems quaint and inappropriate to describe government and its powers. Its usage today is generally confined to legal matters: it appears in the Constitution and is common in legislation; it appears in judgments, usually in connection with the applicability of legislation to a government entity. In most contexts its use appears to be unnecessary because the concept or idea to be conveyed can equally be conveyed without mention of the Crown. For example, legislation could just as effectively provide "This Act binds the Commonwealth" instead of "This Act binds the Crown in right of the Commonwealth" and, indeed, as Gummow J has pointed out, in the Constitution the various polities are referred to without reference to the Crown.[7] A discussion of Crown immunity could be as effectively couched (and far less mysteriously) in terms of government immunity. Crown lands could as easily be referred to as government lands or, preferably State or Territory government lands. Some of the confusion over native title would be eliminated if it was made clear that government land affected, unhelpfully called "Crown land", is actually State or Territory government land in almost all cases. More difficulty would be experienced in shedding the trappings of the Crown in the criminal law, where the accused in indictable matters is still formally prosecuted by the sovereign in the abbreviated Latin form of "R". The same problem exists in prerogative writ cases, where "R" is supposedly in contention with either a *persona designata* or an individual public servant, when the reality is that a citizen is challenging the government. How would one explain this to a recently arrived migrant or visitor to Australia?

WHAT IS THE CROWN?

Though Australia has not yet thrown off the symbolism of the Crown, its presence in areas of our governmental systems is relatively confined. True it is that the Crown and

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5 M Loughlin, "The State, the Crown and the Law" in M Sunkin and S Payne (eds), above n 1 at 57-58 (footnote omitted).

6 General Smuts, *Proceedings and Papers of the Imperial War Conference* (1917) Cmnd 8566 at 47 quoted by M Loughlin, ibid at 36.

7 *Commonwealth v Western Australia* (1999) 160 ALR 638 at 665. See also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 282-283 per McHugh and Gummow JJ.

the monarch feature in the Constitution and that this will remain the case for the immediately foreseeable future, but, despite this apparently strong presence in Australia's constitutive document, their role is now of little practical importance. Australia generally has less to agonise about in connection with the concept of the Crown than is the case in the United Kingdom. Its meaning in Australia is abstract and, though formally bound up with the person of the Queen in a number of ways, the significance of the Crown is found elsewhere. Australia, freed from the propinquity of the person of the sovereign, adopted more egalitarian and republican institutions than the English. As David Malouf has pointed out, the use of the word "Commonwealth" was symbolically important as "an attempt to find a good English word for the Latin *res publica*".[8] Apart from its adoption in four States of the United States, the word "Commonwealth" was used to describe the period of English history when there was no king or queen. Similarly, as pointed out in *Sue v Hill*,[9] Maitland rejoiced in the use of the word the "Commonwealth" in the federation of Australia.[10] This usage may explain why in Australia the concept of the Crown has been less problematic than is the case in the United Kingdom.

Another indication of Australian robustness can be detected in Harrison Moore's treatment of a controversy that arose in connection with the passing of the Sugar Bounty Act 1903 (Cth).[11] The Constitution s 53 provides that the Senate "may not amend any proposed law so as to increase any proposed charge or burden on the people". When the Senate amended the Bill in a manner that would increase the amount to be paid, it was objected that this was in breach of s 53 and that the Senate should, in accordance with the section, have requested the amendment. In answer to this it was argued that the effect of the amendment was to increase a burden on the *Crown* and not the people, because all revenues belonged to the Crown. The controversy was resolved, after views had been expressed by "some of the most learned lawyers in Australia", when the Senate sent a request for an amendment to the House of Representatives. Harrison Moore was not persuaded and commented that "all the money is public money" and "the right to its beneficial use is in the people of the Commonwealth".[12] This wariness of the Crown as a meaningful concept in early colonial Australia can also be seen in a judgment by Stawell CJ,[13] noted by Paul Finn,[14] where the judge insisted on using the expression "the Government of Victoria, not...the Crown".

Despite these republican influences, Australia is nevertheless unavoidably bound up with the trappings of the Crown.

In the United Kingdom, a great deal of agonising has taken place over the concept of the Crown, some of it seemingly because of the propinquity of the person of the sovereign. "[T]he concept of the Crown cannot be disentangled from the person of the

8 *Sydney Morning Herald* 10 November 1999 Opinion at 23.
9 (1999) 163 ALR 648 at 671 per Gleeson CJ, Gummow and Hayne JJ.
10 F W Maitland, "The Crown as Corporation" (1901) 17 *LQR* 131 at 144.
11 W Harrison Moore, "The Crown as Corporation" (1904) 20 *LQR* 351 at 354.
12 Ibid at 355.
13 *R v Rogers ;Ex parte Lewis* (1878) 4 VLR (L) 334 at 368.
14 P Finn, *Law and Government in Colonial Australia* (1987) at 5. Finn also noted the use of "government" instead of "Crown" in early claims against the government legislation in both Queensland and New South Wales.

Monarch."[15] The book, *The Nature of the Crown*[16] reveals a plethora of competing conceptions of the Crown. The various authors express their despair at trying to present a rational framework for describing its functions and role. Martin Loughlin's statement, "The manner in which the concept of the Crown has been utilised [by lawyers] borders on the incoherent"[17] captures the oft-repeated frustrations of these writers. Indeed, Loughlin argues that the dominance of the person of the sovereign has been the cause of a very weak notion of the state in the United Kingdom.[18] Whereas in Australia the political institutions of popular sovereignty and civil society have developed and are the subject of reasonably well-accepted, though not entirely settled, principles, in England the evolution of statehood has been overshadowed by the presence of the Crown. After the constitutional settlement at the end of the seventeenth century, the institutions of government remained a constitutional monarchy (with emphasis on *monarchy* which still played a pivotal role)—a continuation, after adjustment, of what went before, rather than a radical change to the make-up of the state. It was because of this that the special powers and immunities of the king or the queen, which one would think were no longer relevant after the constitutional settlement, continued on. The executive government, formally headed by the sovereign, continued to enjoy the privileges and immunities that previously were personal to the king or queen. They still dog us to this day in both countries.

The Crown as legal entity

In Australia the "Crown" is still used to describe the ten bodies politic as legal entities, that is, the "Crown in right of" the Commonwealth, the six States, the two Territories and Norfolk Island.[19] This usage is not necessary and omitting the prefix "the Crown in right of" would have no effect.[20] For example, contracts are made in the name of the body politic without reference to the Crown and, as already mentioned, its use in legislation in connection with whether the legislation binds the government adds nothing to the meaning or efficacy of the provision. The common section that states that an Act binds the Crown of the enacting legislature and all other manifestations of the Crown could be easily re-drafted without reference to the Crown.

In fact, the presence of the Crown can cause apparent contradictions. In New South Wales, the *Interpretation Act* 1987 s 13 provides that "a reference to the Crown is a reference to the Crown in right of New South Wales" without prefacing this with the usual "unless the contrary intention appears". In the very same Act, s 4 provides that "[t]his Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities." The second mention of the Crown in s 4 clearly cannot mean the Crown in right of New South

15 M Loughlin, above n 5 at 58-59.

16 M Sunkin and S Payne (eds), above n 1.

17 M Loughlin, above n 5 at 37.

18 The concept of the state has been forced onto the United Kingdom by its joining the European Community: see P Craig, "The European Community, the Crown and the State" in M Sunkin and S Payne (eds), above n 1 ch 12.

19 For the historical explanation of why Norfolk Island has the status of a body politic, see Commonwealth Parliament, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Islands in the Sun. The Legal Regimes of Australia's External Territories and the Jervis Bay Territory* (1991) ch 7. See also *Berwick Ltd v Gray* (1976) 133 CLR 603.

20 A suggestion made as early as 1904 by W Harrison Moore, above n 11 at 362.

Wales, although in at least one case a judge has been persuaded that the "other capacities" must mean other capacities within the same polity.[21] Probably this contradiction is resolved by s 5(2) which provides "This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned."

The identification of the ten legal entities in Australia is clear and without complication. It has not been necessary, as it has in the United Kingdom, to theorise about whether the Crown in Australia is a body corporate[22] and whether that body is a corporation sole or aggregate. A robust independence from the mysteries of the Crown as monarch was displayed by Latham CJ in the following passage.

> The principle that the Crown is one and indivisible is very important and significant from a political point of view. But, when stated as a legal principle, it tends to dissolve into verbally impressive mysticism. It is of little assistance in a practical system of law where a Commonwealth can sue a State, a State can sue a Commonwealth, and a State can sue a State...[23]

The conception of the state as legal entity—the body politic—was much clearer in Australia in terms of both legal definition[24] and in practical affairs, such as making contracts. It has always been clear in Australia, starting with the Constitution, that the different components of the federation are legal persons and that, for example, contracts are entered into in the name of the Commonwealth, a State or Territory. Indeed, it might be said that for *all* purposes the principle that the Crown is one and indivisible is inapplicable and no longer of any significance in Australia.[25]

More difficulty is experienced with the legal entity issue in connection with public law where it is not always clear what person on the government side should be the subject of judicial review proceedings. I have faintly suggested that the name of a case should reflect the reality of the complaint, namely, the citizen against the government. However, I recognise that it would be impractical to use the name of the body politic and that a closer identification of the department or body would be necessary. Nevertheless there is useful work to be done in finding something better than the double Latin involved in "R v Smith; Ex parte Jones", for example "Jones v The Department of Immigration and Multicultural Affairs". Some of this work has already been done in Australia, but not in the United Kingdom,[26] under legislative regimes for judicial review where the real parties are named in the proceedings.

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21 Shepherdson J in *Jellyn Pty Ltd v Horwath & Horwath (Qld) Pty Ltd* (1993) ATPR 41-284.

22 W Harrison Moore, above n 11 at 360 noted that the Property for Public Purposes Acquisition Act 1901 (Cth) s 50 provided that the Commonwealth was "deemed to be a corporation sole by the name of the Commonwealth of Australia". This confusion does not appear to have occurred again.

23 *Minister for Works for Western Australia v Gulson* (1944) 69 CLR 338 at 350-351 per Latham CJ. See also *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 122 per Gibbs ACJ, at 128 per Stephen J and at 135-136 per Mason and Jacobs JJ.

24 See Acts Interpretation Act 1901 (Cth), s 22(1)(a).

25 L Zines, Commentary in HV Evatt, *The Royal Prerogative* (1987) at C22.

26 The United Kingdom Law Commission recommended that the title of cases should be "simply" described as "In the matter of an application for judicial review: ex parte Applicant, R v Respondent" thus retaining the double Latin! See The Law Commission *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No 226, 1994) para 8.4.

On the other hand, in England the legal entity issue is far from clear, with confusion about what is the appropriate legal entity to use in connection with, for example, making contracts. The *persona designata* is often used, as illustrated in the *Town Investments* case[27] where the Minister or the Secretary was the named party on leases. As seen below, this usage was the cause of legal disagreement. It would not even be easy to know what name to put on a contract made by the body politic. Would it be the "United Kingdom"? And, is it now the case that Scotland is a separate legal entity from England so that, for example, they could make a contract with each other? It is worth noting that, even though the United Kingdom has, as it were, been forced into statehood by joining the European Community, the actual name of the government party in the *Factortame* litigation was the "Secretary of State for Transport", even when the case was in the European Court of Justice,[28] although the order that was made was against the "United Kingdom". The use of the Secretary of State was unavoidable so long as the habit of using "R v..." is maintained in administrative law cases. But even in private law cases this problem has not been sorted out. As Craig notes, this may cause some difficulties when the state is liable to pay damages.[29]

In addition, in the United Kingdom the Crown as a legal entity was incoherent and difficult to identify, as already noted. Once the natural person of the monarch was no longer a sufficient description, the artificial person of a body corporate had to be employed to take account of the continuity of the office. This, in turn raised questions whether, for example, land was owned by the monarch personally or in his or her corporate capacity; whether officials were appointed personally or independently of the person of the appointing sovereign (the "royal Dignity"); and whether finances were private or public. The Crown was generally thought to be a corporation sole though this was difficult to reconcile with the fact that the Crown was in effect the executive government which consisted of a large number of officials. It has therefore been suggested that the Crown is a corporation aggregate[30] and even that it is a corporation sole *or* a corporation aggregate.[31] Even so, the English conceptualisation has never been very clear and it has even been said that the Crown has no legal personality.[32]

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27 *Town Investments Ltd v Department of the Environment* [1978] AC 359. Lord Diplock provided a historical account of the difficulties with the legal entity problem where there was "no consistency in the description of the capacity in which the persons so designated" entered into contracts (at 381).

28 Case 213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433; Case 221/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1992] QB 680; Case 46/93 and 48/93 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1996] QB 404, 506.

29 P Craig, above n 18 at 320-322. The United Kingdom is required to pay damages after the last round of the *Factortame* litigation in the House of Lords: *R v Secretary of State for Transport, ex parte Factortame Ltd* [1999] 4 All ER 906.

30 *Town Investments Ltd v Department of the Environment* [1978] AC 359 at 400 per Lord Simon; F W Maitland, "The Crown as a Corporation" in *Collected Papers, vol III* (HAL Fisher ed 1911) at 259 cited by M Loughlin, above n 5 at 62.

31 *M v Home Office* [1994] 1 AC 377 at 424 per Lord Woolf.

32 *M v Home Office* [1992] QB 270 at 300 per Lord Donaldson MR. Arguably this is to take the statement out of its context, namely, discussion of public law and, in particular, whether the Crown could be guilty of contempt of court.

Other aspects of the Crown as a legal institution have been troubling in the United Kingdom. It is extraordinary that only as recently as 1978 in the *Town Investments* case[33] has an English court come to grips with the nature of the Crown and its proper description. The issue to be determined in that case was whether anti-inflation legislation applied to office premises, occupied by public servants from various departments, under two leases. The tenant actually named on the leases was the Minister of Works and later the Secretary of State for the Environment "for and on behalf of Her Majesty". It was necessary to determine, for the purpose of the legislation, who was the tenant (the Crown or the Secretary) and who occupied the premises (the public servants, the Crown or the Secretary).[34] The Court of Appeal decided that the premises were leased to the Secretary and not to the Crown and that no part of the premises were occupied by the tenant.[35]

In the House of Lords, Lord Diplock gave the leading judgment. In dealing with the first question—who was the tenant of the premises?—Lord Diplock made the point that confusion arises if private law concepts are employed to sort out the relationship between the Minister, government departments and the Crown.[36] In public law, according to Lord Diplock, the Crown really means the government; and the proper tenant in these leases was the government which, for historical reasons, has been called the Crown. Lord Diplock advocated dropping the expression "the Crown" and substituting "the government". He concluded on the first question that the proper tenant was the government or the Crown and not the Minister or Secretary. "In my opinion, the tenant was the government acting through its appropriate member or, expressed in the term of art in public law, the tenant was the Crown."[37]

On the second question—who was actually occupying the premises?—Lord Diplock had no difficulty in saying that the premises were occupied by the Crown.[38] The other Law Lords, apart from Lord Morris of Borth-y-Guest, agreed with the analysis of Lord Diplock.

So here was an almost Australian common sense brought to bear by the House of Lords on the vexing issue of the Crown and its appropriate characterisation. Mystification was swept aside by Lord Diplock in his robust and irreverent treatment of the Crown as simply the government. Yet the reasoning is then castigated by Sir William Wade as an aberration in conflict with elementary constitutional principles—"judicial inventions".[39] Wade's concerns are that the Crown cannot be both a corporation sole and "the government" and that the concept of the Crown as government, which enjoys immunity from legal process, cannot sit with ministerial non-immunity. In commenting on *Town Investments*, Wade said:

> Elementary constitutional principles, which must have been as well known to their Lordships as to any one else, demand that the legal personalities of the Crown and of

33 *Town Investments Ltd v Department of Environment* [1978] AC 359.

34 A third question also had to be answered: were the premises occupied for the purposes of a "business". This question is not of importance to the immediate discussion.

35 [1976] 1 WLR 1126.

36 [1978] AC 359 at 380.

37 Ibid at 381.

38 Ibid at 382-383.

39 W Wade, "The Crown, Ministers and Officials: Legal Status and Liability" in M Sunkin and S Payne (eds), above n 1 at 23-26.

> ministers should be kept distinct. Otherwise, the immunity of the Crown could not co-exist with the non-immunity of ministers.[40]

This phenomenon of what appeared to be a sensible accommodation of the concept of the Crown to modern government, displayed in *Town Investments*, being so severely criticised is merely illustrative of the tangle that has been woven around the Crown in the United Kingdom. One answer to Wade's criticism is that a minister acts in different capacities at different times. For the purpose of entering into a lease, the minister is merely acting as an "arm" of the Crown. Ironically, Lord Diplock specifically rejected any notion of agency because he was concerned to deal with the issues on the basis of public law principles. But, for the purpose of simple contracting activity, agency is essential, just as it is for corporations that must necessarily deal with the world through their agents. The Crown, that is the body politic, enters into contracts through its people. In this way, the distinction between the Crown and a minister (or other public servant) is kept distinct, as Wade would have it.

Although in Australia the monarch, being geographically distant, has not influenced discussion of the Crown as much as she has in the United Kingdom, the person of the sovereign is specifically mentioned, such as in the Constitution where the frequent references are dictated by the fact that the Queen is the Australian head of state. These references are of no practical importance and, as was made clear in the lead-up to the failed 1999 referendum, the removal of these references from the Constitution would have only symbolic effect. The sovereign appears in legislation, from time to time, such as that discussed by the High Court in *Yanner v Eaton*[41] where it was provided that fauna vested in Her Majesty.[42] Such provisions, one would imagine, would be greeted with astonishment if brought to the attention of an Australian affected by them and could be easily eliminated from the legislation. True it is that the Queen owns all the swans in England,[43] but to vest Australian fauna in her as well seems excessive.[44]

In some, but not all, Australian Acts interpretation legislation it is still necessary to state what is meant by the sovereign.

> In any Act references to the Sovereign reigning at the time of the passing of such Act, *or to the Crown*, shall unless the contrary intention appears be construed as references to the Sovereign for the time being.[45]

It is clear that a contrary intention does indeed appear in very many references to the Crown, simply because it would be meaningless, for example, to say that the Queen

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40 Ibid at 26.

41 (1999) 166 ALR 258.

42 Fauna Conservation Act 1974 (Qld), s 71(2) provided that: "Fauna so seized and detained shall, without further or other authority, be forfeited to Her Majesty, unless all royalty payable thereon is paid within one month of its seizure and detention." One of the puzzles the Court had to deal with (at para [26]) was that the fauna forfeited to Her Majesty already belonged to the Crown!

43 *The Case of Swans* (1592) Co Rep 15b; 77 ER 435. It is clear that Australian black swans are not at risk of royal seizure because the case refers only to white swans.

44 Of course, the High Court majority made it clear in *Yanner* that the notion of property was a limited one and that the legislation provided for control by the government over fauna rather than some notion of beneficial ownership.

45 Acts Interpretation Act 1901 (Cth), s 16 (emphasis added).

was bound by the Trade Practices Act in so far as she carries on a business.[46] One wonders why it is necessary to define what is meant by the sovereign. The Northern Territory and Tasmania have no need to define "the Crown" or "Sovereign".

The Crown as a repository of special rights and privileges

Far more importantly, the concept of the Crown in Australia and England may stand for the bundle of special powers and immunities enjoyed by governments or government bodies. For want of an autochthonous framework, in Australia we are bound up with these ancient powers. The courts must refer back to quaint and seemingly irrelevant conceptions to answer modern questions about the powers and the limits of government and government bodies. It is this aspect of the Crown that is most troubling. In Australia, it has generated a great deal of case law, much of it because of our federal system where questions of one polity's immunity from another polity's laws have taxed the courts. In the United Kingdom this particular application of Crown immunity has been less of a problem, at least on the question of Crown immunity from legislation. However, Britain has had to come to grips with this kind of question after joining the European Community, as the *Factortame* litigation[47] demonstrated. In addition, it may well become more of a problem as powers are devolved to autonomous or quasi-autonomous polities within the United Kingdom. It may well be the case that the courts in the United Kingdom will have to look to Australian cases for guidance on questions of inter-polity immunity.

Crown prerogatives have been the subject of a great deal of judicial and academic debate and commentary over many centuries and the debate continues to this day in both countries. The significance of this debate has usually related to whether the exercise of government powers is justiciable. It was the case that the exercise of prerogative powers could not be questioned but this rule has been eroded in some very important respects, as will be seen below. It is still not even settled what the prerogatives are. The most extreme and minimalist view is advanced by Wade who argues that the Blackstone view—that the prerogative powers are only those powers that could be exercised by the sovereign (and now the government) and not by citizens—can be taken to cover only a very small number of matters. Wade argues implausibly that many of the powers could be exercised by citizens. The powers to appoint and dismiss ministers (merely the employer's prerogative), make treaties (just administrative action) and to issue passports (an action having no legal significance) are not prerogative powers.[48] The extreme (Wade) view does not appear to be generally accepted by commentators.[49] The Dicey view is that the prerogative powers broadly consist of the residue of powers left to the executive government that are not the subject of legislation. Lord Diplock defined the powers as:

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46 Trade Practices Act 1974 (Cth), s 2A.

47 Case 213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433; Case 221/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1992] QB 680; *Factortame Ltd v Secretary of State for Transport* [1990] AC 85; *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 AC 603; Case 46/93 and 48/93 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1996] QB 404, 506; *R v Secretary of State for Transport, ex parte Factortame Ltd* [1999] 4 All ER 906 (HL).

48 H W R Wade, *Constitutional Fundamentals* (1980) at 47-51.

49 See, for example, M Loughlin, above n 5 at 68-69.

> a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent on any statutory authority but nevertheless have consequences on private rights or legitimate expectations of other persons.[50]

But even this may not be a perfect definition because there are arguably non-prerogative executive powers (such as the power to enter into contracts)[51] and non-prerogative immunities, such as immunity from legislation.

As far as Australia was concerned, the boundaries of the prerogatives exercisable by the Governor-General under s 61 of the Constitution were the subject of much debate as Australia emerged as a sovereign nation. Some prerogative powers remained for a time with the Imperial government.[52] But, today, these questions are of historical interest because of a complete devolution of sovereignty to Australia.

> [I]t does not matter any more whether a particular power is exercisable by the Queen or the Governor-General as it is clear that both must act on the advice of Australian ministers.[53]

The same is true at State level after the passing of the *Australia Act* 1986 (Cth).

The Crown prerogatives

Evatt usefully categorised the prerogatives under three headings.[54]

1. The executive powers, which included the power to make treaties, declare war, grant pardons, appoint judges and make contracts.[55]

2. Immunities and privileges—"negative" prerogatives requiring no action by the Crown—which included immunity from suit, public interest immunity and the priority to debts in the event of a bankruptcy. Evatt included immunity from statute under this heading, though today this particular (and practically most important) immunity is regarded in Australia and England as a principle of statutory interpretation rather than a prerogative,[56] albeit one that can only be claimed by a Crown body.

3. Prerogatives in the nature of property, which included the rights to escheats, gold and silver, treasure trove, the ownership of land in a new colony and the right to intellectual property.

It is interesting to note that a similar attempt either to categorise or list the prerogatives from the English perspective[57] again demonstrates the overwhelming influence of the person of the sovereign. Thus, Tomkins notes that the king or the

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50 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 409-410.

51 F Wheeler, "Judicial Review of Prerogative Power" (1992) 14 *Syd LR* 432 at 443-448; B V Harris, "The 'Third' Source of Authority for Government Action" (1992) 109 *LQR* 626.

52 L Zines, above n 25 at C6-C7.

53 Ibid.

54 H V Evatt, *The Royal Prerogative* (1987) at 30-31.

55 See discussion below of a possible category of non-prerogative executive powers, of which the power to enter into contracts is an example.

56 *Bropho v Western Australia* (1990) 171 CLR 1 at 15 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also from the English perspective A Tomkins, "Crown Privileges" in M Sunkin and S Payne (eds), above n 1 at 173.

57 A Tomkins, ibid at 171-172.

queen cannot be arrested, his or her goods may not be seized, he or she may not give evidence in his or her own cause, all swans swimming in open and common rivers belong to the sovereign, whales (the head to the king and the tail to the queen)[58] and sturgeon may be claimed and so forth. (The iniquitous practice of the press gang, whereby young men were forcibly seized for service in the navy, was also a Crown prerogative.) Of more practical importance has been the perennial debate about whether the Queen should pay taxes. Tomkins devotes a great deal of attention to this question, at one stage referring to a delightfully entitled article which appeared in *The Economist*, "Should one pay tax?"[59]

From the Australian perspective, many of these prerogatives are of little or no significance or have been overridden by statute. However, those in Evatt's category 1 are obviously of central importance simply because governments must have the capacity to govern. Indeed, in the proposed amendments to the Constitution, had the 1999 republic referendum been passed, proposed s 70A ensured that Crown prerogatives would continue.[60] In the United Kingdom, there was a misconceived proposal to make all Crown prerogatives subject to the approval of the House of Commons.[61] Had this proposal gone ahead, the government would have been rendered a mere shell until Parliament had considered and approved each exercise of prerogative, including the exercise of executive powers.

The principal issue surrounding the category 1 group of prerogatives is whether their exercise is amenable to judicial review. Traditionally, the courts could rule on what constituted Crown prerogatives but not on the manner of their exercise.[62] As to the manner of their exercise, the traditional approach has given way, in both Australia and the United Kingdom, to a more democratic principle that the source of state power should not determine whether or not judicial review is available. Instead the nature of the power and how it potentially affects citizens is the determinant.[63] Nevertheless, it

58 It was wrongly assumed that the whalebones necessary for the queen's corsetry were found in the tail whereas in fact they are in the head. See Blackstone's *Commentaries on the Laws of England*, vol 1, book I, ch VIII noted by A Tomkins above n 56 at 172.

59 *The Economist* 25 January 1992 referred to ibid at 177.

60 I have argued that the use of the word "prerogatives" was insufficient to achieve what was intended. For example, as discussed below, Crown immunity from statute is not a prerogative. See Parliament of the Commonwealth of Australia, "Advisory report on: *Constitution Alteration (Establishment of Republic) 1999 Presidential Nominations Committee Bill 1999*" (August 1999) para 4.69.

61 Crown Prerogatives (Parliamentary Control) Bill 1999.

62 *Barton v The Queen* (1980) 147 CLR 75. Even this statement may not be entirely settled, it being said that the prerogatives simply exist, independently of the common law. The courts must simply take judicial notice of them. They are axiomatic. See S Payne, "The Royal Prerogative" in M Sunkin and S Payne (eds), above n 1 at 86-87. But cf Sir Edward Coke in the *Case of Proclamations* (1611) 12 Co Rep 74 at 76; 77 ER 1352 at 1354 "the King hath no prerogative, but that which the law of the land allows him."

63 *R v Criminal Injuries Compensation Board; ex parte Lain* [1967] 2 QB 864; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170 at 218-221 per Mason J; *FAI Insurances Ltd v Winnecke* (1982) 151 CLR 342; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218; *Victoria v Master Builders' Association of Victoria* (1994) 7 VAR 278. For a full account up to 1992 see F Wheeler, above n 51. It is to be noted that Australia lags behind the United Kingdom on this issue in that the High Court has not definitively pronounced on whether

is still recognised that there are certain prerogative powers the exercise of which is not justiciable—for example, the prerogative of mercy,[64] the appointment of a judge or declaring war.[65] The precise limits of justiciability have been the subject of most important developments in public law and much analysis and discussion by public lawyers. These developments go to one of the most extraordinary paradoxes that embarrasses the system of government both in the United Kingdom and Australia: the rule of law is regarded as a central tenet of the system and yet at its very centre—the Crown—the rule of law stops in some important respects. The developments in administrative law just described are so important because of the partial erasing of this blot on the constitutional landscape.

The problem of the failure of the rule of law is at the heart of the most important practical issue that still troubles Australian courts, namely, Crown immunity from statute. Because of its importance it warrants separate treatment.

CROWN IMMUNITY

The king can do no wrong

Before examining immunity from statute it is necessary to make some preliminary observations about Evatt's second category, the "negative" prerogatives. The starting point was the twin propositions that the monarch could do no wrong and the apparently unnecessary principle (given the first proposition) that the king or the queen could not be sued in his or her own courts. These propositions were the basis for Crown immunity from private law suits. Their meaning, particularly that the king or the queen could do no wrong, was not altogether clear. One interpretation was that of a legal fiction that the sovereign was incapable of doing wrong no matter how he or she actually behaved and, in any case, was immune from legal process. Another was that the sovereign was under the same obligations as his or her subjects.[66] Yet another was that, because the sovereign had complete power, anything done by him or her could not be questioned[67] or, alternatively, that the sovereign had no power to do or authorise wrong.[68] Whatever was the correct interpretation, it was bizarre to transport these propositions across to the executive government. But, as already noted, it was impossible to shed the trappings of the monarch because the monarch remained head of state after the constitutional settlement at the end of the seventeenth century. As Loughlin has remarked:

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non-statutory powers are amenable to judicial review. It would, however, be quite extraordinary if the High Court were not to follow the English approach. See L Zines, above n 25 at C31.

64 *Hanratty v Lord Butler* (1971) 115(1) *Sol Jo* 386. Not reviewable despite the fact that the prerogative affects the private right of a person.

65 On the question of the extent to which decisions concerning the armed forces are open to judicial review, see P Rowe, "The Crown and Accountability for the Armed Forces" in M Sunkin and S Payne, above n 1 ch 10.

66 T Cornford, above n 1 at 235.

67 M Loughlin, above n 5 at 60.

68 A Tomkins, above n 56 at 176.

> All that seems to have been required was that ancient notion that 'the King can do no wrong' be detached from the concept of the Crown.[69]

But it was not to be, until legislation was passed to sever the connection.

It is here that, again, Australia exhibited a healthy concern for the rule of law, perhaps as a byproduct of other factors. The distance of the tyranny of English ways of thinking together with the need, in a frontier society, for new systems and roles of government combined to make Australia the pioneer of Crown proceedings legislation. This story has been fully told by Paul Finn.[70] In addition, as has been pointed out by Gummow and Kirby JJ in *Commonwealth v Mewett*,[71] the Constitution itself, with its recognition of the role of the High Court as the guardian of the Constitution, placed substantial limitations on the maxim that the sovereign could do no wrong.

The first Crown proceedings Act was passed in South Australia in 1853 and this initiative was followed in New South Wales and Queensland. In these jurisdictions the promise shown in the text of the legislation was thwarted by the conservatism of the judges. Speaking of the legislation of Queensland and New South Wales, Finn remarked:

> As a constitutional innovation it was without parallel in the colonial period. That, perhaps, was its misfortune. It would be unrealistic to have expected the colonial judges to have embarked upon the reappraisals it suggested. The real matter for regret is that their successors have shown little inclination to accept the challenge. The faultless King is not yet dead.[72]

The Victorian legislation, on the other hand, was less adventurous but the judges were more so. They were, for example, prepared to make an order for specific performance in litigation against the Crown, but without specifying who should obey it.[73] The nineteenth century Crown proceedings legislation evolved and was the basis for the Commonwealth legislation that applies today, the Judiciary Act 1903, s 64 which provides that in a suit to which the Commonwealth or a State is a party the rights of the parties shall as nearly as possible be the same as in a suit between subjects. The effect of this legislation and its State and Territory counterparts is to remove Crown immunity from suit.

Though there is no doubt that the effect of the legislation is to remove immunity from suit, it is still a matter of controversy how this occurs, at least at Commonwealth level. In *Commonwealth v Mewett*[74] it was necessary for the High Court to consider the position of the Commonwealth's liability in contract and tort. Was the basis for this liability to be found in the common law, in the Constitution or in the Crown proceedings legislation? Was the removal of immunity effected by the Constitution or the legislation? Brennan CJ, Gummow, Kirby and Gaudron JJ were of the view that the

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69 M Loughlin, above n 5 at 75.

70 P Finn, above n 14, ch 6 and P Finn, "Claims Against the Government Legislation" in P Finn (ed), *Essays on Law and Government Vol 2: The Citizen and the State in the Courts* (1996).

71 (1997) 191 CLR 471 at 545-549.

72 P Finn, above n 14 at 155.

73 Ibid at 157.

74 (1997) 191 CLR 471. See N Seddon, "*The Commonwealth v Mewett* (1997) 191 CLR 471: Common Law Actions, Commonwealth Immunity and Federal Jurisdiction" (1999) 27 *F L Rev* 165.

Commonwealth's liability stemmed from the common law and that immunity had been taken away by the Constitution. On the other hand Dawson and Toohey JJ stated that the Commonwealth's liability and the removal of immunity were attributable to the Crown proceedings legislation. McHugh J had expressed a similar view in the earlier case *Georgiadis v Australian and Overseas Telecommunications Corporation*.[75] The significance of this difference of views is the extent to which the Commonwealth Parliament could take positive steps through legislation to provide the Commonwealth with immunity if that was thought to be necessary.

The Australian experience with Crown proceedings legislation is to be contrasted with that of England where it was not until 1947 that the Crown Proceedings Act was passed.[76] Even then, the legislation was more cautious than its Australian counterparts. The Australian legislation is uncomplicated whereas the United Kingdom Act has 54 sections and is replete with exceptions and qualifications. The meaning of some of the sections is still a matter of controversy.[77] An exception found in the United Kingdom Act is that it is still not possible to obtain an order for specific performance or injunction against the Crown[78] whereas in Australia such orders can be made.[79] The denial of specific performance to the subject against the Crown may have the effect of denying the same remedy to the Crown against the subject. This is because it is a pre-requisite of the availability of specific performance that the contract in question is reciprocally enforceable.

The Crown Proceedings legislation did not affect judicial review. Yet the maxim that the king could do no wrong has had a very significant impact on the shaping of the development of judicial review. Mention has already been made of the very important opening up of government action of all sorts to potential judicial scrutiny, though some areas are still immune from such scrutiny. But it is still the case that such proceedings cannot be brought against the Crown and instead the affected citizen must locate an official.[80] Even then, the effect of the special position of the Crown causes many difficulties. The *M* litigation[81] in the United Kingdom amply demonstrates these difficulties. Can a minister of the Crown, acting in his official capacity, be found to be in contempt of court? Why ever not? After much judicial agonising, the House of Lords came to the conclusion that it was possible for a minister acting in his official capacity to be in contempt of court. The main judgment was given by Lord Woolf and runs to some 30 pages. A one-page judgment was given by Lord Templeman which was as refreshing as it was pithy in its concern for the rule of law.

> My Lords, the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld,

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75 (1994) 179 CLR 297.

76 In Scotland the Crown Suits (Scotland) Act 1857 provided for suits against the Crown in the name of the Lord Advocate.

77 In particular s 21(2). See T Cornford, above n 1 at 246-250.

78 Crown Proceedings Act 1947 (UK), s 21(1). A declaration can be made instead.

79 N Seddon, *Government Contracts: Federal, State and Local* (2nd ed 1999) paras 4.33-4.34.

80 The incoherence of the position is captured by the following remark by Lord Woolf in *M v Home Office* [1994] 1 AC 377 at 407. "Although in reality the distinction between the Crown and an officer of the Crown is of no practical significance in judicial review proceedings, in the theory which clouds this subject the distinction is of the greatest importance."

81 *M v Home Office* [1992] QB 270 (Court of Appeal) and [1994] 1 AC 377 (House of Lords).

> establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.[82]

Immunity from legislation

I have already noted that the Crown was immune from legislation.[83] As with many of the questions that arise in connection with the concept of the Crown, immunity from statute is undoubted but its rationale is obscure. Hogg refers to it as a "rule without a reason".[84] On the face of it, it cannot be attributed to the maxim that the king can do no wrong. It simply does not follow that, because the king can do no wrong, he is immune from legislation. Was the immunity instead justified by the practical reality that there is no point in subjecting the sovereign to legislation because it is not possible to enforce it? Or was it because the sovereign, as the formal source of legislation, was presumed not to intend to apply it to himself or herself?[85] Tomkins notes that the immunity is stated as a legal maxim (or, alternatively, an axiom).

> It is in the nature of maxims that they are deemed not to need legal authority in the form of case law (they are authority in themselves, or an authority unto themselves, perhaps). Conveniently, nobody can remember where they came from, and inconveniently, they usually arrive without explanation or reason.[86]

How was the principle of Crown immunity from statute affected by the Crown proceedings legislation? The legislation not only removed immunity from suit. It also affected what law was to be applied in suits involving the Crown. The legislation in Australia either uses the "as nearly as possible" formula found in the Judiciary Act s 64,[87] or more modern legislation provides that the "same" law shall be applied in a Crown suit as applies in a suit between subject and subject.[88] The effect of the Crown proceedings legislation is that it can apply substantive law, including statute law that might not otherwise apply, to the Crown.[89] In other words, it may reverse the result that would follow from applying the traditional rule of immunity from legislation. However, it has not abolished that rule. It might be thought that the modern model adopted in the Australian Capital Territory, the Northern Territory, South Australia and Tasmania abolishes Crown immunity because it provides that the *same* law is to be applied, as compared with *as nearly as possible* the same law. But this is not the case because the legal principles that allow immunity or privilege to the government in

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82 *M v Home Office* [1994] 1 AC 377 at 395.

83 What this meant was the Crown was not bound by the burdens or obligations of legislation. It could, however, enjoy the benefits or rights given by legislation. See P Hogg, *Liability of the Crown* (2nd ed 1989) at 214-216 and *McGraw-Hinds v Smith* (1979) 144 CLR 633.

84 Ibid at 205.

85 Ibid at 202 where Hogg notes that in the sixteenth century case *Willion v Berkley* (1561) 1 Plow 223; 75 ER 339 the view was expressed that the king was not at liberty to ignore legislation. It was not until 1946 in *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 that the rule of statutory interpretation was settled.

86 A Tomkins, above n 56 at 176.

87 Crown Proceedings Act 1988 (NSW), s 5(2); Crown Proceedings Act 1980 (Qld), s 9(2); Crown Proceedings Act 1958 (Vic), s 25.

88 Crown Proceedings Act 1992 (ACT) s 5(1); Crown Proceedings Act 1993 (NT), s 5(1); Crown Proceedings Act 1992 (SA), s 5(1); Crown Proceedings Act 1993 (Tas), s 5(1).

89 *Maguire v Simpson* (1977) 139 CLR 362; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

certain circumstances are not the types of laws that apply to subjects. They are unique to government. It is therefore impossible to apply the *same* law in all circumstances when the Crown is a litigant.

Much has been written about the effect of the Crown proceedings legislation and, in particular, its effect on the application of (other) legislation to the Crown. Here is not the place to go into the extraordinarily intricate and complex law that has grown up around the issue of Crown immunity from legislation.[90] It is sufficient to note that the principle of statutory interpretation that dictates that legislation does not bind the Crown unless there is express provision or necessary implication to the contrary is the starting point in any enquiry about whether legislation binds the Crown, albeit that the necessary implication may be more readily found since the decision of the High Court in *Bropho v Western Australia*.[91] Of course, this starting point derives from the axiomatic principles of the Crown as sovereign and the stain on the rule of law that the axiom represents has already been noted. It has not been removed by the Crown proceedings legislation.

It is worth noting that the Crown is itself an uncertain conception in the context of immunity from statute. The Crown's entourage for this purpose includes some (but not all) public bodies that are separate legal entities from the body politic[92] and even private bodies.[93] In a time of burgeoning contracting out of public functions, the spectre of private bodies hiding behind the mantle of the Crown will loom larger rather than smaller.[94]

If a court were to conclude, in the absence of the Crown proceedings legislation, that a statute would not apply to the Crown, the Crown proceedings legislation could reverse this result. But, because of the "as nearly as possible" formula (or its tacit presence in modern Crown proceedings legislation), which clearly recognises that there are circumstances involving peculiarly governmental concerns where it is not appropriate to bind the Crown to legislation, it is often uncertain when the Crown will be bound as a result of the application of the Crown proceedings legislation. Further, the Crown proceedings legislation can only affect the issue if there is a "suit".[95] This raises the puzzling question whether the applicable law changes depending on whether legal proceedings have been commenced. This problem was discussed in *Commonwealth v Evans Deakin Industries Ltd*[96] and it was said that the rights and

90 See N Seddon, above n 79, ch 4.

91 (1990) 171 CLR 1. Prior to this case the necessary implication was found if the purpose of the statute would be "wholly frustrated" if the Crown were not bound: *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 at 63. Contrast the formulation in *Bradken Consolidated Ltd v Broken Hill Proprietary Ltd* (1979) 145 CLR 107 at 116 where the necessary implication may be found "if it is manifest from the very terms of the statute that it was the intention of the legislature that the Crown should be bound".

92 N Seddon, above n 79, paras 4.6-4.8.

93 Ibid paras 4.9-4.10. See also N Seddon, "Crown Immunity and Private Bodies" (1999) 10 *PLR* 263.

94 A similar issue has arisen in the United Kingdom with claims to public interest immunity being made by private bodies. See *D v NSPCC* [1978] AC 171 and discussion by A Tomkins, above n 56 at 192-193.

95 *Re Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410; *Commonwealth v Western Australia* (1999) 160 ALR 638.

96 (1986) 161 CLR 254 at 265-266 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

liabilities of the parties are determined on the basis of what they would be if a court should determine them. This solution has not, however, met with approval elsewhere.[97] Yet another factor to be weighed in the balance is that the High Court has more recently exhibited a tendency to apply legislation to the Crown or a Crown body without resort to the *Bropho* reasoning (that a necessary implication that a statute binds the Crown may be fairly readily found) and without resort to the Crown proceedings legislation.[98]

Overall, 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. This type of problem is, of course, inherent in any federal system. Further, there are legitimate governmental concerns about whether it is appropriate to bind the executive or a statutory body discharging public responsibilities to at least some types of legislation. However, the solution to these questions 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;[99] nor that a tenant of the Federal Airports Corporation is able claim a form of immunity, deriving from the Corporation's Crown status, from Victorian planning laws.[100] 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 to state that all legislation binds the Crown unless there is specific provision to the contrary, as the Australian Capital Territory and South Australia have done.[101] 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. A modified version of this model was recommended by the Senate Standing Committee on Legal and Constitutional Affairs in 1992.[102] Nothing has been done about it at Commonwealth level. The need for such reform is greater now because of the uncertainty associated with the High Court's ruling that the

97 *Commonwealth v Mewett* (1997) 191 CLR 471 at 556-557 per Gummow and Kirby JJ.

98 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1997) 189 CLR 253 (State statutory corporation bound by another State's stamp duties legislation); *Re Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410 (Commonwealth statutory corporation bound by State residential tenancies legislation).

99 *Jellyn Pty Ltd v Horwath & Horwath (Qld) Pty Ltd* (1993) ATPR 41-284.

100 *Ventana Pty Ltd v Federal Airports Corporation* (1997) 147 ALR 200.

101 Interpretation Act 1967 (ACT), s 7(1); Acts Interpretation Act 1915 (SA), s 20. These provisions bind the respective governments of both the enacting polity and, so far as the legislative power allows, the governments of other polities. These provisions do not bind their own governments to the laws of other polities. The Crown proceedings legislation achieves this, where applicable.

102 The Parliament of the Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, *The Doctrine of the Shield of the Crown* (1992). This report was principally focused on Crown bodies, in particular government business enterprises, rather than the executive government.

Commonwealth may be bound by State legislation independently of the Crown proceedings legislation.[103]

CONCLUSION

I have tried to show that the concept of the Crown in Australia is of limited significance, whereas it still poses very significant legal and constitutional problems in the United Kingdom. In formal terms the two countries are ruled by the Queen but her presence in Australia is purely symbolic and to all intents and purposes Australia has become a republic. This tendency can be detected from the earliest days—the pioneering Crown proceedings legislation, the adoption of the word "Commonwealth", a more highly developed notion of the state, a clear identification of the bodies politic as legal entities. Perhaps one explanation of the failed republic referendum in 1999 is that there was no need. Australia was already there.

Yet in Australia there is still work to be done in throwing off the residue of the Crown. The most pressing problem is to develop a principled and coherent rule of government immunity from legislation. Lesser tasks would involve demystifying the way in which citizens interact with the government in legal proceedings by omitting references to Latin and the sovereign, both captured in "R". And then there are silly anachronisms that can cause unnecessary difficulties. In Victoria, a person about to be admitted to legal practice must swear allegiance to the Queen. It was reported that a Mr Carl Möller unsuccessfully challenged this rule with the consequence that he cannot be admitted if he adheres to his republican principles.[104] It is time that these leftovers are thrown away, even if Australia continues to be in name a constitutional monarchy for the foreseeable future. This shedding of the remaining trappings of the Crown is a relatively easy task for Australia, whereas for the United Kingdom it is a monumental task.

103 *Re Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410.

104 *Australian Financial Review* 3 December 1999 at 27.