Supreme Court of New South Wales held that a similar sum was 'rent' governed by the provisions of the New South Wales Act, as being either in conflict with the Victorian case or decided upon a special set of facts.[12]

The uncertainty revealed in *Crundwell's* case, *Loder's* case, and *C.O.R. Ltd. v. Hollins* is not surprising in view of the silence of the Victorian and New South Wales Landlord and Tenant legislation on the position of a single rent payable for the lease of premises and business goodwill. As the Landlord and Tenant Act 1953, s. 3 removed new leases of business premises for a term of more than three years from the rent-fixing provisions of the 1948 Act, and the tendency in all recent amendments to the Act has been towards the lifting of restrictions upon rents, the point is of no great practical importance today. Nevertheless, it illustrates loopholes which existed in the legislation in its heyday, and the ease by which it was possible to by-pass the provisions of the Act for the pegging of the rents of business premises. It was unfortunate that such important legislation as the Landlord and Tenant Act should have been allowed to develop in as haphazard a manner as it was.

J. D. MERRALLS

[12] Herron J., the dissentient in *Loder v. Tokoly*, based his judgment upon the same grounds as Gavan Duffy and Dean JJ. in *Crundwell v. Bertrand*.

CROWN – INCORPORATED PUBLIC AUTHORITY – LEGAL POSITION

Wynyard Investments Pty. Ltd. v. Commissioner for Railways (N.S.W.)[1]

The Commissioner for Railways in N.S.W. leased premises for a term of five years. On the expiration of that period, the Commissioner took proceedings to recover possession from the appellant, as tenant. The premises in question were 'prescribed premises' under the Landlord and Tenant (Amendment) Act 1945-52 (N.S.W.) with the provisions of which the Commissioner had not complied. The tenant asked that the information be dismissed on the ground that the Commissioner was not 'the Crown in right of the State of N.S.W.', and therefore not entitled to the privilege of exemption granted to the Crown by s. 5(a) of that Act. The Magistrate rejected this argument and directed the issue of a warrant for possession.

The tenant appealed to the High Court from an order of the Full Supreme Court of N.S.W. discharging a rule nisi for a writ of prohibition directed to the Magistrate and the Commissioner for Railways. The High Court dismissed the appeal. The majority[2]

[1] [1956] A.L.R. 49. High Court of Australia; Williams, Webb, Taylor, Fullagar and Kitto JJ.

[2] Williams, Webb and Taylor JJ.; Fullagar and Kitto JJ. dissented.

[3] [1956] A.L.R. 49, 54.

considered that s. 4(2) Transport (Division of Functions) Act 1932 (N.S.W.), providing that for the purpose of any Act the Commissioner should be deemed a statutory body representing the Crown, was decisive of the issue. 'Accordingly, in his transmogrified form the Commissioner must qualify for inclusion in the term 'The Crown in right of the State of N.S.W.'[3] thereby arguing exemption from the provisions of the Landlord and Tenant (Amendment) Act.

This decision creates a very unsatisfactory situation, in that the Commissioner for Railways in N.S.W. is entitled as landlord to the immunity of the Crown under the Landlord and Tenant (Amendment) Act (N.S.W.), but the Victorian Railways Commissioners are bound by corresponding Victorian security regulations.[4] This anomaly may have been justified by the existence in N.S.W. of the provisions on which the majority relied, but this justification is reduced to nothing by the fact that it is almost certain that the majority would have reached the same conclusion had s. 4(2) not been enacted. They felt it necessary only to mention the names of four cases in which the principles relating to the legal position of public corporations were discussed[5] and proceeded on the basis that the fact that the N.S.W. railways had, with immaterial exceptions, always been a state activity,[6] and that the Department of Railways administered by the Commissioner formed a division of the Ministry of Transport, and that the Commissioner was subject to the control and direction of the Minister for Transport, tended strongly 'to prove an intention on the part of the Parliament of N.S.W. to create a corporation in the person of the Commissioner . . . in order to set up an agency of the Crown constituting a branch department of the Ministry of Transport . . . having administrative capacity to carry on . . . an executive activity of the State.'[7]

To the minority however neither these factors nor s. 4(2) Transport (Division of Functions) Act 1932, concluded the issue. The decisiveness of s. 4(2) is questionable as shown by the strong dissent of Kitto J. with which Fullagar J. expressed his agreement. Their interpretation of that subsection was that whenever an Act contained a provision dealing with 'statutory bodies representing the Crown', then the Commissioners should be deemed such a body. Parliament did not exempt 'statutory bodies representing the Crown' from the provisions of the Landlord and Tenant (Amendment) Act, but only the Crown itself. They reached the opposite view from the majority by deciding that the restrictions on the recovery of

[4] *Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211; [1949] A.L.R. 440.

[5] *Skinner v. Commissioner for Railways* (1937) 37 S.R. (N.S.W.) 261; *Grain Elevators Board of Victoria v. Shire of Dunmunkle* (1946) 73 C.L.R. 70; *Bank of N.S.W. v. The Commonwealth* (1948) 76 C.L.R. 1; *Bank voor Handel en Scheepvaart NV v. Administrator of Hungarian Property* [1954] A.C. 584.

[6] Compare *Tamlin v. Hannaford* [1950] 1 K.B. 18.

[7] [1956] A.L.R. 49, 52.

possession were not such that, if applied to the Commissioner, they would be restricting a recovery of possession for the Crown itself.

So we find, adding to the confusion of the law relating to the legal liability of public corporations, a further anomaly resulting from the emphasis of different aspects in determining whether the public authority should be entitled to the protection of 'the shield of the Crown'. The problem has frequently arisen and various tests have been applied,[8] with the disconcerting result that some public authorities have been regarded as entitled to claim Crown privileges and immunities, while others, very similar, have been placed in the same position as private corporations and individuals, e.g. the Sydney Harbour Trust Commissioners were bound by the Employers Liability Act;[9] the Victorian Railways Commissioners were given priority of the Crown for debts arising from their sale of coal;[10] the N.S.W. Forests Commission was held liable in tort,[11] but the Victorian Forest Commission in 1936, was held not to be so liable;[12] land vested in the Grain Elevators Board of Victoria was not held to be Crown property and therefore was liable to municipal rating;[13] the Electricity Trust of South Australia was held immune from the provisions of the Landlord and Tenant (Control of Rents) Act Amendment Act 1945 (S.A.).[14]

With the decision in the *Grain Elevators Board* case it appeared that the High Court was leaning in favour of a limitation of the immunities and privileges of public corporations. Presumably influenced by this decision, the Full Supreme Court of Victoria in *Victorian Railways Commissioners v. Herbert*[15] overruled the decision of Gavan Duffy J. in *Victorian Railways Commissioners v. Greelish*,[16] and held that the Victorian Railways Commissioners were, unlike the Crown, bound by the Landlord and Tenant (National Security) Regulations. In *Rural Bank of N.S.W. v. Hayes*,[17] the High Court continued in this trend by holding that the appellant statutory corporation was bound by the very section of the Landlord and Tenant (Amendment) Act now in question.

The minority judges in the present case considered that *Hayes'* case was indistinguishable in principle from the present. They rejected the test of determining the general relationship between the

[8] See Friedmann, 'Legal Status of Incorporated Public Authorities' (1948-9) 22 *Australian Law Journal* 7.

[9] *Sydney Harbour Trust Commissioners v. Ryan* (1911) 13 C.L.R. 358.

[10] In *re Oriental Holdings Ltd.* [1931] V.L.R. 279.

[11] *Ex parte Graham; Re Forestry Commission* (1945) 45 S.R. (N.S.W.) 379.

[12] *Marks v. Forest Commission* [1936] V.L.R. 344.

[13] *Grain Elevators Board of Victoria v. Shire of Dunmunkle* (1946) 73 C.L.R. 70.

[14] *Electricity Trust of S.A. v. Linterns Ltd.* [1950] S.A. S.R. 133.

[15] [1949] V.L.R. 211.

[16] [1947] V.L.R. 425.

[17] (1951) 84 C.L.R. 140; [1951] A.L.R. 937.

public authority and the Crown and turned to an examination of the relevant provisions with the object of ascertaining whether the Crown had such an interest in the recovery of possession in question that the lack of protection of 'the shield of the Crown' in favour of the Commissioner would involve interference with the immunity of the Crown itself. For this determination attention is turned to the provisions of the statute or statutes under which the public authority acts, relating to the subject matter at hand, e.g. to the financial provisions when the claim is one of priority for debts (*Re Oriental Holdings Ltd.*[18]); to the property provisions when the question involves payments of rates (*The Grain Elevators Board case*[19]) or recovery of possession of prescribed premises (*Victorian Railways Commissioners v. Herbert*[20]). In the *Bank voor Handel* case[21], the House of Lords took the view without dissent that the Custodian of Enemy Property was a servant of the Crown, but this was not considered sufficient to grant him immunity from the taxation of money which he held. A further issue was involved, namely whether the money was held beneficially for the Crown so that to tax it would interfere with the Crown's immunity.

It is submitted that restrictions on the claim for Crown privileges and immunities by public authorities is of such practical importance in these days when public and private enterprise are working in the same fields, that the decision of the majority of the High Court in *Wynyard Investments Pty. Ltd. v. Commissioner for Railways* is an untimely obstacle in the way of both the development of recent Australian trends and of the acceptance of the high persuasive authority of the House of Lords in the *Bank voor Handel* case. It is further submitted that the minority view in this case is more acceptable than that of the majority being in line both with theoretical approach and practical requirements.

GRETCHEN M. BARTLAU

[18] [1931] V.L.R. 279.
[19] (1946) 73 C.L.R. 70.
[20] [1949] V.L.R. 211.
[21] [1954] A.C. 584.

EVIDENCE – PRIOR INCONSISTENT STATEMENTS – IMPEACHMENT OF WITNESS BY HIS PROPONENT

Reg. v. Hunter[1]

The applicant was convicted of larceny at the Court of General Sessions. At the trial the accused's brother was called by the Crown and gave evidence to the effect that certain articles could not have been stolen property as the Crown alleged. This testimony, if true, was material evidence in support of the defence but it was in conflict with a statement which the witness had made to the police prior to the trial. The Crown Prosecutor sought and, after the

[1] [1956] V.L.R. 31. Supreme Court of Victoria; Martin, O'Bryan and Dean JJ.