PROSECUTING THE CROWN

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This three-part article addresses whether there are impediments to the prosecution of Crown instrumentalities and Crown employees for statutory offences. In Part I it is argued that each manifestation of the Crown has the capacity to bind the other manifestations of the Crown. Part II details the statutory presumptions that protect Crown instrumentalities. It is asserted that the courts recognise both a general presumption, that an Act does not bind the Crown, and a specific presumption that the Crown is not subject to prosecution. In Part III it is argued that Crown employees are not benefited by an immunity from prosecution.

INTRODUCTION

There is considerable uncertainty as to when Crown instrumentalities are subject to criminal prosecution and under what circumstances they are entitled to immunity. Some members of the judiciary have argued that criminal prosecution is 'essentially personal and punitive' and it is therefore not open to the courts to convict the Crown.[1] The argument has merit as it relates to 'traditional' crimes such as rape and murder where the perpetrator is an individual and the relevant punishment is a term of imprisonment. The argument lacks credit in relation to offences that target corporations. It is by no means an overstatement to suggest that Crown immunity from prosecution potentially undermines an entire legislative regime in the context where organisations are targeted by the legislation. For example, laws enacted to protect water supplies from harmful micro-organisms such as cryptosporidium and giardia could be rendered completely ineffective if the Crown, acting with impunity, were to dump contaminants into the water. It has also been argued that in limited circumstances, Crown servants are entitled to immunity from prosecution. Those wishing to add credibility to the constitutional theory that the States cannot legislate to affect the Commonwealth have advocated Crown employee immunity. However, an argument

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1 See: *M v The Home Office* [1992] 1 QB 270 at 311 per Nolan LJ and *Cain v Doyle* (1946) 72 CLR 409 at 418-419 per Latham CJ.

that advocates the Crown's capacity to order employees to break the law is inconsistent with the High Court's rejection of the defence of superior orders.

Two developments in the 20th century have ensured that the question of Crown criminal liability is of more than theoretical interest. Firstly, the variety of activities in which the Crown is involved has increased dramatically, 'going far beyond the classical public functions of justice, order and external defence.'[2] The executive government competes with private enterprise in a wide range of commercial, industrial and developmental activities.[3] Construction, manufacture, printing, electric power generation, transportation, agriculture, waste disposal and the provision of medical services are examples of well-established areas of Crown activity in this country. Secondly, statutes that invariably utilise criminal sanctions as an important (if not the principal) means of ensuring compliance, regulate all of these areas of commercial activities and a multitude of others.[4] These offences will be referred to as 'public welfare offences'.[5] It is for a contravention of a 'public welfare offence' rather than a traditional common law crime that the Crown is likely to face prosecution.[6]

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2 Stone, J. *The Province and Function of Law*. Sydney: Associated General Publications Pty Ltd, 1947, 573. See also the Law Reform Committee of South Australia, *One Hundred and Fourth Report of the Law Reform Committee of South Australia to the Attorney-General on Proceedings By and Against the Crown*, 1987, Appendix Five at 1; *Jacobsen v Rogers* (1995) 182 CLR 572 at 587 and *Southland Acclimatisation Society v Anderson* [1978] 1 NZLR 838 at 843.

3 *Bropho v Western Australia* (1990) 171 CLR 1 at 19.

4 Hogg, P. *Liability of the Crown*. 2nd ed. Sydney: The Law Book Co Ltd., 1989, 232.

5 Sayre, F. in 'Public Welfare Offences' (1933) 33 *ColumLRev*, 55 was the first to use the term 'public welfare offences' to describe crimes that make certain behaviour punishable irrespective of the absence of an element of culpability. 'Public welfare offences' were described by Friedmann, W. in 'Public Welfare Offences, Statutory Duties, and the Legal Status of the Crown' (1950) 13 *MLR*, 24 at 27 as administrative in character and lacking the moral stigma of traditional common law crimes. The term 'public welfare offences' is given a broader meaning in this paper to include offences and statutes that regulate behaviour that is potentially dangerous to the public welfare. Many of the offences created by 'public welfare' statutes include an element of culpability (see for example, *Environmental Protection Act 1994* (Qld) s438(1) (wilfully causing material environmental harm) and *Occupational Health and Safety Act 2000* (NSW) s21 (intentionally or recklessly interfering with a thing provided for health, safety and welfare.) It is no longer correct to describe them as lacking moral stigma.

6 On the limited number of occasions when the courts have been required to consider Crown criminal liability the case has involved a breach of a public welfare statute (see for example: *Cain v Doyle* (1946) 72 CLR 409, *Roberts v Abern* (1904) 1 CLR 406 and *Environmental Protection Authority v Water Board* (1993) 79 LGERA 103).

The structure of this paper is in three parts. The first part focuses on the Crown's capacity to subject itself to criminal liability and its capacity to subject other manifestations of the Crown to prosecution. It is concluded that although the Crown can be made amenable to criminal prosecution, doubt remains as to whether the Crown in right of the States can subject the Crown in right of the Commonwealth, to criminal sanctions. The second part is concerned with the protection that statutory presumptions afford the Crown. It is argued that the courts have identified two quite separate presumptions: the specific presumption against criminal prosecution, and the general presumption that the Crown is not bound by statute. Although they hunt in pairs, each has a separate legal existence. The differences between the two presumptions are explored. The third part addresses the question of Crown employee liability. It is concluded that in the absence of statutory protection, employees, whether they be State or Commonwealth, are subject to prosecution.

PART I: THE QUESTION OF CAPACITY

CAPACITY OF THE CROWN TO SUBJECT ITSELF TO CRIMINAL PROSECUTION

As most of the commercial, industrial and developmental activities performed by the Crown occur within the Crown's geographical jurisdiction, the most important question is whether the Crown has the capacity to subject itself to criminal liability. This section examines the judicial and policy arguments for and against the Crown being amenable to criminal liability.

Given the relative paucity of criminal prosecutions against the Crown, it is not surprising that the law of Crown immunity is vague. The principle that 'the Crown can do no wrong' led to the argument that parliament passes laws for the benefit of the citizens, not for the benefit of the Crown; therefore, the law does not apply to the Crown.[7] The basis for the argument is reminiscent of the medieval illogical dispute as to God's powers: '(1) he who is all powerful cannot bind himself; (2) the sovereign is all powerful, and therefore (3) the sovereign cannot bind himself and always retains the right to resume his liberty.'[8] It could of course be argued that it is the Crown's very omnipotence that enables

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7 See *Cain v Doyle* (1946) 72 CLR 409 at 417-418 per Latham CJ.

8 Stone, J. *The Province and Function of Law: A Study in Jurisprudence*. Buffalo: William S. Hein and Co., Inc., 1950, 86 in reference to the arguments of Roguin, E. in (1923) 1 *La Science Jurisique Pure*, 24-25.

9 Stone, J. *The Province and Function of Law: A Study in Jurisprudence*. Buffalo: William s. Hein &and Co., Inc., 1950, 86 in reference to the arguments of Roguin, E. in (1923) 1 *La Science Jurisique Pure*, 24-25.

the legislator to bind itself, for '(1) he who is all powerful can bind himself precisely because he is all powerful; (2) the sovereign is all powerful, and, therefore, (3) the legislator can bind himself.'[9] These arguments are based on the concept of an 'Omnipotent Being' and are, therefore, applicable to a time when the monarch ruled supreme. In a Constitutional Monarchy it is important to distinguish between the expression 'the Crown' in reference to the executive arm of government and 'the Crown' in reference to the Monarch. The statement that the 'Crown can do no wrong' should be restricted in its application to the time when the Monarch reigned supreme. Although the executive arm of government derives many of its powers and privileges from the Monarch, in a modern democracy it is not necessary that it retain all the Monarch's immunities.

The leading High Court decision that addresses the prosecution of the Crown is *Cain v Doyle*[10]. The statements of Latham CJ in *Cain v Doyle*[11] have been interpreted as support for the argument that the Crown cannot be made amenable to prosecution. *Cain v Doyle*[12] did not involve the prosecution of the Crown but of a factory manager who had been charged with aiding and abetting[13] the Commonwealth in the commission of an offence against s18(1) of the *Re-establishment and Employment Act 1945* (Cth). Section 18(1) imposed a penalty of £100 on any employer who terminated the employment of a former employee without reasonable cause. The majority of the court held that the defendant could not be prosecuted for aiding and abetting, as s18(1) did not create an offence for which the alleged principle offender (the Commonwealth) could be prosecuted. Latham CJ stated that:

> 'It has never been suggested that the criminal law binds the Crown. ... [T]he fundamental idea of the criminal law is that breaches of the law are offences against the King's peace, and it is inconsistent with this principle to hold that the Crown can itself be guilty of a criminal offence.'[14]

It is possible to read the Chief Justice's judgment as authority for the argument that it is impossible for the juristic entity of the Commonwealth to prosecute itself.[15] His Honour supported the

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10 (1946) 72 CLR 409.
11 (1946) 72 CLR 409.
12 (1946) 72 CLR 409
13 See *Crimes Act 1914* (Cth) s5.
14 (1946) 72 CLR 409 at 417-418.
15 Professor Hogg is one commentator who argues that his Honour's judgment amounts to a categorical denial of the notion that appropriate language in a statute could subject the Crown to criminal prosecution (see Hogg, P. *Liability of the Crown*. 2nd ed. Sydney: The Law Book Co. Ltd, 1989, 11 and 232-233). Limited support for Hogg's interpretation of the judgment of Latham CJ can be found in the dissenting judgment of Windeyer J in *Downs v Williams* (1971) 126 CLR 61 at 77. See also *R v Chow* (1988) 11 NSWLR 561 at 566; 30 A Crim R 103 at 108, and *Ridgeway v R* (1993) 69 A Crim R 480 at 486 per Legoe J. A contextual analysis of the judgment of Latham CJ,

proposition that the Crown is not amenable to prosecution by stating that any penalty imposed on the Crown would be illusory as the Crown cannot be imprisoned and the alternative punishment of a fine would constitute a payment from consolidated revenue to consolidated revenue. Furthermore, the Crown has the discretion to remit any fine imposed.[16] In the recent English Court of Appeal decision of *M v Home Office*[17], Nolan LJ supported the position that the Crown cannot be made amenable to criminal prosecution. His Honour held that as a matter of law the courts could not find the Home Office or the Home Secretary guilty of contempt.[18] The reasons given by Nolan LJ are similar to those advanced by Latham CJ in *Cain v Doyle*[19]. Nolan LJ stated that proceedings for contempt are 'essentially personal and punitive.'[20] The only punishment for contempt of court is imprisonment, fine, or sequestration of assets by the State. Therefore, the Home Office cannot be punished for contempt as it cannot be imprisoned and all of its assets belong to the State.

With respect, Latham CJ's and Nolan LJ's reasons for rejecting Crown criminal liability are unconvincing. It is not necessarily true that the imposition of a monetary penalty on the Crown would require Treasury to both pay and receive a fine. On the facts before the Court in *Cain v Doyle*,[21] a portion of the penalty imposed on an employer for a breach of the *Re-establishment and Employment Act 1945* (Cth) could have been paid to an aggrieved employee.[22] In the case of 'public welfare offences', the court may order that all or part of a fine be paid to an individual or agency by way of a moiety or as a reimbursement for the cost incurred by those responsible for investigating and prosecuting an offence.[23] Furthermore, the primary reason for imposing a fine may not

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however, suggests that his Honour did not intend to place such a fetter on legislative power. His Honour's judgment should be read as a restatement of the common law presumption that the Crown is not subject to criminal liability, not as a description of legislative incapacity. This interpretation is consistent with the fact that Latham CJ found it necessary to consider the meaning of s10(1) of the Act, which states that: 'In this Division unless the contrary intention appears - "employer" includes the Crown.' If Latham CJ supported the argument that the Crown could not be made amenable to prosecution in any circumstances, it would not have been necessary for his Honour to address the interpretation of s10(1) of the Act. Furthermore, a prohibition on the prosecution of the Crown is not consistent with his Honour's justification for the Crown's immunity. Latham CJ was of the opinion that the practical difficulties and pointlessness of punishing the Crown explained the existence of the Crown's immunity from prosecution.

16 (1946) 72 CLR 409 at 418-419.
17 [1992] 1 QB 270.
18 [1992] 1 QB 270 at 311.
19 [1946] 72 CLR 409.
20 [1992] 1 QB 270 at 311.
21 (1946) 72 CLR 409.
22 *Cain v Doyle* (1947) 72 CLR 409 at 421 per Starke J.
23 See for example, *Environmental Protection Act 1994* (Qld) s500.

be to hurt the accused financially as the stigma attached to the prosecution of the Crown for 'social welfare offences' may be a greater punishment than the imposition of a fine.

The other members of the Court did not agree with the statements of Latham CJ in *Cain v Doyle*[24], and the Court of Appeal's decision in *M v Home Office*[25] was overturned on appeal to the House of Lords in *In re M*.[26] The majority of the court in *Cain v Doyle*[27] agreed with Dixon J who held that the Crown can be made amenable to criminal prosecution.[28] His Honour stated that although there is a strong presumption against legislation imposing criminal liability on the Crown, an appropriately worded provision would have that effect. Dixon J's judgment has received recent approval by the High Court.[29] In *In re M*[30] the House of Lords agreed with the Court of Appeal that the Crown could not be imprisoned and that it is inappropriate to fine or sequestrate the assets of the Crown. Their Lordships held, however, that judges can enforce the law against the Crown as executive.[31] Lord Woolf, with whom the other members of the Court agreed, stated that the very finding of contempt against a government department 'would vindicate the requirement of justice.[32]

There are strong historical and policy considerations in favour of the Crown being amenable to prosecution. In *Canadian Broadcasting Corporation v The Queen*[33] the Supreme Court of Canada stated that:

> 'It is difficult to believe that after the great constitutional struggles through which we and our forbearers have gone to bring to an end the concept of the absolute monarchy we are still faced with the defence of absolute immunity by the monarch's administration.'[34]

The same argument was advanced in *In re M*[35] where Lord Templeman stated that:

> '[T]he argument that there is no power to enforce the law by injunction

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24 (1947) 72 CLR 409.
25 [1992] 1 QB 270.
26 [1994] 1 AC 377.
27 (1947) 72 CLR 409.
28 (1947) 72 CLR 409, Rich J concurring. See also Starke J at 420-421. Williams J, at 431, dissented.
29 See *Jacobsen v Rogers* (1994) 182 CLR 572 at 587 per Mason CJ, Deane, Dawson, Toohey, and Gaudron JJ; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1997) 189 CLR 253 and *Telstra v Worthing* (1999) 161 ALR 489 at 496. See also the judgments of Brennan J, as he then was, in *Clyde v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 24 and *Bropho v Western Australia* (1990) 171 CLR 1 at 26.
30 [1994] 1 AC 377.
31 [1994] 1 AC 377 at 395.
32 [1994] 1 AC 377 at 425.
33 (1983) 145 DLR (3d) 42.
34 (1983) 145 DLR (3d) 42 at 51.
35 [1994] 1 AC 377.

> or contempt proceedings against a minister in this official capacity would, if upheld, 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.'[36]

In light of the historical and policy arguments and the High Court''s endorsement of Crown criminal liability it must now be accepted that the Crown can subject itself to the wide range of 'social welfare offences'.[37]

Not only does the Crown have the capacity to subject itself to criminal sanctions, the capacity to do so is not subject to territorial limitations. The High Court of Australia accepts that, following the *Balfour Declaration* of 1929[38], the Crown in right of the Commonwealth has 'power to make laws which operate extraterritorially'.[39] Therefore, Commonwealth legislation that subjects the Crown, in right of the Commonwealth, to criminal sanctions may be enforced regardless of where the activities that constitute the offence are performed. The High Court has also accepted that State parliaments have the power to enact laws that operate extraterritorially.[40] However, the State parliaments' power is restricted to the enactment of laws that have some territorial nexus to the State.[41] The precise nature of territorial limitation remains unresolved, however, the High Court in the *Union Steamship Co of Australia Pty Ltd v King*[42] held that State legislation will be valid even though there is only 'a remote and general connexion between the subject-matter of the legislation and the State'.[43] In light of this broad interpretation of States' power to enact laws that have an extraterritorial application, it is submitted that legislation that subjects the enacting State to criminal sanctions can apply to the Crown, irrespective of whether the offence is committed.

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36 [1994] 1 AC 377 at 395.

37 In other common law jurisdictions the Crown can be subjected to prosecution; see *Cooper v Hawkins* [1904] 2 KB 164, *Canadian Broadcasting Corporation v Attorney-General for Ontario* (1959) 16 DLR (2d) 609 and *Southland Acclimatisation Society v Anderson* [1978] 1 NZLR 838.

38 The Declaration was given legislative authority in the *Statute of Westminster 1931* (Imp).

39 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 12. See also: *Bonser v La Macchia* (1969) 122 CLR 117 at 189, 224-225; *R v Bull* (1974) 131 CLR 203 at 263, 270-271, 280-282; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 468-469, 494-495 and *Pearce v Florenca* (1976) 135 CLR 507 at 514-520, 522.

40 See *Broken Hill South Ltd v Commissioner of Taxation* (NSW) (1937) 56 CLR 337 at 375 and *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 12-14.

41 See the *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14 and *State Authorities Superannuation Board v Commissioner of State Taxation* (NSW) (1997) 189 CLR 253 at 270-271.

For example, if a State department of primary industry commits an offence against the State's fisheries laws, subject to the legislation applying to the Crown, the department could be prosecuted regardless of whether the illegal activity took place in the State, in another State, on the waters beyond State jurisdiction[44] or within the jurisdiction of another nation.[45]

THE CROWN'S CAPACITY TO BIND OTHER MANIFESTATIONS OF THE CROWN: THE FEDERAL QUESTIONS

The question of Crown immunity from prosecution is necessarily more complex in a federal system of government, where there is more than one manifestation of the Crown, than it is in a unitary system of government. In early judgments, such as the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[46] (*Engineers*), members of the High Court based their decisions on the proposition that the Crown is indivisible. The courts no longer apply the rule of indivisibility. Gibbs ACJ in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[47] described the rule as 'more remote from practical realities than when the *Engineers'* case[48] was decided, and which is of little practical assistance in many cases.' It is now common practice to refer to the Crown in right of the Commonwealth, or the Crown in right of one of the States. Therefore, in a federal context it is necessary to ask three questions. Firstly, can the Crown in right of the Commonwealth subject the Crown in right of a State or States to criminal prosecution? Secondly, can the Crown in right of a State subject the Crown in right of another State to criminal prosecution? Thirdly, can the Crown in right of the State subject the Crown in right of the Commonwealth to criminal prosecution?

1. The Commonwealth's Capacity To Bind The States

The Commonwealth does not have a direct legislative power in relation to criminal law. It is argued, however, that the Commonwealth can subject the Crown in right of the States to criminal prosecution. The High Court has upheld two limitations of the Commonwealth's capacity to bind the States, however, the limitations are likely to be of only limited

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42 (1988) 166 CLR 1.

43 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14. See also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 198 CLR 253 at 271 for recent approval of the above statements.

44 Waters beyond State jurisdiction include the High Seas and waters subject to the sovereignty or sovereign rights of the Commonwealth.

45 A discussion of the problem of a potential conflict of laws when the legislation of a State or the Commonwealth applies extraterritorially is beyond the scope of this paper (see *State Authorities Superannuation Board v Commissioner of State Taxation* (NSW) (1997) 189 CLR 253 at 285-287).

significance in relation to 'public welfare offences'.

In contrast to earlier decisions of the Court, the majority in *Engineers*[49] accepted that there was no general prohibition on either the Commonwealth or the States passing legislation that would affect the legal position of the other.[50] In the eighty years since the High Court's decision in *Engineers*[51], the courts have not been asked to consider whether the general proposition that the Commonwealth Parliament can legislate so as to bind the States, includes the power to impose criminal sanctions upon the States. The High Court has, however, endorsed two implied limitations on the general principle accepted in *Engineers*.[52] The first is that Commonwealth legislation that discriminates against the States or a State vis-a-vis other members of the community, is invalid.[53] The second implied limitation states that a non-discriminatory

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46 (1920) 28 CLR 129.

47 (1978) 145 CLR 107 at 122.

48 (1920) 28 CLR 129.

49 (1920) 28 CLR 129, Knox CJ, Isaacs, Higgins, Rich and Starke JJ; Duffy J dissented.

50 In decisions such as *D'Emden v Pedder* (1904) 1 CLR 91, *Federation Amalgamated Government Railway & Tramway Service Association v NSW Railway Traffic Employees Association* (1906) 4 CLR 488 and *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, the High Court had accepted that the Commonwealth and the States were immune from each other's legislation.

51 (1920) 28 CLR 129.

52 (1920) 28 CLR 129. Although the High Court has not decided whether there are 'two implied limitations, two elements or branches of one limitation, or simply one limitation' this paper will proceed on the basis that there are two implied limitations. See *Re Australian Education Union: Ex parte Victoria* (1995) 184 CLR 188 at 227.

53 See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 per Latham CJ, Rich, Starke, Dixon and Williams JJ; McTiernan J dissenting. The Constitution does not explicitly prevent Commonwealth legislation from discriminating against the States, however Rich J at 66, Starke J at 75 and Dixon J at 81 found that the prohibition was implied from the nature of the federal system. The justification for the implied limitation has gained the support of most members of the High Court: see *Victoria v Commonwealth* (1971) 122 CLR 353 at 392 per Menzies J, at 402 per Windeyer J, at 406 per Walsh J, at 422 per Gibbs J (for a contrary view see Barwick CJ at 382-383); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 128-129 and *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 260-261. Not all Commonwealth legislation that discriminates against the States is invalid. In *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 the High Court accepted that federal legislation that discriminates against the States will be valid if the constitutional power, in accordance with which the legislation was enacted, contemplates such a law. In the High Court decision of *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 478 it was submitted that provisions of the *Native Title Act 1993* (Cth), which prohibited States and Territories from extinguishing or impairing native title, were contrary to the implied federal restriction against discriminatory legislation. The majority of the High Court held that the relevant provisions of the *Native Title Act 1993* (Cth) were validly enacted pursuant to the race head of power, s51(xxvi), of the Constitution. The enactment of laws which excluded State and Territory laws from affecting native title was the only way the Commonwealth could exercise its power pursuant to s51(xxvi) and therefore were not invalid for reasons of discrimination. The Court also rejected Western

Commonwealth law would be invalid if it prevents, or impedes, the States in the performance of 'the normal and essential functions of government', or which interferes 'in a substantial way with the exercise of [State] constitutional power'.[54] In the numerous decisions that consider the implied limitations, the High Court has made no reference to a third limitation that restricts the Commonwealth Parliament's power to impose criminal sanctions on the States. It is submitted, therefore, that such a limitation is unlikely to be endorsed in the future.

How the implied limitations will affect the wide range of Commonwealth legislation that creates criminal offences will be determined by the courts on an individual basis. However, it is submitted that neither of the implied limitations is likely to invalidate most 'public welfare offences'. Commonwealth laws that utilise criminal sanctions are generally non-discriminatory in application and although they may regulate aspects of the physical and cultural environment in which the organs of state government function, they are unlikely to 'destroy or curtail the continued existence of the states or their capacity to function'.[55] In the event that legislation is found to be invalid, two aspects of the implied limitation are relevant in the current context. Firstly, the protection provided by the implied limitations is not limited to those instrumentalities entitled to the shield of the Crown, but are extended to agents of the State not normally entitled to the Crown's protection. Statutory authorities invested with the responsibility of conducting statutory functions in the public interest are protected.[56] Nor is the protection limited to the performance of 'governmental functions', rather it extends to the 'trading functions' undertaken by governments.[57] Therefore, a wide range of statutory authorities and activities would be protected against the operation of a Commonwealth

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Australia's argument that the law was invalid as it imposed a greater burden upon that State than any other State. The protection extends to State agencies, see: *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 682-683 and *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 22.

54 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 66 per Rich J, and at 74 per Starke J. Latham CJ at 56, 60 and Dixon J at 82 also clearly indicated that the Commonwealth could not exercise legislative power so as to destroy or curtail the existence of the States (see *Re Australian Education Union: Ex parte Victoria* (1995) 184 CLR 188 at 227). Although cited with approval by the High Court in *Victoria v The Commonwealth* (1971) 122 CLR 353 at 390-391, 410-411, 424; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 139-140, 213-215, 280-281; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 191-192, 216, 225-226; *Re Lee; Ex parte Harper* (1986) 160 CLR 430 at 453; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 525, 547; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 160 at 164, 244 and *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 481, it was not until the 1995 decision of *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 that the principle was applied by the Court.

55 *Re Australia Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 231. See, Comans, P. and Davidson, I. 'The Application of Environmental Laws to the Crown - a

criminal provision that breached either of the implied limitations. Secondly, in circumstances where Commonwealth legislation is found to discriminate against the States the relevant provisions or indeed the Act in its entirety will be invalid.[58] By contrast, if an Act is held to impair the governmental functions of the State and the State's capacity to function as a government, the offending provisions will remain operative as against the general community but unenforceable in its application to the States.[59] Therefore, any Commonwealth 'public welfare offence' provision that is in breach of the second implied limitation, would continue to be enforceable against all but the Crown in right of the States.

2. A State's Capacity To Bind Other States

The Crown in right of a State can impose liability upon the Crown in right of another State.[60] As identified above, however, the High Court has stated that the federal structure imposes some territorial limitations upon the legislative power of the States. Although the precise nature of the territorial limitations is unknown, the courts have accepted that States possess the capacity to impose criminal sanctions on the Crown in right of another State for activities that occur within the enacting state's borders.[61] Conversely, it is unlikely that States could enact a valid law that imposes liability on another State for activities that occur within the borders of that other State, or within the borders of a third State. It is also submitted that as the implied limitations on the application of Commonwealth's laws to States are based on the nature of the federal system, the limitations should have inter-State application. The implied

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Thorny Issue' (1992) 2 *AELN*, 37 at 38.

56 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192.

57 *Re Australia Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 230.

58 See *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 where it was held that s48 of the *Banking Act 1945* (Cth) was invalid, and *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, where Gibbs CJ, Mason, Wilson and Dawson JJ held that the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth) was invalid in its entirety. Deane J upheld only ss6(1) and 7 while Brennan J upheld the entire Act except for s6(2).

59 See *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, where the Commonwealth Industrial Relations Commission was prevented from making awards pursuant to the *Industrial Relations Act 1988* (Cth) to the extent that it breached the implied limitation on the Commonwealth's legislative authority.

60 See *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 518-519; *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 at 595; *State Authorities Superannuation Board v Commissioner of State Taxation* (WA) (1997) 189 CLR 253 at 270-271, 288-289, 293 and *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 506.

61 See *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 518-519; *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 at 595; *State Authorities*

limitation against discrimination would prevent a State from applying legislation that imposed criminal liability on the instrumentalities of another State or States only. The second implied limitation is unlikely to have any practical application, as a law that impairs the governmental functions of another State and its capacity to function as a government is likely to be void for lack of territorial nexus to the enacting State. There is, however, limited judicial consideration of the application of the implied limitations to the legislative power of the States. In *Re Residential Tenancies Tribunal*[62], Brennan CJ rejected the application of the implied limitations to the States' capacity to bind other States.[63] By way of contrast, Kirby J accepted that the implied limitations apply to the legislative capacity of the States, at least in their capacity to bind the Commonwealth.[64] The logical extension of Kirby J's decision is that the implied limitations also have an inter-State application. The other members of the High Court did not address the issue. Therefore, in the absence of authority the application of the limitations to the States' legislative capacity remains unsettled.

3. States' Capacity To Bind The Commonwealth

The most vexing of the federal related questions is whether the States can enact criminal provisions that bind the Commonwealth. As stated above, the majority in *Engineers*[65] rejected the previously accepted principle that neither the Commonwealth nor the States could enact legislation that controlled the other. The High Court was asked to decide whether the dispute settlement regime established by the *Conciliation and Arbitration Act 1904* (Cth) applied to State governments as employers. The Court held that the States were subject to the Act. The *ratio* of the case is restricted to the Commonwealth's capacity to bind the States, however, the majority of Knox CJ, Isaacs, Rich and Starke JJ stated that the principle they

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Superannuation Board v Commissioner of State Taxation (WA) (1997) 189 CLR 253 at 270-271, 288-289, 293 and *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 506.

62 *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

63 (1997) 190 CLR 410 at 425-426.

64 (1997) 190 CLR 410 at 507-508.

65 (1920) 28 CLR 129.

66 (1920) 28 CLR 129 at 155. The *Engineers* decision was followed by *Pirrie v McFarlane* (1925) 36 CLR 170, *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 and *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 where, on each occasion, the majority of the High Court held that the relevant State legislation applied to Commonwealth agents or instrumentalities.

67 See Dixon J's dissenting judgement in *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 529-530, Fullagar J's judgement (with whom Dixon CJ agreed) in *Commonwealth v Bogle* (1953) 89 CLR 229 at 259-260; Fullagar J's judgement (with whom Dixon CJ and Kitto J agreed) in *Williams v Hursey* (1959) 103 CLR 30 at

applied to the Commonwealth also applied to the States.[66] In a series of decisions Sir Owen Dixon and Fullagar J challenged the principle that State governments possess the capacity to legislate so as to affect the Commonwealth.[67] This challenge to the orthodoxy of *Engineers*[68] culminated in the High Court's decision in *Commonwealth v Cigamatic*.[69]

Dixon CJ's judgement in *Cigamatic*[70], when read in conjunction with his Honour's earlier dissenting judgement in *Uther v Federal Commissioner of Taxation*[71] and Fullager J's *obiter* statement in *Commonwealth v Bogle*[72], forms the basis of what is commonly referred to as the '*Cigamatic* doctrine'. The doctrine can be simply defined as the Commonwealth's immunity from State legislation.[73] The scope of the *Cigamatic* doctrine has been the subject of considerable academic and judicial debate.[74] For 35 years following the *Cigamatic*[75]decision the High Court failed to address the question as to the scope of the immunity, despite the numerous opportunity to clarify the doctrine.[76] This lead

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69 and Dixon CJ's judgement (with whom Kitto, Taylor and Owen JJ agreed) in *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 55-56. For a detailed analysis of the High Court's decisions prior to *Commonwealth v Cigamatic* (1962) 108 CLR 372, see Meagher, R. and Gummow, W. 'Sir Owen Dixon's Heresy' (1980) 54 *ALJ* 25; Zines, L. 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *FI. Rev.* 221; Zines, L. *The High Court and the Constitution*. 4th ed. Sydney: Butterworths, 1997, 353-366 and Mescher, I. 'Wither Commonwealth Immunity?' (1998) 17 *ABR* 23.

68 (1920) 28 CLR 129.

69 (1962) 108 CLR 372.

70 (1962) 108 CLR 372, Kitto, Menzies, Windeyer and Owen JJ in agreement.

71 (1947) 74 CLR 508.

72 (1953) 89 CLR 229 at 259-260.

73 A justification for the Commonwealth's immunity from State laws can be found in Dixon J's judgement in *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 528-529 and in Fullagar J's judgement in *Commonwealth v Bogle* (1953) 89 CLR 229. For a critic of these arguments see *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at 504-506 per Kirby J and the joint judgement of Dawson, Toohey and Gaudron JJ at 446-447.

74 Commentators and the judiciary have postulated three approaches to the application of the *Cigamatic* doctrine (see Zines, L. *The High Court and the Constitution*. 4th ed. Sydney: Butterworths, 1997, 355 and Willheirm, E. 'Crown Immunity and Application of State Laws to the Commonwealth.' *Constitutional Law Forum*, August 1993, 7). See also Evans, G. 'Rethinking Commonwealth Immunity.' (1972) 8 *MULR* 521 at 522; Howard, C. *Australian Federal Constitutional Law*. 3rd ed. Sydney: Law Book Company Ltd., 1985, 201-205; Hanks, P. *Constitutional Law in Australia*. 2nd ed. Sydney: Butterworths, 1996, 248-251, Meagher, R. and Gummow, W. 'Sir Owen Dixon's Heresy' (1980) 54 *ALJ* 25 at 28-29 and Lumb, R. and Ryan, K. *The Constitution of the Commonwealth of Australia Annotated.* 4th ed. Sydney: Butterworths, 1986, 352-353.

75 (1962) 108 CLR 372.

76 See for example *Maguire v Simpson* (1977) 139 CLR 362, *Commonwealth v Evans Deakin Industries* (1986) 161 CLR 254, *Dao v Australian Postal Commission* (1987) 162 CLR 317, *Breavington v Godelman* (1989) 169 CLR 41 and *Council of the*

Aitken to describe the High Court as demonstrating an 'unbecoming timidity' in its failure to explore the scope of the doctrine.[77] The State appellate courts, on a number of occasions, endorsed the argument that the Commonwealth enjoys 'total' immunity or 'general' immunity from State legislation.[78] Although critical of the Court's decision in *Cigamatic*[79], Constitutional Law commentators such as Zines, Hanks and others agree that Sir Owen Dixon had re-established the principle that the Commonwealth had a general immunity from state legislation.[80] At a governmental level, the Federal Attorney-General's Department traditionally took the view that the States lack any capacity to bind the Commonwealth.[81] The acceptance of the total immunity principle would prevent the application of State criminal provisions to the Commonwealth.

The effect of the *Cigamatic* doctrine has been ameliorated by a number of High Court decisions that apply s64 of the *Judiciary Act 1903* (Cth).[82] The effect of s64 is that, 'as nearly as possible', the entire body of law by which the rights of parties to a suit are governed apply to the Commonwealth and the States as though they were ordinary subjects.[83] The High Court's broad interpretation of s64 means that State laws may

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Municipality of Botany v Federal Airports Corporation (1992) 175 CLR 453 at 460, 470.

77 Aitken, L. 'The Liability of the Commonwealth under Section 75(iii) and Related Questions' (1992) 15 *NSWLJ* 482.

78 See *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 at 593-599 per McHugh J; *Kangaroo Point East Association Inc v Balkin* (1993) 119 ALR 305 at 310 per Macrossan CJ and Davies JA; *Whiteford v Commonwealth* (1995) 132 ALR 393 at 400 per Kirby P. Contrast the above judgements with that of Wilcox J (with whom Northrop J agreed) in the Federal Court decision of *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231 at 240.

74 (1962) 108 CLR 372.

80 See Zines, L. *The High Court and the Constitution*. 4th ed. Sydney: Butterworths, 1997, ch 14; Howard, C. *Australian Federal Constitutional Law*. 3rd ed. Sydney: The Law Book Company Ltd., 1985, 201-205; Hanks, P. *Constitutional Law in Australia*. 2nd ed. Sydney: Butterworths, 1996, 248-251 and Meagher, R and Gummow, W. 'Sir Owen Dixon's Heresy' (1980) 54 *ALJ* 25 at 29.

81 Willheirm, E. 'Crown Immunity and Application of State Laws to the Commonwealth' *Constitutional Law Forum*, August 1993, 8. The paper was presented at the Forum on behalf of the Federal Attorney-General's Department.

82 See *Maguire v Simpson* (1977) 139 CLR 362 where the High Court held that s64 applies to both procedural and substantive rights so that on the facts before the Court the *Limitation Act 1969* (NSW) applied to the Commonwealth.

83 See Aitken, L. 'The Liability of the Commonwealth under Section 75(iii) and Related Questions' (1992) 15 *NSWLJ* 482, where the author argues that an important question such as the application of laws to the Commonwealth should have a constitutional base. Zines, L. *The High Court and the Constitution*. 4th ed. Sydney: Butterworths, 1997, 368, argues that in light of the High Court's decision in *Maguire v Simpson* (1977) 139 CLR 362, the case of *Cigamatic* (1962) 108 CLR 372 was wrongly decided.

84 In *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 the majority rejected the argument that s64 was limited to liability for a claim in contract or tort. The justices also rejected the argument that s64 does not begin to operate until such

bind the Commonwealth even though such laws do not bind the State.[84] It also means, that even if a State statute is expressly excluded from applying to the Commonwealth, s64 applies the statute to the Commonwealth.[85] There are, however, a number of limitations on the application of s64.[86] The most important limitation, for the purpose of this paper, is that s64 does not operate so as to subject the Commonwealth to criminal proceedings for a breach of State legislation.[87] Section 64 applies only to civil proceedings, as the word 'suit' is defined in s2 of the *Judiciary Act 1903* (Cth) to include 'any action or original proceedings between parties'.[88]

In 1997 the High Court was once again asked to address the scope of the *Cigamatic* doctrine in *Re Residential Tenancies Tribunal; Ex Parte Defence Housing Authority*.[89] The High Court was required to determine the extent to which the Defence Housing Authority (DHA), a Commonwealth statutory body established pursuant to s4 of the

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time as an action is brought before a court. Section 64 has in effect provided that there is a dispute that can result in a suit before a court.

85 Willheirm, E. 'Crown Immunity and Application of State Laws to the Commonwealth' *Constitutional Law Forum*, August 1993, 13.

86 The High Court has interpreted the words 'as nearly as possible' in s64 to mean that the section has no application in circumstances where the Crown is 'performing a function peculiar to government'. See *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 264-265. In the absence of authority as to what are 'functions peculiar to government' commentators have argued that they are likely to be limited to a very narrow category of activities. See Zines, L. *The High Court and the Constitution*. 4th ed. Sydney: Butterworths, 1997, 371; Aitken, L. 'The Liability of the Commonwealth under Section 75(iii) and Related Questions' (1992) 15 *NSWLJ* 482, 508 and Comans, P. and Davidson I., 'The Application of Environmental Laws to the Crown - a Thorny Issue' (1992) 2 *AELN* 37, at 38. An example may include acts performed by the armed forces in the course of operations against an enemy. Section 64 does not have the effect of applying State laws in circumstances where their application is inconsistent with validly enacted provisions of the Commonwealth. See *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 and *Dao v Australian Postal Commission* (1987) 162 CLR 317. In circumstances of an inconsistency between State and Commonwealth laws, s109 of the Constitution states that the Commonwealth laws shall prevail. Therefore, if the Commonwealth enacts a legislative scheme which is a comprehensive and exclusive code, any State laws that apply to the scheme will be invalid by virtue of s109. Six members of the High Court in *Re Residential Tenancies Tribunal* stated by way of *obiter* that s64 applies only to suits that can be brought before a court of law. Section 64 does not have the effect of subjecting the Commonwealth to the jurisdiction of tribunals or other quasi-judicial bodies. See *Re Residential Tenancies Tribunal; Ex Parte Defence Housing Authority* (1997) 190 CLR 410 at 448 per Dawson, Toohey and Gaudron JJ, at 460-461 per McHugh J, at 474-475 per Gummow J and at 511 per Kirby J.

87 See, Zines, L. *The High Court and the Constitution*. 4th ed. Sydney: Butterworths, 1997, 371-372; Willheirm, E. 'Crown Immunity and Application of State Laws to the Commonwealth' *Constitutional Law Forum*, August 1993, 13 and Hanks, P. *Constitutional Law in Australia*. 2nd ed. Sydney: Butterworths, 1996, 255.

88 The definition of 'suit' is contrasted with the definition of 'cause' in s2 which 'includes any suit and also includes criminal proceedings'. The limitation was acknowledged in *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 265 where the

Defence Housing Authority Act 1987 (Cth), was subject to the *Residential Tenancies Act 1987* (NSW). In finding against the DHA the majority of the Court held that there is nothing in *Cigamatic*[90], or related cases, that supports the proposition that the Crown or its agents in right of the Commonwealth enjoy any special immunity from the operation of State or Federal laws of general application.[91] However, the decision does not expunge Dixon CJ's 'heresy' from the Court's jurisprudence as Kirby J was the only member of the High Court prepared to jettison the *Cigamatic* implied immunity doctrine.[92] Dawson, Toohey and Gaudron JJ, in a joint judgement, draw a distinction between the 'capacities of the Crown' and the 'exercise of those capacities'.[93] The justices held that the Crown in right of the States has no power to modify the Commonwealth's executive capacities; its 'powers, privileges and immunities'.[94] State legislation will apply to the Commonwealth if it is of general application and merely regulates the exercise of the Commonwealth's capacities in relation to activities that it carries out in common with other citizens.[95]

The rejection of the total immunity approach leaves open the possibility that the Crown in right of the States can subject the Commonwealth to criminal prosecution. It can be implied from the joint judgment in *Re Residential Tenancies Tribunal*[96], that the *Cigamatic* doctrine does not make immune the Crown in right of the Commonwealth from State criminal offences. The justices evoke the rule of law and the High Court's decision in *A v Hayden*[97] to support the proposition that the Crown, in right of a State and the Commonwealth or their agents, do not 'enjoy any special immunity from the operation of laws of general application'.[98] As *Hayden's*[99] case involved the prosecution of Federal

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majority stated that the Commonwealth may not be subject to a penalty for a breach of its obligations prescribed by the *Factories, Shop and Industries Act 1962* (NSW).

89 (1997) 190 CLR 410.

90 (1962) 108 CLR 372.

91 (1997) 190 CLR 410 at 444 per Dawson, Toohey and Gaudron JJ. Brennan J delivered a separate judgment in which he substantially agreed with the joint judgment. McHugh J and Gummow J, in separate judgments, held that the Defence Housing Authority is not so closely related to any Department of the Commonwealth to be entitled to the protection of the Crown

92 (1997) 190 CLR 410 at 504-509.

93 (1997) 190 CLR 410 at 438-439, Brennan J at 424-425. McHugh J and Gummow J, in separate judgements, criticise the distinction made between the Crown's capacities and the exercise of those capacities (at 454-455 and at 472). For further criticism of the distinction see Zines, L. 'The Nature of the Commonwealth' (1998) 20 *Adel LR*, 83 and Gladman, M. *'Re The Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410: States' Powers to Bind the Commonwealth' (1999) 27 *FLRev* 151.

94 (1997) 190 CLR 410 at 438.

95 (1997) 190 CLR 410 at 445-446.

96 *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

agents, it can be concluded that the reference to 'laws of general application' applies to both civil and criminal laws. By contrast, Brennan CJ stated, by way of *obiter*, that 'it is meaningless to speak of the Crown being "bound" by State criminal laws which either prescribe duties to be performed under penalty or prohibit conduct of a prescribed kind'. The Commonwealth cannot, therefore, be made amenable to prosecution for a breach of State laws.[100] The argument that the Crown in right of a State has the capacity to subject the Crown in right of the Commonwealth to criminal liability has been strengthened by the High Court's recent decision in *Telstra Corporation v Worthing*.[101] Although the case did not involve criminal proceedings, the Court stated in reference to a New South Wales statute that it would 'require the clearest indication of a legislative purpose to subject the Commonwealth to the penal provisions of the Act.'[102]

It is submitted that there are strong policy reasons why the Commonwealth should be amenable to State criminal laws. Firstly, as stated in the joint judgment, the principle of equality before the law requires that the Commonwealth executive should not enjoy any special immunity. Where individuals, corporations and other manifestation of the Crown are subject to the criminal provisions of an Act, why should the Commonwealth be exempt? Such an exemption would reduce the stigma and thereby be the deterrent factor associated with prosecution. Secondly, the reasons identified by Latham CJ in *Cain v Doyle*[103] as to why the Crown should not be amenable to prosecution have no or little application to inter-governmental prosecutions.[104] Finally, there may be little practical benefit to the Commonwealth's protection from prosecution. In circumstances where an Act binds the Crown, the Commonwealth may be subject to civil action for a continuing or anticipated breach of the criminal provisions of a State Act.[105] The Commonwealth may be civilly liable either by virtue of s64 of the *Judiciary Act 1903* (Cth) or because such an action is consistent with the *Cigamatic* doctrine as stated in *Re Residential Tenancies Tribunal*.[106] Furthermore, as argued in Part III of this paper, any Commonwealth immunity from prosecution does not extend to protect Commonwealth employees from prosecution for breaches of State laws. Therefore, the effect of Commonwealth immunity may be to shift the focus

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97 (1984) 156 CLR 532.
98 (1997) 190 CLR 410 at 444.
99 (1984) 156 CLR 532.
100 (1997) 190 CLR 410 at 428. See also Gummow J at 472. For the counter argument, that the Court rejected the proposition that the Commonwealth can be made subject to criminal proceedings, see Zines, L. 'The Nature of the Commonwealth' (1998) 20 *Adel LR* 83.
101 (1999) 161 ALR 489.
102 (1999) 161 ALR 489 at 496.
103 (1946) 72 CLR 409 at 418-419.

of retribution from the Commonwealth executive to a Commonwealth employee. In such circumstances, the futility of the immunity is demonstrated by the fact that the Commonwealth is likely to indemnify its employees and pay the fine imposed for the breach of the State laws.

PART II: THE PRESUMPTIONS

THE GENERAL AND SPECIFIC PRESUMPTIONS

An important right of the Crown is its presumptive immunity from parliamentary legislation. While the Parliament may make its laws applicable to the Crown, there is a general presumption that legislation does not bind the Crown. As with the principle that the 'Crown can do no wrong', the presumption is based on the Crown's connection with the Monarch. In the 19th century decision of *Attorney-General v Donaldson*[107] Alderson B stated that 'it is inferred prima facie that the law made by the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown'.[108] As expressed, the legislative presumption is general in application. It applies to all the provisions of an Act. Some members of the High Court have recently made statements in support of the argument that the Crown is not only entitled to the benefit of the general presumption, but also to a second, more specific, presumption that the Crown is not amenable to prosecution.[109]

At the turn of the 20th century, both English and Australian courts handed down decisions predicated on the presumption that the Crown is immune from prosecution.[110] *Roberts v Ahern*[111], was the first High Court decision to consider the prosecution of the Crown. The Court held that since the *Police Offences Act 1890* (Vic) made no reference to the Crown, the Crown and its servants were not amenable to prosecution for an offence prescribed by the Act. The facts of the case were such that it was not necessary for the Court to consider whether the criminal provisions of the Act were subject to a specific legislative presumption. The Court was able to simply apply the general presumption to find that the Crown was not bound. In *Cain v Doyle*[112] the majority accepted that there is a strong presumption against the

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104 *Cain v Doyle* (1946) 72 CLR 409.

105 See below Part II.

106 *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

107 (1842) 152 ER 406 at 409. For an analysis of the history of Crown immunity see Street, H. 'The Effects of Statutes Upon the Rights and Liabilities of the Crown' (1947-1948) 7 *UTorontoLJ,* 357.

108 Alderson B did not deal explicitly with criminal statutes.

109 See: *Jacobsen v Rogers* (1995) 182 CLR 572 at 587; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1997) 189 CLR 269 at 270 and *Telstra v Worthing* (1999) 161 ALR 489 at 498.

Crown being amenable to prosecution. The presumption can only be displaced by the 'clearest expression of [legislative] intention'.[113] The Court did not explain the scope or nature of the presumption. The question, as to whether the presumption is simply part of the more general presumption that an Act does not bind the Crown or a separate and independent presumption, remained unanswered. In other common law jurisdictions the courts treat the presumption, in favour of Crown immunity from prosecution, as a mere subset of the more general presumption.[114] In *Southland Acclimatisation Society v Anderson*[115] Quilliam J, of the New Zealand Supreme Court, stated that the specific presumption is 'perhaps no more than an extension of the principle that the Crown is never bound, even to civil liability, except where that is made entirely clear.'[116]

Commentators are divided as to whether the specific presumption is a separate, independent principle or should be treated as merely the microform of the general rule. Hogg and Street fail to distinguish between the presumptions whilst McNairn argues that the courts should not make such a distinction.[117] Selway and the New South Wales Law Reform Commission, however, have argued that there are two independent presumptions.[118]

Prior to the High Court's decision in *Bropho v Western Australia*[119], (*Bropho's* case) the Australian courts had applied a rigid test in the application of the general presumption. The Privy Council in *Province of Bombay v Municipal Corporation of Bombay*[120] stated that the rigid test was derived from the Latin maxim ''*Roy n'est lie par ascun statute si il ne soit expressement nonsme*'', (no statute binds the Crown unless the Crown is expressly named therein).[121] The only exception to the rule was that the Crown could be bound by 'necessary implication'. The test developed by the courts to determine if the statute exhibited the

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110 *Cooper v Hawkins* [1904] 2 KB 164.
111 (1904) 1 CLR 406 at 417-418.
112 (1946) 72 CLR 409.
113 (1946) 72 CLR 409 at 424-425.
114 See *R v Eldorado Nuclear Ltd.* (1983) 4 DLR (4th) 193 at 198-203 and *Canadian Broadcasting Cooperation v The Queen* (1983) 145 DLR (3d) 42 at 48.
115 [1978] 1 NZLR 838.
116 [1978] 1 NZLR 838 at 841.
117 Hogg, P. *Liability of the Crown*. 2nd ed. Sydney: The Law Book Co Ltd., 1989, 234; Street, H. 'The Effects of Statutes Upon the Rights and Liabilities of the Crown' (1947-1948) 7 *UTorontoLJ*, 357 and McNairn, C. *Governmental and Intergovernmental Immunity in Australia and Canada*. Canberra: Australian National University Press, 1978, 88-90.
118 See: New South Wales Law Reform Commission, *Report of the Law Reform Commission on Proceedings By and Against the Crown.* (Report of the Law Reform Commission no 24, 1975) paras 14.15-14.16 and Selway, B. 'Proceedings Involving the

'necessary implication' was that the very terms of the statute must manifest a legislative intention to bind the Crown. An Act manifested such an intention where the purpose of the statute would be 'wholly frustrated' if the Crown were not bound.[122] However, in *Bropho's* case[123] the High Court rejected the Privy Council's rigid test as it applied to the general presumption. The majority adopted a test that enables the court to have regard to a wider range of material in an effort to identify legislative intent.[124] As stated above, Dixon J in *Cain v Doyle*[125] held that it would require the 'clearest expression of [legislative] intention' before a court would find that the Crown was amenable to prosecution for a breach of an Act. It is clear that the test applied by Dixon J is inconsistent with the test applied by the High Court in *Bropho's* case.[126]

In *SPCC v Electricity Commission*[127] the New South Wales Land and Environment Court was asked to decide whether the more flexible test adopted in *Bropho's* case[128] should be applied when the Crown is being prosecuted.[129] Bannon J referred to the judgment of Dixon J in *Cain v Doyle*[130] and went on to state that the High Court in *Bropho's* case[131] adopted a more flexible approach to the presumption. His Honour applied the flexible test advanced in *Bropho's* case[132] and found that the Electricity Commission was liable to penalty for a breach of the *Clean Waters Act 1970* (NSW).[133]

State Crown in "State" Jurisdiction' (1992) 14 (6) *LSB(SA)*, 27 at 29.

119 (1990) 171 CLR 1.

120 [1947] AC 58.

121 [1947] AC 58 at 61.

122 [1947] AC 58 at 61. The principle set out in *Province of Bombay Municipal Corporation of Bombay* [1947] AC 58 was accepted by the High Court in *Commonwealth v Rhind* (1966) 119 CLR 584 at 598 per Barwick CJ (with whom McTiernan J agreed) and at 606 per Menzies J (Taylor and Owen JJ made no reference to the principle); *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 at 167 per Wilson J (with whom Gibbs and Mason JJ agreed); *Bradken Consolidated Ltd v Broken Hill Pty Co. Ltd* (1979) 145 CLR 107 at 126 per Gibbs ACJ, at 127 per Stephen J and at 134-135 per Mason and Jacobs JJ and *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172 at 187 per Barwick CJ, at 199-200 per Gibbs J, at 221-222 per Stephen J and at 240 per Aitkin J.

123 (1990) 171 CLR 1.

124 (1990) 171 CLR 1 at 21-22.

125 (1946) 72 CLR 409.

126 (1990) 171 CLR 1 at 21-22.

127 (unreported), NSW Land and Environment Court (11 October 1991).

128 (1990) 171 CLR 1.

129 *SPCC v Electricity Commission* (unreported), NSW Land and Environment Court (11 October 1991) is the only case brought before the New South Wales Land and Environment Court in which Crown immunity has been raised.

130 (1946) 72 CLR 409.

131 (1990) 171 CLR 1.

132 (1990) 171 CLR 1.

133 Section 16 of the *Clean Waters Act 1970* (NSW) makes it an offence to 'pollute any waters'. Section 3 of the Act stated that 'This Act binds the Crown'. The Act has since been amended. On appeal to the New South Wales Court of Criminal Appeal the issue

Bannon J's decision is based on the supposition that the specific presumption is indistinguishable from the general presumption.[134] The approach adopted by Bannon J, however, is not supported by the majority's judgment in *Bropho's* case[135] and is not consistent with recent High Court decisions. *Bropho's* case[136] was concerned with an application for a declaration as to the status of certain land and for an injunction restraining the State of Western Australia and the Western Australian Development Corporation[137] from breaching s17 of the *Aboriginal Heritage Act 1972* (WA). As the appellant had sought a civil remedy, it was not necessary to, and the High Court did not, decide whether the criminal sanctions of s17 could be enforced against the Crown.[138] In *Jacobsen v Rogers*[139] and *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[140] (*SASB*) the High Court made statements, by way of *obiter*, that the presumption that the Crown is not amenable to prosecution should be treated as a separate legal principle from the presumption that an Act does not bind the Crown. The majority in *SASB*[141] stated that:

> 'An intention that the Crown should not be bound by that provision (an offence provision) is manifested, not by the application of a presumption of the kind discussed in *Bropho*, but by a *different presumption* based upon the inherent unlikelihood that the legislature should seek to render the Crown liable to a criminal penalty (italics added).'[142]

Although strictly *dicta*, the statement clearly supports the argument that there are two independent legal presumptions. The general presumption relates to the application of legislation to the Crown generally, while the specific presumption is concerned with the Crown's liability to prosecution for a breach of an Act.

Based on the High Court's acceptance that there are two independent presumptions, it is argued below that, although there are similarities between the two presumptions, there are also some important distinctions as to how they will be applied. Most notably, the ease with which the presumptions are displaced will differ between the two

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of the Crown's immunity from prosecution was not argued (see *Electricity Commission v EPA* (1992) 28 NSWLR 494).

134 See *Cain v Doyle* (1946) 72 CLR 409 at 424.

135 (1990) 171 CLR 1.

136 (1990) 171 CLR 1.

137 The Western Australian Development Corporation was held to be an agent of the Crown. See, *Bropho v Western Australia* (1990) 171 CLR 1 at 11.

138 (1990) 171 CLR 1 at 25.

139 (1995) 182 CLR 572 at 587.

140 (1997) 189 CLR 253.

141 (1997) 189 CLR 253.

142 (1997) 189 CLR 253 at 270. The court held that although the *Stamp Act 1921* (WA)

presumptions. As the strength of the presumption that the Crown is not subject to criminal prosecution has not been diffused by the High Court's decision in *Bropho's* case[143] it follows that the New South Wales Land and Environment Court decision of *SPCC v Electricity Commission*[144] was incorrectly decided. It is also argued that whilst the general presumption protects the Crown from all aspects of an Act, the specific presumption will not necessarily have the same effect and may only protect the Crown from the penal application of offence provisions. It does not protect the Crown from the directive (civil) application of those same offence provisions. Finally, as discussed in Part III, the general presumption applies to Crown employees acting in their official capacity whilst the specific presumption does not offer any protection to Crown employees.

The Crown in Federal System

In a federation it is necessary to ascertain whether the presumption, that the Crown is immune from prosecution, has inter-jurisdictional application. A narrow view of the presumption would mean that only the Crown that is exercising jurisdiction is immune. A broad view would mean that the Crown in right of each of the States and the Commonwealth is presumed to be protected from prosecution for an offence against its own criminal laws and from the criminal laws of other jurisdictions. Hogg argues that the narrow approach should be applied to the general presumption as it limits the scope of the immunity and recognises that each government is a separate legal entity.[145] The Australian and Canadian courts have favoured the broad application of the immunity.[146]

The inter-jurisdictional application of the general presumption has been held to apply regardless of whether it is a State[147] or the Commonwealth[148] that is the enacting legislature. In *Bradken*[149] Gibbs ACJ identified the rationale for the inter-jurisdictional application of the

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bound the Crown, the Crown was not subject to criminal prosecution under the Act.

143 (1990) 171 CLR 1.

144 (unreported), NSW Land and Environment Court, (11 October 1991).

145 Hogg, P. *Liability of the Crown*. 2nd ed. Sydney: The Law Book Co Ltd., 1989, 239-240. Professor Hogg's arguments are equally applicable to the specific presumption. See McNaire, C. 'Comment' (1978) 56 *CanBRev*, 145 at 152 and McNaire, C. *Governmental and Intergovernmental Immunity in Australia and Canada*. Canberra: Australian National University Press, 1978, 23-29 for arguments in favour of the immunity having an inter-jurisdictional application.

146 See *Alberta Government Telephones v Canadian Radio-television and Telecommunications* (1989) 61 DLR (4th) 193 at 224-228.

147 *Alberta Government Telephones v Canadian Radio-television and Telecommunications* (1989) 61 DLR (4th) 193 at 224-228. See also *The Commonwealth v Rhind* (1969) 119 CLR 584 at 598-599 per Barwick CJ with whom McTiernan J agreed, and at 606-607 per Menzies J.

148 *Jacobsen v Rogers* (1995) 182 CLR 572 at 585.

149 *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107 at 116-112

presumption in the following terms:

> 'Legislation of the Commonwealth may have a very different effect when applied to the government of a State from that which it has in its application to ordinary citizens. It seems only prudent to require that laws of the Parliament itself should not be held to bind the States when the Parliament itself has not directed its attention to the question whether they should do so.'[150]

Whilst it is established that the broad view applies to the general presumption, until recently it was by no means certain that it also applies to the specific presumption. An argument against the acceptance of the broad view is that the reasons given in *Cain v Doyle*[151] for the Crown's specific presumption do not have the same weight when applied to non-enacting manifestations of the Crown. A fine imposed on a different manifestation of the Crown would not simply involve a payment from consolidated revenue to consolidated revenue of the same government; the power to remit a fine is at the discretion of a government with a different legal personality; and the Crown could invest a court of summary jurisdiction with the authority to hear matters brought against the Crown in its other capacities. However in *Telstra Corporation v Worthing*[152] the High Court applied the specific presumption in an inter-jurisdictional context.[153]

Legislative Rebuttal of the Specific Presumption

There remains uncertainty as to how the presumption against criminal prosecution of the Crown can be displaced. In *Cain v Doyle*[154], Dixon J held that it would require the 'clearest expression of [legislative] intention' to bind the Crown.[155] In *Jacobsen v Rogers*[156] the majority of the High Court stated that the 'Crown itself may not be subjected to criminal liability, save in the most exceptional circumstances'.[157] Unfortunately, the High Court did not indicate what constitutes 'exceptional circumstances'. It is submitted that the minimum required is an explicit legislative expression that the Crown is subject to criminal

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per Gibbs ACJ, at 127-128 per Stephen J, and at 135-136 per Mason and Jacobs JJ (Murphy J at 140 dissented).

150 (1979) 145 CLR 107 at 123.

151 (1946) 72 CLR 409.

152 (1999) 161 ALR 489 at 496.

153 See also *Jacobsen v Rogers* (1995) 182 CLR 572 at 585 and *State Authorities Superannuation Board v Commissioner of State Taxation* (1997) 189 CLR 253 at 270, where the High Court by way of *obiter* supported that application of the broad view to the specific presumption.

154 (1946) 72 CLR 409.

155 (1946) 72 CLR 409 at 425. See also *Telstra v Worthing* (1999) 161 ALR 489 at 498.

156 (1995) 182 CLR 572.

157 (1995) 182 CLR 572 at 587. See also *State Super v Commissioner of State Taxation*

prosecution. Clearly, if legislation is silent as to its application to the Crown, or if it expressly exempts the Crown from its operation, the Crown will not be criminally liable for an offence against the Act.[158] The principle criminal law statutes of the States and the Commonwealth, such as the *Crimes Act 1900* (NSW), *Crimes Act 1958* (Vic), *Criminal Code 1899* (Qld) and the *Crimes Act 1914* (Cth) are silent as to their application to the Crown and, therefore, do not bind the Crown.[159] The interpretation Acts of South Australia and the Capital Territory expressly protect the Crown from prosecution for a breach of an Act.[160]

What is the effect of provisions that partly protect or bind the Crown? Prior to *Bropho's* case[161] the courts had decided that a provision shielding the Crown from only part of a statute was enacted *ex abundanti cautela* and did not give rise to a contextual argument that the non-specified sections bound the Crown.[162] The same principle was applied where an Act shielded particular branches of the Crown.[163] Such disregard for a contextual analysis is inconsistent with the principle identified in *Bropho's* case[164] that the court's paramount function is to give effect to the intention of parliament. In *SASB*[165] the majority of the High Court referred to a provision of the *Stamp Act 1921* (WA), which exempts the Crown in right of Western Australia, and stated that:

> '[B]y the exemptions which it grants in favour of the Crown (in right of Western Australia), the *Stamp Act* manifests a clear intention that the Crown should be otherwise bound by its provisions, save to the extent that it creates a criminal offence in relation to the non-payment of duty ... If a legislative intent that the Crown should be bound does appear from the provisions of a statute then it should be given effect. Apart from the specific exemptions provided, and to a large extent because of them, such an intent appears, in our view, from the provisions of the *Stamp Act*. ... Different considerations apply in respect of the offence created by s39(1a) of the *Stamp Act*.'[166]

Clearly the principle, as it relates to the general presumption, has not survived the decision in *Bropho's* case.[167] However, as indicated by the above passage, the need for an explicit legislative expression to rebut the specific presumptions means that the principle continues to

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(1996) 140 ALR 129 at 136.

158 See *Telstra v Worthing* (1999) 161 ALR 489 at 496.

159 The *Criminal Code Act 1913* (WA), *Criminal Code Act 1994* (NT), *Criminal Code Act 1924* (Tas), *Crimes Act 1900* (ACT) and the *Criminal Law Consolidation Act 1935* (SA) all fail to include provisions binding the Crown.

160 *Acts Interpretation Act 1915* (SA) s20(1) and the *Interpretation Act 1967* (ACT) s7(1).

161 (1990) 171 CLR 1.

162 See *Andrew v Rockell* [1934] NZLR 1056 at 1058.

163 See *Alberta Government Telephones v Canadian Radio-television* (1989) 61 DLR (4th) 193 at 234 and *Smithett v Blythe* (1830) 109 ER 876.

164 (1990) 171 CLR 1.

165 (1997) 189 CLR 253.

apply to that presumption. Therefore, a statutory declaration that the Crown is not bound by a specific criminal provision will not be interpreted to mean that the Crown should otherwise be criminally liable under the Act.

WORDS OF GENERAL APPLICATION

It is common for legislation to state that the Act binds the Crown or that it binds the State.[168] Although there is some support for the argument that such provisions are sufficient to subject the Crown to criminal prosecution, the weight of authority is against such an application.[169]

In *Cain v Doyle*[170] the Court was required to decide whether s10(1) of the *Re-establishment and Employment Act 1945* (Cth) subjected the Commonwealth to prosecution for an offence against the Act. The section stated that; 'in this Division unless the contrary intention appears - "employer" includes the Crown'.[171] The majority held that s10(1) did not displace the strong presumption that the Crown is immune from criminal liability.[172] Professor Hogg is critical of the majority's decision in *Cain v Doyle*.[173] He argues that if a statute binds the Crown by express words, then it should be safe to conclude that the Crown is also subject to the penal sanctions provided for by the Act.[174] This argument is not supported by recent statements of the High Court[175] or by decisions from other common law jurisdictions.[176] In

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166 (1997) 189 CLR 253 at 269-270.

167 (1990) 171 CLR 1.

168 See for example: *Fisheries Act 1994* (Qld) s10, *Environment Protection Act 1970* (Vic) s2, *Aboriginal Heritage Act 1988* (SA) s4, *Environmental Protection Act 1986* (WA) s4 and *Territory Parks and Wildlife Conservation Act 1993* (NT) s10.

169 See: *SPCC v Electricity Commission* (unreported), NSW Land and Environmental Court, (11 October 1991).

170 (1946) 72 CLR 409.

171 (1946) 72 CLR 409 at 418 per Latham CJ and at 424-425 per Dixon J, with whom Rich J agreed.

172 (1946) 72 CLR 409 at 432. Williams J, dissenting, held that the general words of s10(1) were sufficient to subject the Commonwealth as an employer to prosecution under s18(1) of the *Re-establishment and Employment Act 1945* (Cth). Starke J agreed with Williams J but concurred with the majority's decision.

173 (1946) 72 CLR 409.

174 Hogg, P. *Liability of the Crown*. 2nd ed. Sydney: The Law Book Co Ltd., 1989, 232-234. Bannon J in *SPCC v Electricity Commission* (unreported), NSW Land and Environment Court, 11 October 1991) adopted the approach propounded by Professor Hogg. As argued above however, Bannon J's decision is based on an incorrect interpretation of the majority's decision in *Bropho v Western Australia* (1990) 171 CLR 1. Other commentators disagree with Professor Hogg; see for example, Price, S. 'Crown Immunity on Trial - the Desirability and Practicability of Enforcing Statute Law Against the Crown' (1990) 20 *VUWLR*, 213 at 240.

175 See *Jacobsen v Rogers* (1995) 182 CLR 572 at 587 and *State Super v Commissioner of State Taxation* (1997) 189 CLR 253 at 269-270.

Southland Acclimatisation Society v Anderson[177] the New Zealand Supreme Court was asked to decide whether the Mines Department could be prosecuted for a breach of the *Water and Soil Consecration Act 1967* (NZ). Section 3 of the Act stated that '[t]his Act shall bind the Crown'.Quilliam J held that s3 did not provide a clear indication that the Crown was intended to be criminally liable under the Act.[178]

Recently enacted statutes commonly include a provision to the effect that the Act binds the 'State, and, as far as the legislative power of the Parliament permits, the Commonwealth and the other States'.[179] The courts have not yet considered whether this recently adopted form of the declaration discloses an intention to subject the Crown to criminal liability. It could be argued that the legislature has demonstrated an intention to bind the Crown in all possible respects, by binding the Crown in all its manifestations to the extent that State's legislative power permits. It seems unlikely, however, that such a provision would satisfy either Dixon J's test of 'clearest expression of intention' or constitute 'exceptional circumstances'. The recently adopted formulation simply clarifies the jurisdictional question as to an Act's application to non-enacting legislatures whilst at the same time acknowledging that the States lack full legislative competence over the Commonwealth.[180] Such provisions should not be interpreted as an attempt to bind the Crown in every possible manner.

General Provision on Specific Application

A small number of statutes use general words of application to bind the Crown to specific provisions of the Act.[181] Where one of the specific provisions creates an offence it could be argued that there is a clear intention to subject the Crown to criminal prosecution.[182] Similarly, if all or most of the operative provisions of an Act create offences or specify sentences there is also a strong argument that general words of

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176 See *Canadian Broadcasting Corp. v Attorney-General (Ont)* (1959) 16 DLR (2d) 609.

177 [1978] 1 NZLR 838.

178 *Southland Acclimatisation Society v Anderson* [1978] 1 NZLR 838 at 843 per Quilliam J.

179 The exact words used vary, see, for example, *Coastal Protection and Management Act 1995* (Qld) s14, *Occupational Health and Safety Act 1983* (NSW) s6, *Clean Air Act 1961* (NSW) s2A, *Dangerous Goods Act 1975* (NSW) s5A, *Prevention of Cruelty to Animals Act 1986* (Vic) s4, *Occupational Health and Safety Act 1985* (Vic) s5 and *Occupational Safety and Health Act 1984* (WA) s4(1). The Commonwealth provisions make no reference to lack of legislative power: see, for example, *National Parks and Wildlife Conservation Act 1975* (Cth) s5 and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s6.

180 See *Residential Tenancies Tribunal of New South Wales and others; Ex parte Housing Authority* (1997) 190 CLR 410 at 426 per Dawson, Toohey and Gaudron JJ.

application impose criminal liability on the Crown. The contrary argument is that any general provision will not be sufficiently strong to rebut the presumption, despite its specific reference to a provision that creates an offence or its location within a statute that primarily creates offences. The declaration that the Crown is bound would apply to subject the Crown to the directive aspects of the offence provisions, (see below) but would not subject the Crown to the penal aspects of the provisions.

WORDS NECESSARY TO SUBJECT THE CROWN TO PROSECUTION

As argued, most of the provisions found in legislation that purport to bind the Crown do not subject the Crown to criminal liability, therefore, it is necessary to determine what statutory form would be required to make the Crown amenable to prosecution. Clearly, in order to subject the Crown to criminal liability the legislature must satisfy the 'clearest expression of intention' test. This could be achieved by stating that the Crown is liable to be prosecuted for an offence against the Act, or by stating that certain manifestations of the Crown are liable to prosecution.

In a federal system it is important to establish what form of words is necessary to bind the Crown in all its manifestations. Provisions of general application to the effect that 'This Act binds the Crown' are insufficient to rebut the general presumption that the Crown in all its capacities is not bound by legislation.[183] It is submitted that the principle will also apply to the specific presumption. The legislature must specify which manifestation of the Crown it intends to make amenable to prosecution. A provision such as 'the Crown in right of the New South Wales, the Commonwealth and the other States and Territories shall be liable to criminal prosecution for an offence against this Act' indicates a clear intention to displace the presumption as it applies to all manifestations of the Crown. The incorporation of such a provision does not necessarily lead to the conclusion that the Crown, in all its capacities, would be bound. It merely leads to the constitutional question, detailed in Part I, as to the power of the various Federal legislatures to bind the Crown in its other capacities.

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181 See for example *Water Act 1989* (Vic) s5.

182 See *Water Act 1989* (Vic) s75.

183 See *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 11 per Latham CJ, at 26 per Dixon J, at 28 per McTiernan J and at 30 per Williams J; *Commonwealth v Bogle* (1951) 89 CLR 229 at 259 per Fullagar J with whom Dixon, Webb and Kitto JJ agreed and *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 262 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ. In New South Wales, *Interpretation Act 1987* (NSW) s13(b), and in Victoria *Interpretation of Legislation Act 1984* (Vic) s38, give legislative effect to the common law principle by way of an

PROTECTION FROM THE PENAL BUT NOT THE CIVIL APPLICATION

An important distinction between the general and specific presumption is the extent of protection that the two presumptions afford the Crown. The general presumption protects the Crown so that the entire Act has no application to the Crown. Conversely, if the penal provisions are not central to the structure of legislation, the Crown's immunity from prosecution affords the Crown only limited protection from legislation.[184] In *Cain v Doyle*[185], Latham CJ, held that the effect of s10 of the *Re-establishment and Employment Act 1945* (Cth)[186] was to subject the Crown in its capacity as an employer to the non-criminal provisions of the Act for which a civil remedy was provided. Dixon J took an even more restricted view of the presumption. His Honour held that the Crown was only immune from the penalty clauses of the offence provisions. Therefore, s18, which created an offence, could be enforced against the Crown in its directive capacity but not in its penal capacity.[187] Furthermore, Dixon J stated that the civil remedies that may be sought against the Crown are not restricted to those specifically provided for by the statute.[188] Therefore, the courts could grant injunctive relief against the Crown for a continuing or anticipated breach of s18 of the *Re-establishment and Employment Act 1945* (Cth), but they could not impose a penalty on the Crown for an actual breach of the provision.

The approach adopted in *Cain v Doyle*[189] by Dixon J has been referred to with approval in other common law jurisdictions.[190] It has, however, been criticised by Hogg and McNairn who argue that it 'seems odd indeed that a single provision should apply in its directive aspect but not in its penal aspect to the Crown.'[191] Despite the criticism by the learned commentators there are strong arguments in favour of the approach adopted by his Honour. Firstly, it is consistent with the statement in *Cain v Doyle*[192] that the presumption is not justified on the

express declaration that a reference to the 'Crown' is a reference to the Crown in right of the enacting State.

184 See *Telstra v Worthing* (1999) 161 ALR 489 at 496.

185 (1946) 72 CLR 409 at 419.

186 Which stated that '"employer" includes the Crown'.

187 (1946) 72 CLR 409 at 419 and 425-426.

188 (1946) 72 CLR 409 at 425.

189 (1946) 72 CLR 409 at 419.

190 See *Southland Acclimatisation Society v Anderson* [1978] 1 NZLR 838 at 840 and *Canadian Broadcasting Corp v Attorney-General for Ontario* (1959) 16 DLR (2d) 609 at 616.

191 McNairn, C. *Governmental and Intergovernmental Immunity in Australia and Canada*. Canberra: Australian National University Press, 1978, 89 and Hogg, P. *Liability of the Crown*. 2nd ed. Sydney: The Law Book Co Ltd., 1989, 233.

192 (1946) 72 CLR 409 at 419.

193 McNairn, C. *Governmental and Intergovernmental Immunity in Australia and Canada*. Canberra: Australian National University Press, 1978, 22 and Hogg, P.

basis of the Crown's intrinsic attributes but upon the practical difficulties of prosecuting and punishing the Crown. Secondly, it limits the scope of the Crown's immunity from prosecutions, thus, increasing the extent to which the Crown is subject to the 'ordinary' laws that govern society. It is unusual that the same commentators that criticise Dixon J advocate that the Crown should be subject to the 'ordinary' law.[193] Thirdly, if the Crown is not amenable to the directive application of criminal provisions, its employees, who are criminally liable[194], would be placed in the horns of a dilemma as there would be no mechanism by which the Crown could be restrained from ordering its employees to commit offences. Finally, Dixon J's approach is consistent with the legislative trend in 'public welfare' statutes to provide for civil enforcement to remedy or restrain an offence against the statute.[195]

The High Court in *Bropho's* case[196] supported the distinction between the directive aspects and the penal aspects of a single provision. The Court held that although the Crown may not be criminally liable for a breach of s17 of the *Aboriginal Heritage Act 1972* (WA), its employees and agents were liable; therefore, injunctive relief could be granted against the Crown for an anticipated breach of the provision.[197] However in *Telstra v Worthing*[198] the High Court held that in circumstances where penal provisions are central to the structure of an Act and the Act expressly states that the Crown is not liable to prosecution, the Crown is not subject to the regulatory scheme created by the Act.[199] Unlike the *Bropho* case[200], *Telstra v Worthing*[201] was concerned with an Act that would have little application independent of the penal provisions. Therefore, specific presumption will only protect the Crown from the entire operation of the statute where the regulatory scheme established would have no meaningful function independent of the penal provisions. It is concluded, therefore, that where the Crown is bound by legislation it may be amenable to civil remedies for a breach of the Act, albeit that the Crown is immune from prosecution.[202]

Liability of the Crown. 2nd ed. Sydney: The Law Book Co Ltd., 1989, 233.

194 See Part III.

195 For example *Environmental Protection Act 1994* (Qld) s502.

196 (1990) 171 CLR 1.

197 (1990) 171 CLR 1 at 25. Similarly in *Corkill v Forestry Commission of NSW* (1991) 73 LGRA 126 Stein J, of the Land and Environment Court of New South Wales, held that a declaration and order could be made against the Forestry Commission for an anticipated criminal breach of the *National Parks and Wildlife Act 1974* (NSW).

198 (1999) 161 ALR 489.

199 (1999) 161 ALR 489 at 496.

200 (1990) 171 CLR 1.

201 (1999) 161 ALR 489.

202 See *State Super v Commissioner of State Taxation* (1996) 140 ALR 129 at 141 per

PART III: PROSECUTION OF CROWN EMPLOYEES

It must now be accepted that there is no general impediment to Crown employees being prosecuted for offences committed in the course of their official duties. Crown employees can be convicted of offences regardless of whether the relevant Act expresses an intention to bind the Crown. The principle of Crown employee liability, however, has been challenged by some members of the judiciary and by constitutional theorists. It is submitted that there are two reasons why Crown employee immunity has received support. Firstly, the courts on occasions have failed to distinguish between the general presumption that legislation does not bind the Crown and the specific presumption that the Crown is not amenable to prosecution. Secondly, Constitutional theorists, in an effort to make credible the *Cigamatic* doctrine, have argued that Commonwealth Crown employees cannot be prosecuted for a breach of State laws.

THE CRIMINAL LAW HAS NO REGARD FOR PERSON'S STATUS

The prominent constitutionalist A V Dicey argued that 'A Colonial Governor, a Secretary of State, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person'.[203] Dicey's theory was based on his belief that bureaucratic power could be controlled by ensuring that Crown employees are subject to the same laws that govern private citizens. The application of the general presumption, that legislation does not bind the Crown, has not given credence to Dicey's theory. The general presumption not only confers protection on the Crown, but also affords protection to Crown employees.[204] The presumption has also been applied to protect individuals who are not Crown employees in

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McHugh and Gummow JJ, dissenting; the majority did not consider the issue.

203 Dicey, A. *The Law of the Constitution*. 9th ed. London: Macmillan, 1959, 193-194.

204 See *Bropho v Western Australia* (1990) 171 CLR 1 at 16 and 24-25. In *British Broadcasting Corporation v Johns* [1965] Ch 32, Diplock LJ stated that 'I will content myself by saying that Crown "immunity" is restricted to persons who are servants or agents of the executive government and is enjoyed only in relation to acts which they do or property which they own or occupy exclusively in that capacity'.

205 See *Lower Hutt City v A.G.* [1965] NZLR 65; *Wellington City v Victoria University* [1975] 2 NZLR 301 and *City of Ottawa v Shore & Horwitz City Construction. Co.* (1960) 22 DLR (2d) 247.

206 *Wenpac v Allied Westralian Finance* (1993) 123 FLR 1 at 18. See also *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107 at 123-124 per Gibbs ACJ, at 129 per Stephen J and at 137-138 per Mason and Jacobs JJ.

circumstances where those individuals are performing functions on behalf of the Crown. Independent contractors engaged to carry out work for the government have been held to be protected from statutory requirements that they obtain permits[205] and partners in a firm of chartered accountants, appointed by a government instrumentality as its agents to act as mortgagee in possession, have been held to have immunity from the operation of the *Trade Practices Act 1974* (Cth).[206] McNairn contends that in circumstances where it is prejudicial to the sovereign's interests, Crown employees are also immune from criminal liability. The Crown's interests would be prejudiced if an employee were prosecuted for acts committed pursuant to direct orders from a superior officer, or pursuant to a statutory duty.[207] Hogg agrees that employees are entitled to immunity if the Crown would otherwise be prejudiced. He rejects, however, the argument that obedience to superior orders is sufficient to establish the requirement of prejudicial interest. Hogg postulates that Crown immunity should only be afforded to Crown employees when the offence is committed in pursuit of an 'important Crown purpose' that renders the breach unavoidable and necessary.[208]

The failure to distinguish between the general and the specific presumption has at times led courts to hold that Crown employees are also protected from criminal prosecution. An example is the early High Court decision of *Roberts v Abern*.[209] In that decision the High Court held that an agent of the Commonwealth was protected from prosecution for carrying away nightsoil without a licence.[210] The decision of *Roberts v Abern*[211], although never overturned, has on numerous occasions been the subject of criticism by members of the High Court.[212] The decision was inconsistent with statements of the

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207 McNairn, C. *Governmental and Intergovernmental Immunity in Australia and Canada*. Canberra: Australian National University Press, 1978, 91-95.

208 Hogg, P. *Liability of the Crown*. 2nd ed. Sydney: The Law Book Co Ltd., 1989, 237-238.

209 (1904) 1 CLR 406.

210 *Police Offences Act 1890* (Vic) s5(vii).

211 (1904) 1 CLR 406.

212 In *Pirrie v McFarlane* (1925) 36 CLR 170 at 213, Higgins J referred to *Roberts v Abern* (1904) 1 CLR 406 and stated that the decision may need to be reconsidered following the Courts rejection of the inter-government immunity principle in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. See also *West v The Commissioner of Taxation* (1937) 56 CLR 658 at 696-697 per Evatt J and *The Commonwealth of Australia v Bogle* (1953) 89 CLR 229 at 268 per Fullagar J. Constitutional law theorists have also criticised the decision (see Zines, L. 'Dixon's Theory of Federalism' (1965) 1 *FLRev*, 221 at 230, disputing whether the rule applied by the Court in *Roberts'* case was correct.)

213 (1904) 2 CLR 139.

214 (1904) 1 CLR 406.

215 (1904) 2 CLR 139.

216 (1904) 2 CLR 139 at 155-156.

High Court in *Clough v Leahy*[213], a decision handed down in the same year as *Roberts v Ahern*.[214] Griffith CJ stated in *Clough v Leahy*[215], that no person is protected from the prosecution 'by saying he acted under the authority of the Crown'.[216]

It is submitted that, in accordance with Dicey's Dicey's theory, the weight of authority is against Crown employees being protected from prosecution. Support for this view can be found in the 1925 High Court decision of *Pirrie v McFarlane*.[217] The defendant, a member of the Royal Australian Air Force, had been charged with driving a car on a public highway without a licence, an offence against the *Motor Car Act 1915* (Vic). At the time of the breach the defendant was performing official duties in accordance with the orders of a superior officer. The majority of the High Court held that the defendant could be prosecuted for a breach of the state motor vehicle laws. Commentators have argued that, in light of the High Court's subsequent adoption of the *Cigamatic* doctrine, *Pirrie v McFarlane*[218] could no longer be seen as a correct statement of law.[219] The High Court, however, has in a number of recent decisions held that Crown employees are amenable to prosecution for acts committed in their official capacity. In *A v Hayden*[220] the High Court was asked to decide whether members of the Commonwealth's Australian Secret Intelligence Service (ASIS) were amenable to the criminal laws of Victoria. The Court held that employees of the Crown are subject to prosecution for offences committed in the course of their duties and that the Crown cannot confer authority upon its servants to

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217 (1925) 36 CLR 170.

218 (1925) 36 CLR 170.

219 Professor Howard stood alone in arguing that the decision could be understood on the basis that, although state laws do not bind the 'Commonwealth as a juristic entity', its employees are not protected from the operation of state laws. See Howard, C. 'Some Problems of Commonwealth Immunity and Exclusive Legislative Powers' (1972) 5 *FLRev*, 31 at 35. In *Pirrie v McFarlane* (1925) 36 CLR 170 only Higgins J (at 217-218), who was in the majority, held that there is no presumption that Commonwealth Crown Servants are protected from state legislation. In *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 at 598 McHugh JA, of the New South Wales Court of Appeal, rationalises the seeming inconsistency between the *Cigamatic* doctrine and the decision of *Pirrie v McFarlane* (1925) 36 CLR 170 by adopting Professor Howard's approach. In *Re The Residential Tenancies Tribunal of New South Wales* (1997) 146 ALR 495, Brennan CJ at 499-500 and Gummow J at 534-535 endorsed the approach advocated by Howard while Kirby J at 559-560 criticised it as difficult to reconcile with the reasoning of the Court in *Pirrie v McFarlane* (1925) 36 CLR 170.

220 (1984) 156 CLR 532.

221 (1984) 156 CLR 532 at 540 per Gibbs CJ, at 550 per Mason J, at 562 per Murphy J and at 580-582 per Brennan J. The Supreme Court of Canada in *Canadian Broadcasting Corporation v The Queen* (1983) 145 DLR (3d) 42 at 45, 51 held that Crown employees are subject to prosecution for unlawful acts committed in their official capacity.

222 *A v Hayden* (1984) 156 CLR 532.

223 (1995) 184 CLR 19.

commit a crime: 'it is no excuse for an offender to say that he acted under the orders of a superior officer'.[221] *Hayden's* case[222] has received considerable judicial endorsement. The cases of *Ridgeway v R*[223] and *Yip Chiu-Cheung v R*[224] both concerned the prosecution of individuals who had been arrested as the result of a sting operation. In both cases undercover police officers had been involved in the illegal importation of drugs, resulting in the subsequent detention of the accused for trafficking offences. The High Court and the Privy Council made *obiter* statements that, although the police were not charged, the police involvement in the importation of illicit substances was unlawful.[225] Both Courts referred to *Hayden's* case[226] and stated that the superiors of the undercover officers had no power to authorise the police involvement in the illegal importation of drugs.[227] In the recent decision of *Jacobsen v Rogers*[228] the High Court stated that the Crown 'carries out those functions through servants and agents who, notwithstanding that they act with the authority of the Crown, have no immunity from the ordinary criminal law'.[229]

Even Ministers of the Crown, acting in their official capacity, are subject to criminal liability. In *In re M*[230] a judge of the English Court of Appeal made an order that a political asylum seeker, who was being deported, be returned to the jurisdiction of the High Court. The order was communicated to the Secretary of State who, upon receiving favourable legal advice, failed to comply with the order. Proceedings for contempt of court were brought against the Secretary of State in his official capacity and against the Home office. The House of Lords held that a government department and a Minister of the Crown are amenable to

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224 [1995] 1 AC 111.

225 See *Yip Chiu-Cheung v R* [1995] 1 AC 111 at 118, and *Ridgeway v R* (1995) 184 CLR 19 at 31.

226 *A v Hayden* (1984) 156 CLR 532.

227 See *Yip Chiu-Cheung v R* [1995] 1 AC 111 at 118, and *Ridgeway v R* (1995) 184 CLR 19 at 29.

228 (1995) 182 CLR 572.

229 (1995) 182 CLR 572 at 587.

230 [1994] 1 AC 377.

231 [1994] 1 AC 377 at 435, Lord Woolf with whom the other Law Lords agreed stated that 'I do not believe that there is any impediment to a court making such a finding [of contempt], when it is appropriate to do so, not against the Crown directly, but against a government department or a Minister of the Crown in his official capacity'.

232 (1925) 36 CLR 170 at 213. The words used by Higgins J are similar in content to those used in the report of the Commission on the Responsibility of the Authors of The War and Enforcement of Penalties (29 March, 1919, Chapter III) when it addressed the argument that a sovereign may be immune from prosecution for war crimes and crimes against humanity:'Such a conclusion would shock the conscience of civilized mankind'. Lee, H. 'Commonwealth Liability to state Law – The Enigmatic Case of *Pirrie v McFarlane*' (1987) 17 *FLRev* 132, at 139 states that the 'peace, order and good government of the Commonwealth depends also on the peace, order and good government of the States'. How can the peace, order and good government of a State

contempt proceedings.[231]

An unfettered rule of law that permits Crown employees to commit offences against society without fear of punishment is clearly unacceptable. Why should a Crown employee be immune from punishment in circumstances where he or she causes a person's death by wilfully disposing of a poisonous chemical with the knowledge that lives will be put at risk? As Higgins J stated in *Pirrie v McFarlane*: 'Such a grotesque result of the Constitution must startle the unsophisticated'.[232] Furthermore, a restricted immunity, as proposed by McNairn and Hogg, would place Crown employees in an untenable position. In certain circumstances they would be entitled to the Crown's protection, whilst in others they would not. It is unacceptable that Crown employees would not know whether their proposed actions would be subject to punishment. Finally, the principle of equality before the law demands that Crown employees be afforded no special protection from prosecution.

In light of the decisions referred to above and the persuasive policy considerations, it is surprising that the Full Court of the Federal Court, in a recent decision, stated that the Crown's immunity extends to protect its employees. In *Woodlands v Permanent Trustee*[233] the Federal Court referred with approval to the decision of *Roberts v Ahern*[234] and made the following *obiter* statements:

> 'The principle of *Roberts* seems to be that the immunity that attaches to the Crown itself, from the effect of a statute making unlawful a particular act, extends also to persons retained by the Crown to perform the act, whatever the precise nature of the relationship between the Crown and them.'[235]

It is submitted, with respect, that the Federal Court's endorsement of the discriminatory application of the criminal law derives from the Court's failure to distinguish between the general and specific presumption.

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be maintained if a 'Federal Officer' is permitted to commit criminal acts?

233 (1996) 139 ALR 127.

234 (1904) 1 CLR 406.

235 (1996) 139 ALR 127 at 143.

236 Some theorists, however, argue that the principles are ill-founded and should be discarded. See, for example, Meagher, R. and Gummow, W. 'Sir Owen Dixon's Heresy' (1980) 54 *ALJ*, 25; Lee, H. 'Commonwealth Liability to state Law – The Enigmatic Case of *Pirrie v McFarlane*' (1987) 17 *FLRev*, 132 at 135 and Hogg, P. *Liability of the Crown*. 2nd ed. Sydney: The Law Book Co. Ltd., 1989, 241-242.

237 See Evans, G. 'Rethinking Commonwealth Immunity' (1972) 8 *MULR*, 521 at 531; Zines, L. *The High Court and the Constitution*. 4th ed. Sydney: Butterworths, 1997, 360-361, 364-365; Lee, H. 'Commonwealth Liability to state Law – The Enigmatic Case of *Pirrie v McFarlane*' (1987) 17 *FLRev*, 132 at 135 and *Woodlands v Permanent Trustee* (1996) 139 ALR 127 at 143.

238 *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

The discriminatory approach has also received support from Constitutional theorists and some judges who seek to make credible the *Cigamatic* doctrine.[236] The theorists argue that as the Commonwealth must act through its employees, a finding that those employees are amenable to criminal prosecution under State laws would subvert the *Cigamatic* doctrine.[237] It is of little practical consequence if the Commonwealth itself is immune from State 'public welfare offences' but the Commonwealth's employees must comply with such laws. In an effort to make sense of the *Cigamatic* doctrine, McHugh J in *Re Residential Tenancies Tribunal*[238] stated that the rule prohibiting the Crown from authorizing its agents or employees to breach the law was formulated for a unitary system of government and must be modified in its application to a federal system of government.[239] McHugh J argued that in order to determine whether the Commonwealth executive can authorise its servants, or agents, to disobey a State law, the first question that must be asked is whether the State law binds the Commonwealth. As McHugh J held that the Commonwealth executive can indicate that its activities are not to be bound by State statutes, the Commonwealth can authorise its agents and servants to breach state criminal laws.[240]

It is submitted, with respect, that his Honour should have abandoned the 'heresy' of *Cigamatic*[241] rather than arguing in favour of Commonwealth employee protection from State criminal laws. If the national interest requires that servants of the Commonwealth be protected from the penal provisions of State legislation the executive government of the Commonwealth has ample power to enact legislation that, by virtue of s109 of the Constitution, will protect its servants. The principle that Crown employees are subject to the criminal laws of the land demonstrates the difficulties with the application of the *Cigamatic* doctrine.

Legislative Protection Of Crown Employees

Although, as has been argued, Crown employees are not generally protected from prosecution they may be afforded legislative immunity.

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239 (1997) 190 CLR 410 at 457.

240 (1997) 190 CLR 410 at 457.

241 (1962) 108 CLR 372.

242 See *Acts Interpretation Act 1915* (SA) s20 and *Interpretation Act 1967* (ACT) s7. The provisions relate to offences created by legislation only. It can be assumed that servants of the Crown are not immune from prosecution for common law offences.

243 For example, *Nature Conservation Act 1992* (Qld) s143 provides that conservation officers who act under the direction of the Minister or who exercise a power under the Act are not liable to be prosecuted for an offence committed against the Act.

244 *Webster v Lampard* (1993) 177 CLR 598 at 605. The interpretation Acts of South Australia and the Australian Capital Territory state that the act must be 'within the scope of the agents (obligation) authority'.

In South Australia and The Australian Capital Territory an 'officer or employee of the Crown' and other persons who perform functions on behalf of the Crown have been afforded immunity from prosecution.[242] In other jurisdictions some Acts grant immunity from prosecution to specific individuals in specific circumstances.[243] Such statutory provisions are limited to the protection of acts committed within the scope of the employees' obligations or 'in "pursuance" or "execution" of some statutes or in "carrying" some statute "into effect" or in "pursuance", "execution" or "discharge" of some public duty or office.'[244] The courts interpret these statutory restrictions to mean that Crown employees are entitled to statutory immunity in two circumstances. Firstly, where an employee in the pursuit or execution of a statutory, or public duty or in the discharge of a public office, commits an otherwise legally unjustifiable act. Secondly, where an employee commits an offence with a genuinely held but mistaken belief that his or her actions are 'within the limits of the authority expressly or impliedly conferred by the relevant statutory provision or office'.[245] The latter application is subject to the qualification that servants are not entitled to statutory protection if their conduct is 'actuated solely or predominantly by a wrong or incorrect motive'.[246]

CONCLUSION

In conclusion, the Crown has the capacity to subject itself and other manifestations of the Crown to prosecution. All manifestations of the Crown are, however, protected by the specific legislative presumption that the Crown is not amenable to prosecution for a breach of an Act. The specific presumption can only be displaced by the 'clearest expression of [legislative] intention'. In a recent decision of the Land and Environment Court it was held that, in light of changes to the general presumption that an Act does not bind the Crown, the courts will apply a less rigid test to the question of Crown liability to prosecution. This decision is, however, inconsistent with the High Court's recent *obiter* statements that there are two independent presumptions and that the rigid test, which can only be displaced by an express legislative declaration that the Crown is bound, will continue to be applied to the specific presumption. It is argued, therefore, that provisions binding the Crown will not subject the Crown to prosecution unless the relevant provision expressly states that the Act binds the

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245 *Webster v Lampard* (1993) 177 CLR 598 at 606 per Mason CJ, Deane and Dawson JJ. See also *Little v The Commonwealth* (1947) 75 CLR 94 at 108 per Dixon J, *Trobridge v Hardy* (1955) 94 CLR 147 at 171 per Taylor J and *Marshall v Watson* (1972) 124 CLR 640 at 650-651 per Stephen J.

246 *Trobridge v Hardy* (1955) 94 CLR 147 at 162 per Kitto J, approved in *Webster v Lampard* (1993) 177 CLR 598 at 605 per Mason CJ, Deane and Dawson JJ.

Crown so as to make it liable to prosecution. The Crown may be subject, however, to the civil enforcement of the criminal provisions. By contrast, both State and Commonwealth employees are not the beneficiaries of a presumption that protects them from prosecution. It matters not that the legislation that creates an offence makes no specific reference to Crown employees; the criminal provisions bind them. Given the current status of the law it is surprising that there have been relatively few prosecutions of Crown employees.

The consequence for prosecutors of the above findings is that, when presented with evidence that the Crown or its employees have committed a criminal offence, the prosecutor must ascertain whether the Act that creates the offence states that the Crown is subject to prosecution. If the Act so provides, proceedings can be brought against the Crown. With the exceptions of South Australia and the Australian Capital Territory, where Crown employees have been afforded legislative protection, if the Act makes no reference to the prosecution of the Crown the prosecutor should proceed against individual employees. The advantage of proceeding against an employee is that it does not matter that the law breached is a State law and that the alleged perpetrator is a Commonwealth employee. The specific presumption places the Crown in an advantageous position relative to other organisations, but places Crown employees at a disadvantage to their counterparts in the private sector as Crown employees, rather than employers, are more likely to be subjected to criminal proceedings. It is, therefore, important that legislative drafters consider whether the Crown should be subject to prosecution. Both equality before the law and the need to ensure that the objectives of a statute are met, dictate that most legislation that includes 'public welfare offences' should subject the Crown to criminal liability.