
Options for the doctrine of Crown immunity in 21st century Australia

Dr Anthony Gray*

This article outlines the historical development of the position of the Crown in terms of immunity from statute, and considers the reception of these doctrines in Australian law, including the extra complication provided by a federal system in discussing these issues. The author then considers various formulations that might be used in future, including broad and narrow conceptions of immunity, in an attempt to make the law in this area as coherent as possible while recognising the realities and requirements of modern governance.

INTRODUCTION

The legal position of the Crown¹ has been considered over many centuries, spanning periods during which the notion of the Crown evolved from the monarch to something much broader, and the role of the monarch in law making greatly minimised. The issue of the extent to which the Crown is bound by statute has been contentious. As we will see, various formulations of the immunity have found favour with judges. I will refer to two main formulations: (a) a narrow view of Crown immunity, confining the immunity to legislation affecting what we call Crown prerogatives;² and (b) a broader view of Crown immunity, meaning an immunity from all kinds of legislation. The issue of Crown immunity remains a live one, considered (in the context of derivative Crown immunity) by the High Court of Australia in *Australian Competition & Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1.³

EARLY HISTORY: CROWN IMMUNITY FROM STATUTE?

Some royalists believed that subjects could not question, let alone attempt to overrule, the King's actions. The King could voluntarily submit to the law but could not be coerced by it.⁴ Bracton in his 1235 *Laws and Customs of England* wrote, *Quod Rex non debet esse sub homine, sed sub Deo et Lege* (that the King should not be under man, but under God and the law). Coke is said to have quoted Bracton in response to claims by James I that he governed as of divine right, and thus it was treasonous to suggest the monarch be subject to law. John Bradshaw, who presided over the trial at which Charles I was sentenced to death, is said to have relied on Bracton's comments to justify the proceedings.⁵ Significant historical documents, including the *Bill of Rights 1689* (ENG) and the United States *Declaration of Independence* in 1776, suggest that the monarch is subject to legislation.⁶

* Associate Professor, Law, University of Southern Queensland. Thanks to the anonymous reviewer.

¹ A precise definition of the Crown is elusive, see: Cornford T, "Legal Remedies Against the Crown and its Officers" in Sunkin M and Payne S (eds), *The Nature of the Crown* (1999) p 233 (the concept of the Crown is "deeply ambiguous"); Winterton G, *Parliament, the Executive and the Governor-General* (1983) p 207 (in the monarchies of the British Commonwealth, the Crown is shorthand for executive government); Seddon N, "The Crown" (2000) 28 Fed L Rev 245 at 247-248 (the concept is abstract but could be used (in Australia) to describe 10 bodies politic as legal entities).

² These will be defined later.

³ Derivative immunity is the extent to which bodies dealing with the Crown are entitled to the same immunities and privileges as the Crown enjoys. More detailed discussion of derivative immunity appears in Wright R, "The Future of Derivative Crown Immunity – With a Competition Law Perspective" (2007) 14 *Competition and Consumer Law Journal* 240.

⁴ Goldsworthy J, *The Sovereignty of Parliament* (1999) pp 80-83.

⁵ Lord Denning, *What Next in the Law?* (1982) p 6.

⁶ Both documents point out alleged infractions by the monarch (James II and George III respectively) against the law. The *Magna Carta* 1215 established the possibility that the will of the monarch could be overturned by others but for various reasons this was not enforced until much later.

In *Willion v Berkley* (1561) 1 Plowden 223; 75 ER 339, the Court of King's Bench found that the statute *De Donis Conditionalibus*, restricting the alienation of land, bound the Crown in the absence of express words or necessary implication. Brown J concluded that it was a "difficult argument to prove that a statute, which restrains men generally from doing wrong, leaves the King at liberty to do wrong". Dyer CJ found "that which is necessary and useful to be reformed requires to be reformed in all, and not in part only".

In *Magdalen College* (1615) 11 Co Rep 66 at 72a; 77 ER 1235 at 1243, the court found that Crown immunity from statute was confined to laws that derogated from "any prerogative, estate, right, title or interest of the Crown".⁷ Lord Coke in that case claimed that the King was bound by Acts for the suppression of wrong, holding that the "King cannot do a wrong".⁸ Acts made for the public good were also binding on the King, as were laws for the advancement of religion. Similarly in *Case of Proclamations* (1611) 12 Co Rep 63, Coke held the Crown had no inherent power to make or alter the law of the land. The strong links between the judiciary and the monarchy in these and earlier times have been noted and the suggestion made that it was understandable that judges should show great deference to the royal prerogative given that judges were considered royal servants.⁹

In *Case of Ecclesiastical Persons* (1601) Co Rep 14a at 14b, it was said:

in divers cases the king is bound by act of Parliament although he not be named in it, not bound by express words; and therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King.¹⁰

Subsequently, and perhaps as Street says,¹¹ influenced by the trend towards a literal interpretation of statutes generally, judges in England began to take the view that the Crown was not bound by statute unless there were express words to that effect.¹² A further gloss to this was added; that statutes, though not binding the Crown expressly, could do so by "necessary implication".¹³ These subsequent developments are purely judicial add-ons, and cannot find support in the original statements in the 17th century cases.¹⁴ These glosses continue to be applied today, at least in England.¹⁵ The Privy Council in *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 at 63, established a very strict test as the basis for which a necessary implication could be made, requiring that the beneficent purpose of the Act be wholly frustrated if the Crown were not bound, in order that the Crown be bound.

⁷ See also *Attorney-General v Allgood* (1734) 4 Parker 1 at 3-5; 145 ER 696 at 697. This is the "narrow" conception of Crown immunity from statute.

⁸ *Solum Rex hoc non potest facere, quod non potest injuste agreee*; adopted in *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 338 at 365 (Griffith CJ), 370 (Barton J to like effect).

⁹ Plunknett T, *Statutes and Their Interpretation in the Fourteenth Century* (1922) p 167; Street H, "The Effect of Statutes Upon the Rights and Liabilities of the Crown" (1947) 7 Univ Toronto LJ 357.

¹⁰ Though the case cannot be regarded as of strong authority as it was apparently heard in Parliament. This is pre-Glorious Revolution.

¹¹ Street, n 9 at 367.

¹² See, eg *R v Cook* (1790) 3 TR 519 at 521 per Lord Kenyon: "generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect"; see also *Attorney-General v Donaldson* (1842) 10 M & W 117 at 124 (Alderson B); *Ex Parte Postmaster Genera*; *Re Bonham* (1879) 10 Ch D 595 at 601 (Jessel MR).

¹³ See, eg *US v Hoar* (1821) 2 Mason 311 at 314-315 per Story J: "where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed, or the language used, that the Government itself was within the contemplation of the legislature, before a court of law would be authorised to put such a construction on any statute. In general, Acts of the legislature are meant to regulate and direct the different, and often contrary force to the government itself. It appears therefore to be a safe rule founded on the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the Act". Kirby J cast doubt on the continued correctness of Story J's remarks, given the growth of the regulatory state, in *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 55.

¹⁴ Street, n 9; Hogg P, *Liability of the Crown* (2nd ed, 1989) p 243.

¹⁵ *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 at 61; *Lord Advocate v Dumbarton District Council* [1990] SC (HL) 1; *M v Home Office* [1994] 1 AC 377. This is the broader view of Crown immunity from statute.

POSITION IN AUSTRALIA: CROWN IMMUNITY FROM STATUTE

Conflicting positions are evident in the early High Court of Australia decisions¹⁶ where the question of Crown immunity from statute was raised.¹⁷ There is difference of opinion as to whether the immunity is broad or narrow, as defined above.

In *Roberts v Ahern* (1904) 1 CLR 406 at 417-418, Griffith CJ, speaking for the court, declared the general rule that the Crown is not bound by a statute unless it appeared on the face of the statute that it was intended so, declaring the immunity was based on the royal prerogative. Griffith CJ acknowledged authority suggesting that the Crown could be bound if it were necessarily implied that it was intended it be bound.

In *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358, a different view was apparent. Griffith CJ appeared to suggest a narrow version of the prerogative, stating that laws not specifically naming the Crown could bind the Crown, but any law that stripped the Crown of its ancient prerogative would have to specifically name the Crown (at 365):

The doctrine that the Crown is not bound by a Statute unless specifically named or included by necessary implication has been sometimes misunderstood and extended beyond the purposes for which it was laid down ... It “does *not* mean that the King, looked upon as a mere individual, may not be in certain cases precluded by Statutes, which do not specifically name him, ‘of such inferior rights as belong indifferently to the King or to a subject, such as the title to an advowson or a landed estate’; what it does mean is that the King cannot ... be stripped by a Statute, which does not specifically name him, of any part of his ancient prerogative”.¹⁸

Griffith CJ found that the government of New South Wales was subject to the same laws as individuals, at least in its commercial operations (at 367). Barton J took a similar position, concluding that if the intention of the Act was to provide for the public good, or the advancement of religion or justice, or to provide a remedy against a wrong, prevent fraud, or tort, the Crown would be bound. Defining the issue as a question of the intention of Parliament¹⁹ rather than a general immunity, Barton J concluded that if Parliament had wished to exempt the Crown from the legislation being considered, it could and would have done so expressly (at 371). As a result, no immunity existed.²⁰

A narrower conception of Crown immunity also appears in the High Court decision of *Minister for Works (WA) v Gulson* (1944) 69 CLR 338. There was support (at 356 (Rich J), 358 (Starke J), 362 (McTiernan J)) for the proposition that the Crown is not bound by any statute in the absence of express words or necessary implication (the broad immunity), but Latham CJ (dissenting) refused to apply a presumption that the Crown (in right of a State) not be bound by Commonwealth law (at 353). Williams J (with whom Rich J agreed) would confine the immunity to cases involving “the prerogative, right or property of the Crown”; in such cases, the statute would need to apply to the Crown expressly or by necessary implication before the Crown would be bound.

The High Court accepted the broad immunity provided by the Privy Council in *Bombay in Commonwealth v Rhind* (1966) 119 CLR 584 at 598 (Barwick CJ),²¹ but again, a narrower view was evident by some members of the court in *Downs v Williams* (1971) 126 CLR 61. There, Gibbs J noted

¹⁶ I believe that the divergence of views taken by various judges on these issues in Australia’s legal history justifies a fuller discussion of past cases than I would otherwise pursue.

¹⁷ On the position of the Crown generally in Australia, see Winterton G, “The Evolution of a Separate Australian Crown” (1993) 19 Mon LR 1; Winterton G, “The Limits and Use of Executive Power by Government” (2003) 31 Fed L Rev 421; Stokes M. “Are there Separate State Crowns?” (1998) 20 Syd LR 127.

¹⁸ Citing *Hardcastle on Statutes* (1st ed), p 180. Griffith CJ cited the comment of Lord Coke in *Magdalen College* (1615) 11 Co Rep 66; 77 ER 1235 that “the King cannot do a wrong”.

¹⁹ The importance of intention of Parliament in assessing whether immunity exists was also emphasised *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 154 (Knox CJ, Isaacs Rich and Starke JJ).

²⁰ In relation to the ability of one government in a federation to legislate to bind another, see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 145.

²¹ See also *Wynyard Investments Pty Ltd v Commissioner of Railways (NSW)* (1955) 93 CLR 376; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172.

(at 97) the view that the maxim, the King could do no wrong, could cause more injustice in Australia than England due to differing conditions. Windeyer J (at 71-72) referred back to the comments of Brown J in *Willon v Berkley* then added:

Governments engage today in a variety of commercial and industrial undertakings. Modern statutes ought I think to be read with that, as well as ancient dogmas, in mind ... I do not think that the Crown, if it conducts a factory, is necessarily to be regarded as exempt from the responsibilities for the safety of persons employed there which the Parliament imposes upon subjects of the Crown who conduct factories.²²

In *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, the High Court applied the *Bombay* approach in a case involving the so-called “federal complication” of a law from one level of government in the federal system purporting to bind the Crown in right of another jurisdiction, although some members of the High Court noted dissatisfaction with the approach.²³

The High Court re-assessed the *Bombay* position in the landmark decision of *Bropho v Western Australia* (1990) 171 CLR 1.²⁴ The court noted (at 14):

The rule that statutory provisions worded in general terms are to be construed as ... inapplicable to the Crown was initially confined to provisions which would have derogated from traditional prerogative rights (ie the narrow view of immunity) ... or was said to be subject to very broad exceptions (where) ... the intention of the statute was to provide for the public good or the advancement of religion and justice or to give a remedy against a wrong or to prevent fraud or tortious usurpation ... It has however been clearly accepted in more recent cases in the court that the rule is of general application.

The High Court continued (at 18-19):

[While] “the Crown” encompassed little more than the Sovereign ... there may well have been convincing reasons for an assumption that a legislative intent that general statutory provisions should bind the Crown ... would be either stated in express terms or made “manifest from the very terms of the statute” ...

... [the rationale for Crown immunity] would seem to have little relevance ... to the question whether a legislative provision worded in general terms should be read down so that it is inapplicable to the activities of any of the employees of the myriad of governmental commercial and industrial instrumentalities covered by the shield of the Crown ... historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of ... endeavour.

The High Court did not, however, reverse the presumption that an Act did not bind the Crown or its instrumentalities (at 22); although it clarified that the presumption was merely one of statutory interpretation and should not be elevated to any higher status (at 15, 28).²⁵ It re-affirmed that the question was one of intention to be gleaned from the object of the Act and statutory circumstances (at 23), including the content and purpose of the particular provision, and the identity of the entity in respect of which the question of applicability of the provision arises.

²² Similar sentiments appear in the Canadian decision of *R v Eldorado Nuclear Ltd* [1983] 2 SCR 551 at 558 per Dickson J: “Why that presumption (of Crown immunity) should be made is not clear. It seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject”.

²³ See *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 122 (Gibbs ACJ noted Professor Hogg’s claim there was no clear rationale for a broad immunity, and that the history of the presumption was an example of communis error), 127 (Stephen J referred to academic commentary of Hogg and Street doubting the antecedents of the rule and claiming they were not authoritative as claimed, but concluded that only statute could now alter the position).

²⁴ See Berry D, “Crown Immunity from Statute: *Bropho v State of Western Australia*” (1993) 14 Statute L Rev 204; Taylor G, “*Commonwealth v Western Australia* and the Operation in Federal Systems of the Presumption that Statutes do not Apply to the Crown” (2000) 24 MULR 77.

²⁵ The presumption was formulated in slightly different terms in *Commonwealth v Western Australia* (1999) 196 CLR 391 at 410 (Gleeson CJ and Gaudron J), as a presumption that a statute which regulates the conduct of rights of individuals does not apply to members of the executive government of any of the polities in the federation, government instrumentalities and authorities intended to have the same legal status as the executive government, their servants or agents.

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

the capacities of the Crown on the one hand, by which we mean its rights, powers, privileges and immunities, and the exercise of those capacities on the other ...

The purpose in drawing a distinction between the capacities of the Crown and the exercise of them is to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities.²⁶

A majority of the High Court used this distinction to test the constitutionality of laws relating to the prerogative – in other words laws which changed the prerogative itself would not be allowed, but laws that merely sought to regulate activities undertaken in the exercise of the prerogative were legitimate.²⁷

SUMMARY OF POSSIBLE VIEWS ON CROWN IMMUNITY

On the question of Crown immunity from statute, there are five main possibilities:

1. The Crown is only bound by legislation that expressly refers to it.²⁸
2. There is a presumption that the Crown is not bound by legislation, and express words or necessary implication (in terms of the “wholly frustrated” test) are required to overturn the presumption.²⁹
3. The Crown is entitled to no special treatment, and is bound by all legislation.³⁰
4. There is a presumption that the Crown is not bound by legislation, and express words or necessary implication (in terms of legislative intention given the statutory circumstances) are required to overturn the presumption.³¹
5. The Crown is entitled to special treatment in relation to its prerogatives, but otherwise the Crown is prima facie bound by all legislation (perhaps, subject to evidence of contrary intention).³²

Following is a critical consideration of each of these possibilities.

1. Crown only bound by legislation that expressly refers to it

This assertion has questionable historical foundations. It seems to have emanated from the comment of Lord Coke that “the King can do no wrong”. Some have taken this to suggest that the Crown enjoys some kind of broad immunity from statute and from civil liability. However, others have suggested

²⁶ *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 438-439 per Dawson, Toohey and Gaudron JJ, 424 (Brennan CJ agreeing); see also Mescher I, “Whither Commonwealth Immunity?” (1998) 17 Aust Bar Rev 23; Penhallurick C, “Commonwealth Immunity as a Constitutional Implication” (2001) 29 Fed L Rev 151.

²⁷ The court did re-affirm the presumption that the Crown not be bound by the general words of a statute: *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 444 (Dawson, Toohey and Gaudron JJ).

²⁸ This was the view taken in the English decisions referred to above, eg *R v Cook* (1790) 3 TR 519; and that of the Chief Justice in *Roberts v Ahern* (1904) 1 CLR 406.

²⁹ This is the *Province of Bombay* approach, accepted in Australia in cases such as *Commonwealth v Rhind* (1966) 119 CLR 584, but later (prospectively) overturned in *Bropho v Western Australia* (1990) 171 CLR 1.

³⁰ This is supported by the early English cases such as *Willion v Berkley* (1561) 1 Plowden 223; 75 ER 339; and (in effect) in *Magdalen College* (1615) 11 Co Rep 66; 77 ER 1235; *Case of Ecclesiastical Persons* (1601) Co Rep 14a.

³¹ This has been the approach taken in Australia since *Bropho v Western Australia* (1990) 191 CLR 1.

³² Confinement of the immunity to Crown “prerogatives” appears in *Magdalen College* (1615) 11 Co Rep 66; 77 ER 1235 and derives support from the High Court *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410; see also *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 363 (Williams J; with whom Rich J agreed).

that Lord Coke's comments can be read as in fact asserting that the sovereign was under the same obligations as their subjects; rather than that they warranted some kind of special treatment.³³ As Walsh J, speaking of Crown immunity, noted in *Byrne v Ireland* [1971] IR 241 at 265:

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

Gummow and Kirby JJ also observed in *Commonwealth v Mewett* (1997) 191 CLR 471 at 544 that the generalised immunity that developed may have been based on a misunderstanding of historical legal writers (Bracton was the one named).

This seems correct, when the comment "the King cannot do a wrong" in context – where in the previous sentence, Coke had stated that the king should not enjoy immunity, because as the fountain of justice and as God's representative, he was expected to uphold high standards of behaviour and provide a role model for others.³⁴ In fact, on one view, if that were the king's role it would be essential for them to be bound by statute, to make sure they did act in a way that was appropriate to this role. Others read the comments to mean that the sovereign had no power to authorise wrong.³⁵ There is also the issue, regardless of what the comments mean, of whether they should be transplanted over to the Executive.³⁶

Such a broad-brushed immunity would also abrogate principles of equality before the law. In *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 572, Gaudron, McHugh and Gummow JJ gave as one of their reasons for abolishing a past legal immunity enjoyed by highway authorities that the rule "denied equal protection of the law"; Kirby J used a similar concept of "equality before the law" in justifying his position (at 594). In the context of Crown immunity from statute, the Supreme Court of Canada has noted that the presumption of immunity conflicts with basic notions of equality before the law.³⁷

2. Broad Crown immunity: Bombay approach?

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

The "wholly frustrated" approach to necessary implication has been subject to criticism on the basis that it is disconnected with an approach to statutory interpretation based on intention, which is the approach typically taken to the interpretation of Acts of Parliament.³⁸

There is a world of difference from the question whether an individual monarch should or not be bound by legislation or should or should not be able to be sued, to a question whether a large entity comprising thousands of individuals and conducting a broad range of activities, including commercial

³³ Cornford, n 1, p 235.

³⁴ *Magdalen College* (1615) 11 Co Rep 66 at 72a, 77 ER 1235 at 1243: "The King shall not be exempted by construction of law out of the general words of an act made to suppress wrong, because he is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong ... And though a right was remediless, yet the Act which provides a necessary and profitable remedy for the preservation of right and to suppress wrong shall bind the King."

³⁵ Tomkins A, "The State, the Crown and the Law" in Sunstein M and Payne S (eds) *The Nature of the Crown* (1999) p 60.

³⁶ Seddon, n 1 at 256.

³⁷ *AGT v CRTC* [1989] 2 SCR 225 at 291; see also, Canada Law Reform Commission, Working Paper No 40, 1987, *The Legal Status of the Federal Administration*, p 16: concluding the immunity was "directly contrary to the principle of equality under the law ... it is therefore obviously necessary to move towards a solution which is more in accordance with the rule of law and the principle of equality"; Alberta Law Reform Institute, Report No 71, 1994, *The Presumption of Crown Immunity*, p 67; Dicey A, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1960), p 193: "every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals". No exception was made for the Crown.

³⁸ Street, n 9; Alberta LRI, n 37, p 42.

and industrial activities should be entitled to the same privilege.³⁹ A private organisation, subject to relevant laws, would be justifiably concerned if one of their competitors, who was entitled to the shield of the Crown, was not subject to the same laws. Private organisations who supply to the Crown have tried to secure the privileges of the Crown through the concept of “derivative immunity”.⁴⁰ A perception would be created of an unlevel playing field. The Crown is involved in business activities of such a grand scale that inequities exist if it is given preferential treatment in terms of compliance with regulation.⁴¹ The High Court made the same point in *Bropho*:

the historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavours and where it is a commonplace for governmental, commercial, industrial and developmental instrumentalities and their servants and agents ... to compete and have commercial dealings on the same basis as private enterprise.⁴²

The doctrine may not suit the realities of the Crown in 21st-century Australian life.

In terms of which entities qualify to obtain the shield, the boundary between what are “government” functions and what are not has become blurred, evidenced by the prevalence of concepts such as public-private partnerships. Would such a body be entitled to the shield of the Crown with all that it entails? Blurring of the lines between government and private industry is also shown by the fact that some entities that were “public” have become “private”, yet carry out the same functions and activities, and bodies that were “private” have in some cases become “public”. This has led to the breakdown of a test formerly used as a basis for establishing whether or not a body was entitled to the shield of the Crown.⁴³

Others have commented that even if Crown immunity were ever justified in England, it was never justified in Australia given the needs of the colonies when the government was required to perform many functions that in England would have been conducted privately.⁴⁴ As Kirby J noted recently in *Baxter*:

[T]he specificities and juxtapositions in the Australian *Constitution* concerning the part played in its governmental institutions by the Queen and the Crown, and particularly the provisions made (necessary to a federation) for the integrated judicature, made it inapposite to import into our constitutional institutions, without significant adjustment, notions of governmental immunities and prerogatives that earlier existed in the United Kingdom. ...

...

... It is a basic mistake of constitutional doctrine in Australia to treat the Commonwealth, the States and the Territories as manifestations of the Crown. It follows that it is an equal mistake to derive uncritically the applicable law of the governmental immunities of those polities from notions of the English common law or the royal prerogatives. This is because the new polities take their character from their creation and acceptance by the Australian people ... it should not be assumed that this change in the source, origin and character of the Australian constituent polities did not affect the ambit and content of such immunities. It was thus an error to import into the new constitutional arrangements for Australia, without modification, all of the law on Crown immunities and Crown prerogatives apt to a different country, in different times, reflecting different constitutional purposes and values.⁴⁵

³⁹ *Bropho v Western Australia* (1990) 171 CLR 1 at 18-19.

⁴⁰ *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1.

⁴¹ See Australian Law Reform Commission (ALRC) (92/2001), *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, para 22.39.

⁴² *Bropho v Western Australia* (1990) 171 CLR 1 at 19.

⁴³ Functions test: *Townsville Hospital Board v Townsville City Council* (1982) 149 CLR 282.

⁴⁴ *Bropho v Western Australia* (1990) 171 CLR 1 at 18-19.

⁴⁵ *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 48-50 [102]-[108].

Seddon has labelled the immunity a “stain on the rule of law”.⁴⁶ Academics and law reform agencies⁴⁷ tend not to favour Crown immunity from statute – there has been a chorus of criticism of the concept of Crown immunity from statute on the basis that it lacks historical foundation⁴⁸ and leads to greater complexity.⁴⁹ Hogg and Monahan in the leading treatise, *Liability of the Crown*, suggest that the presumption should be reversed with a general rule that the Crown is subject to statute, subject to statutory override,⁵⁰ as did Glanville Williams,⁵¹ who puts the survival of the doctrine down to vis inertiae:

the rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but the vis inertiae. The chief objection to the rule is its difficulty of application. Consider how much clearer the law would be if the rule were that the Crown is bound by every statute in the absence of express words to the contrary.⁵²

Seddon reaches the same conclusion, as do others.⁵³

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

3. Crown not entitled to special treatment and is bound by all legislation

While this approach has some intuitive appeal in terms of the rule of law and equality of all, no Australian judge has ever stated that this is the position, and acceptance of it would require the overrule of a number of High Court decisions. The closest has been the comment of Barton J in *Ryan* that if the Parliament wished for the Crown to be exempt from legislation, it must state so expressly.⁵⁴ In *Baxter*, Kirby J claimed that the doctrine of Crown immunity and royal prerogative should not have been imported into Australia’s constitutional arrangements “without significant adjustment”, without stating what it might be.⁵⁵ Kirby J quoted extensively from some Irish decisions, however, including *Byrne*.⁵⁶ He concluded that “one day the error of the current approach of this Court to these questions will be understood. The starting point for the enlightenment will be a reading of the reasons of Walsh J in *Byrne v Ireland*”. In *Byrne*, Walsh J had noted that Art 2 of the Constitution of the Irish Free State had declared that all powers of government and authority, legislative and judicial, were derived from the people. In contrast, the basis of the Crown prerogatives in English law was that the King was the personification of the state.

The above rationale in the Irish context cannot be directly applied to the Australian constitutional context. The preamble to the Australian *Constitution* refers to the people of the colonies uniting “under the Crown of the United Kingdom”; s 1 vests legislative power in the “Federal Parliament”, including

⁴⁶ Seddon, n 1 at 260.

⁴⁷ See, eg Alberta LRI, n 37, p 1 (recommended reversal of presumption of Crown immunity); Ontario Law Reform Commission, *Report on the Liability of the Crown* (1989) (recommended reversal of the presumption); British Columbia Law Reform Commission, *Report on Civil Rights* (1972) (recommended reversal of the presumption which led to reforms in that province); see also Canada LRC, n 37, p 2: the presumption of Crown immunity was an anachronism.

⁴⁸ Street, n 9 at 384.

⁴⁹ Hogg P and Monahan P, *Liability of the Crown* (3rd ed, 2000) p 325.

⁵⁰ Hogg and Monahan, n 49, pp 326-328. See also Taylor, n 24 at 118 (criticises notion that the presumption should be weaker in respect of “commercial activities” and stronger in other areas due to uncertainty created by different ideas of what are traditional government functions).

⁵¹ Glanville-Williams, *Crown Proceedings* (1948) pp 48-58.

⁵² Glanville-Williams, n 51, pp 53-54.

⁵³ Seddon, n 1 at 261; Churches S, *An Historical Survey of the Presumption in the Common Law that General Statutes Do Not Bind the Crown* (PhD thesis, University of Melbourne, 1988) (favours abolishing the presumption); Churches S, “The Trouble with Humphrey in Western Australia: Icons of the Crown or Impediments to the Public?” (1990) 20 UWALR 688.

⁵⁴ *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358 at 371.

⁵⁵ *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 48-49; see also at 27 (joint reasons declare that Crown immunity is a rule of statutory interpretation and not some prerogative power). There is debate about this because Evatt, previously in his discussion of prerogatives, had included Crown immunity from statute as one: Evatt HV, *The Royal Prerogative* (1987) pp 30-31.

⁵⁶ *Byrne v Ireland* [1971] IR 241.

the Queen; and s 2 provides for the appointment of the Queen's representative in Australia. It is, with respect, an error then to equate Australia's constitutional arrangements with those of republican Ireland. We should not replace one inappropriate borrowing with another.

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

4. Presumption that Crown not bound: Subject to Parliament intention and consideration of purpose of the Act and statutory circumstance

This is the status quo, and reflects the positive reform to this area of the law undertaken by the High Court in *Bropho*. However, the rule is not ideal. It retains a presumption that the Crown is not bound by the statute, largely due to reasons of precedent. As indicated, however, the presumption is of dubious origins, and is ill-suited given the growth in the role of the Crown over the years, and the difficulties in identifying which bodies might be entitled to its protections. While I understand the rationale for such a suggestion, a number of difficulties are apparent.

1. The test is potentially uncertain. There could well be differences of opinion as to the intention of Parliament given the subject matter of the law, in the absence of express words one way or the other; for all the difficulties with the *Bombay* approach, at least it provided certainty in application; the facts of *Bropho* might have shown quite easily an intention to bind the Crown; many other cases will not be so clear cut. The Australian Law Reform Commission recognised this difficulty.⁵⁷
2. The *Bropho* approach might be suggesting a differential approach to "commercial" and "traditionally governmental" type activities, when such a line is inherently difficult to draw and necessarily subjective, and which has already been abandoned in the context of deciding whether a body is entitled to the shield or not.⁵⁸
3. *Bropho* introduced a differential test depending on when legislation was passed, with the *Bombay* approach applicable to statutes passed between 1947 and 1990, and the *Bropho* approach applicable to statutes passed before 1947 or after the decision was given. While I understand the rationale for such a suggestion, it can lead to difficulties. What of a statute, eg, passed in 1989 but amended in 2008? Does the *Bombay* test apply to the original provisions, and the *Bropho* approach to the amendment?
4. The formulation in *Bropho* regarding Crown immunity does not accommodate the prerogative/exercise of prerogative dichotomy explained by the High Court in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410. Given that both High Court decisions deal with the question of whether the Crown is bound by legislation, it is submitted they must be reconciled. I submit that the *Bropho* test as currently applied by the High Court does not reconcile with the *Defence Housing* synopsis. There is only a very brief reference to *Bropho* in *Defence Housing* and no discussion of their interplay. Nor has it been considered in subsequent cases like *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90.

⁵⁷ ALRC, n 41, para 22.41.

⁵⁸ Similarly, Greg Taylor believes the *Bropho* decision might be heralding a move towards a tiered approach, with a presumption of immunity for "really" government activities, and no presumption for "more commercial activities"; he is critical of this on the basis of the American experience with a similar rule – the diverse views, to some extent reflecting different political beliefs, as to what is a "government" type activity and what is not: Taylor, n 24 at 118. Writing of the similar Canadian test of "logical implication" that the Crown be bound, Hogg and Monahan criticise the test due to uncertainty caused by the fact that "judges differ as to the force of oblique indications": Hogg and Monahan, n 49, p 291.

5. Other authors have noted that the absence of an express provision stating that the Crown is bound is far more likely to be caused by inadvertence than a conscious desire that the Crown not be bound.⁵⁹

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

5. Crown immunity confined to prerogatives only: No presumption Crown not bound – Crown bound in respect of laws not altering prerogative unless legislation provides otherwise?

There is precedent for a “narrow” Crown immunity from statute – that it be confined to Crown prerogatives only. For example, Lord Coke in *Magdalen College* (1615) 11 Co Rep 66; 77 ER 1235, confined the immunity to laws that “derogated from any prerogative of the Crown”. Equally, Williams J in *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 363, confined the immunity to cases involving the prerogative of the Crown, as did Griffith CJ in *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358 at 365, at least in the absence of express words.

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

The purpose in drawing a distinction between the capacities of the Crown and the exercise of them is to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities. In *Commonwealth v Cigamic Pty Ltd (in liq)* (1962) 108 CLR 372, it was held that a State legislature had no power to impair the capacities of the Commonwealth Executive, but at the same time it was recognised that the Commonwealth might be regulated by State laws of general application in those activities which it carried out in common with other citizens.⁶⁰

By parity of reasoning, it is suggested that the new rule in the context of Crown immunity generally should involve a distinction being made between:

- (a) laws that alter the Crown prerogative – in which case express words binding the Crown would be needed, otherwise a general presumption of immunity would apply;⁶¹ and
- (b) laws that merely regulate its exercise – in which case the Crown would enjoy no special immunity, and would be presumed to be bound. It would be able to immunise itself with express words.⁶²

⁵⁹ Alberta LRI, n 37, p 5.

⁶⁰ *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 439 (Dawson, Toohey and Gaudron JJ); the joint reasons referred to *Commissioner of Taxation (Cth) v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 308 where Dixon J maintained a distinction between the general law of a State which may incidentally affect Commonwealth administrative action, and governmental rights belonging to the federal Executive as such.

⁶¹ This is consistent with the view that Crown prerogatives are part of the common law, and liable to be varied by legislation: *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 567 (HL). It is consistent with the High Court's approach in *Barton v Commonwealth* (1974) 131 CLR 477 at 488 per Barwick CJ: “the rule that the prerogative ... is not displaced except by a clear and unambiguous provision is extremely strong”; Mason J (at 501) required a “clearly expressed intention” to abrogate the prerogative. Space does not allow me to explain more fully what is meant by prerogative powers here, but see Evatt H, *Certain Aspects of the Royal Prerogative* (unpublished LLD thesis, University of Sydney, 1924) pp 30-31, 39-41, 72-73; Winterton, n 1, p 48.

⁶² This reversal of the presumption has occurred in two Australian jurisdictions (*Acts Interpretation Act 1915* (SA), s 20; *Interpretation Act* (ACT), s 7), in Canada in British Columbia (RSBC (1996), c 238, s 14(1)) and Prince Edward Island (RSPEI (1998), c I-8, s 14), and recommended by: Parliament of the Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, *The Doctrine of the Shield of the Crown* (1992) 10.3; New Zealand Law Reform Commission; Ontario LRC, n 47; Alberta LRI, n 37. Similarly, see ALRC, n 41: “considerations of transparency and accountability require that in circumstances in which the government determines that it should not be bound by the same law as citizens, the extent of its immunity should be expressly stated”.

This is defensible on the basis that the basic test remain one of parliamentary intention, consistent with the courts' approach to statutory interpretation more generally on ambiguous questions.⁶³ One of the leading academics in this field has expressed support for some presumption in such cases.⁶⁴

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

CONCLUSION: NARROW CONCEPTION OF CROWN IMMUNITY

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

- (a) there are express words that suggest the Crown is intended to be exempt;
- (b) the Act alters Crown prerogatives, in which cases express words are required in the Act to have this effect.

This approach aligns well with some of the historical basis of the immunity and precedent, and recognises the role of the Crown has evolved substantially in the intervening centuries. It reflects egalitarian values and is consistent with the rule of law, and enjoys support from the academy.

⁶³ *Acts Interpretation Act 1901* (Cth), s 15AA.

⁶⁴ See Winterton, n 17, "The Limits and Use" at 443: "in determining whether legislation impliedly intends to alter, regulate or abolish a prerogative power, the courts should apply the general approach to statutory interpretation outlined in *Bropho*. There should, at most, be a mild presumption against such intention".