ONE HUNDRED AND FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

PROCEEDINGS BY AND AGAINST THE CROWN

1987

CROWN PROCEEDINGS

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One Hundred and Fourth Report of the Law Reform Committee of South Australia relating to proceedings by and against the Crown

To: The Honourable C.J. Sumner, M.L.C.

Attorney-General for South Australia

Sir,

One of your predecessors referred to us for consideration the desirability of updating and further clarifying the law relating to proceedings by and against the Crown in right of the State of South Australia with particular reference to the Crown Proceedings Act 1972.

Whilst enacted to "simplify the conduct of proceedings against the Crown" (Attorney-General's Second Reading Speech, 28.3.72) there remain various obscurities in and certain omissions from the Crown Proceedings Act, 1972 and this report recommends changes to both this Act and other statutes to overcome these problems.

A INTRODUCTION

The Committee has approached the topic of Crown Proceedings holding the view that the Crown in right of South Australia should, as far as the circumstance of the Crown's peculiar responsibilities in the government of the State permit, possess the same or similar rights, powers and privileges, and be subject to the same obligations and duties, as any ordinary citizen. We do not believe that the Crown should retain any procedural or substantive prerogatives or privileges unless there are compelling public policy reasons for it to do so. As Professor Wade states in his Administrative Law (5th Edn. 1982), page 697:-

"It is fundamental to the rule of law that the Crown, like other public authorities, should bear its fair share of legal liability and be answerable for wrongs done to its subjects."

Differences will arise as to what constitutes that "fair share" but the Committee is of the view that the Crown Proceedings Act should aim to achieve within the limits previously prescribed the principle of parity or even-handedness as between Crown and subject.

That there was in 1972 a need for thoroughgoing legislative reform in the area of Crown proceedings was illustrated by Holdsworth's comments in his History of English Law Vol.X (1938) pp.345-346 where the author stated:-

"Most ... procedural privileges originated at an early period in the history of the common law. Some of them represent relatively primitive legal ideas. Others represent a period in legal history when the relation of the King to the law, to the courts,and to his judges was very different from the relations which were established as the result of the Great Rebellion and the Revolution. ... The judges gained independence and security of tenure at the Revolution; but the special remedies, exemptions and procedural privileges, which had originated in the Middle Ages and had been developed and elaborated in the sixteenth and seventeenth centuries, remained."

As the Chairman of this Committee had occasion to point out in West Lakes Limited v. The State of South Australia (1980) 25 S.A.S.R. 389 at 407 the Crown Proceedings Act surmounts two hurdles namely:-

(1) "the problem which is succinctly stated in Tarring's Law of the Colonies 3rd edition (1906) p.50 where it is said "A colonial Government is not a corporation and cannot be effectually served with a writ",

and

(2) "the other problem that the Crown could only be sued, in such cases as it could be sued at all, by

petition of right."

Whilst the present Crown Proceedings Act achieves some success in modernising certain aspects of Crown proceedings, the Act appears on closer analysis to overlook a number of important areas where the principle of parity and even-handness has been and continues to be excluded. This report will recommend a number of changes to the present law so as to bring the Crown Proceedings Act, and many other statutes, into line with that principle of parity. At the outset, the Crown Proceedings Act should explicitly state the desirability of parity being achieved.

The report which follows examines the many ancient and outmoded exemptions and procedural privileges of the Crown. We determine whether any and, if so, which privileges should continue to favour the Crown in its juristic entity as "The State of South Australia" (See s.5(2) of the Crown Proceedings Act and China Ocean Shipping Co. v. The State of South Australia (1979) 145 CLR 172, 191).

Unfortunately, the present legislation leaves much uncertain as to the status of the entity "The State of South Australia" and as to the extent of citizens' rights against it. For example, does and, if so, should this new juristic entity succeed to the rights and privileges of the Crown, some of them now merely of historical interest, others conducive to injustice. Can the subject maintain a suit against "The State of South Australia" where another statute permits of suit against a Minister of the Crown or a statutory corporation? What priorities and privileges should the Crown enjoy over and above ordinary creditors in the

winding up or dissolution of corporate bodies or estates? And how useful is a citizen's right to sue the Crown in contract or tort if a multitude of statutes state they do not bind the Crown or if there is to be uncertainty as to whether a particular body or utility falls within the protective shield of the Crown? These and other questions are considered at length below, but in relation to each such question, our starting point is always the desirability of achieving the principle of parity or even-handedness referred to above.

What emerges from our deliberations is the desirability of limiting Crown privileges to five main immunities, the retention of which are, we believe, justified in the public interest. These five should be recognised and embodied only by and their existence dependent upon statute. They can be stated shortly as:-

1. Crown privilege, so far as it exists, (and there are two views on this as the Report shows), on discovery of documents and answering interrogatories.
2. Immunity from execution, attachment for contempt, distress and similar processes.
3. Generous rights of intervention in cases touching and concerning Crown rights, titles and interests and in all cases where the public interest is at stake.
4. Proceedings which are preserved under s.15 of the present Crown Proceedings Act i.e.: fines, penalties, forfeitures, the parens patriae jurisdiction etc.,
5. Preference or priority as a creditor when the Crown is a taxing authority.

In addition, the Committee advocates that the personal privileges of the Monarch be protected by expressly providing in the Crown Proceedings Act that nothing contained therein in any way affects those privileges. We also stress that none of the recommendations contained herein purport to deal with or are intended to affect the personal actions, prerogatives and privileges of the Monarch.

B MISCELLANEOUS PRIVILEGES

Listed below are some thirty areas of privilege pertaining to the Crown, many of which we consider offend against the principle of parity and require legislative reform. In relation to each we state the grounds upon which the privilege so offends, or, as in certain instances, justifies their retention. We also suggest the manner in which the unwarranted privileges might be removed or remodelled. Considerable research into each topic has been undertaken by the Committee or on its behalf and, accordingly, where appropriate, an appendix is attached detailing that research. We now turn to these privileges.

1. Ancient Procedures

At settlement, South Australia inherited certain of the prerogative procedures of English law favouring the Crown. The principal ones were the Latin information, the English information, the writ of scire facias, writs of extent, and the writs of diem clausit extremum, capias ad respondendum, and subpoena ad respondendum, the writs of

appraisement and inquisition, and inquests and traverses of office. They were and remain complex and technical and, although long forgotten, may still be invoked by the Crown to obtain advantages over another party which are not enjoyed in suits between subject and subject; see, for example, Walker's reference to the "English information" at p. 402 of his Oxford Companion to Law (1980).

In 1947, the United Kingdom Parliament abolished these ancient procedures by sections 23, 33 and the First Schedule to the Crown Proceedings Act 1947 (U.K.). We recommend a similar approach in order that any doubt about their current status be dispelled. We are aware that the New South Wales Law Reform Commission's Twenty-fourth Report entitled "Proceedings By and Against the Crown" considered that express abolition of ancient procedures was unnecessary in that "(f)or all practical purposes they have disappeared" (p.42). However, South Australian law differs sufficiently from that of New South Wales (see esp. p.41 of the N.S.W. Report) to warrant express abolition.

In addition, section 39 of the South Australian Constitution Act, 1934, as amended, refers to the writ of capias ad satisfaciendum, the general name afforded to Crown writs directing the sheriff to arrest persons named therein for the purpose of commencing actions or in execution of a Crown debt. Section 39 concerns writs of capias ad satisfaciendum directed to Members of Parliament. It is obsolete and should be repealed. Similarly, s.115 of the Law of Property Act 1936, as amended refers to further

ancient procedures of inquisition and office found. This section should be reworded to have these matters accord with modern usage.

In regard to proceedings by a subject against the Crown we recommend that the procedures of monstrans de droit (itself subsumed by the petition of right) and liberate be included in the general abolition. However, the Committee considers that the petition of right ought to be retained in that it might afford an occasional useful residual function although here again there is considerable doubt as to whether the petition of right survived the repeal of s.74 of the Supreme Court Act 1935 by Act No. 41 of 1972. The petition of right demonstrated its value as a proceeding of last resort in the South Eastern War Settlers case in our Supreme Court in 1967 as well as in constitutional cases such as the Western Australian secession petition, and should be retained as a "backstop" proceeding when all other means of relief against the Crown have failed.

Appendix One refers in more detail to English and Australian use of ancient procedures.

2. Interlocutory Orders and Judgments

With the express exception of s.7 of the Crown Proceedings Act, the Crown is presently immune from interlocutory orders and judgments to restrain specific conduct as well as applications for injunctive relief.

Section 21 of the United Kingdom Crown Proceedings Act,

1947 expressly prohibits injunctions against the Crown (although orders declaratory of the rights of the parties are permitted, s.21(1)(a)), reiterating the Common Law immunity of the Crown and its servants and agents from injunctive relief (see de Smith, Judicial Review of Administrative Action, 4th edn., (1980), p. 445 and Bell: Crown Proceedings, 1948, p. 9).

We consider that reform of this privilege is appropriate and adopt the remarks of the British Columbia Law Reform Commission in its 1972 report on "Legal Position of the Crown" when it says:-

> It is very important ... that the rule of law is not frustrated by illegal activity which destroys the subject of litigation before a final decision is made as to the rights of the parties. This is the purpose of interim relief."

With the exception of Mr. Gray who considers that the Crown should never be amenable to an injunction where the act complained of is clearly an intra vires act, the Committee is of the opinion that both interim and perpetual injunctions should be available against the Crown, its servants and agents save insofar as there are no issues of executive necessity arising (in which case the plaintiffs remedy should be in damages alone: see Executive Necessity [infra]). Therefore the definition of "proceedings" in s.5(1) of the South Australian Crown Proceedings Act, should include a reference to interlocutory procedures and orders.

On the other hand, the Committee believes that where the Crown itself seeks an interlocutory or interim

injunction, the present position whereby the Crown is not required to give an undertaking as to damages as a necessary pre-requisite to the granting of an injunction (see Bell, Crown Proceedings, [1948] p. 149, citing Attorney-General v. Albany Hotel (1896) 2 Ch. 696 and further discussion at 25 (ii) infra) should be retained, but a right to damages should be given as set out at page 40.

In relation to interim injunctions against the Crown it may be argued that the Crown might, in an emergency, want to override the law leaving it to the legislature to ratify its actions ex post facto and that the grant of an interim injunction against the Crown might prevent it from doing so. To this objection we respond by adopting the reply of Professor Street:-

> "This ignores the prerogative rights of the Crown in an emergency which are untouched by the [Crown Proceedings] Act. Moreover, it takes no account of the fact that the injunction is a discretionary remedy. It is yet another example of the unwillingness of the Executive to trust the Judiciary" (and see Governmental Liability (1975) at page 142).

3. Costs and Interest

Costs have now been assimilated to the position now obtaining as between subject and subject by virtue of the 1977 amendments to the Crown Proceedings Act, (see s.7(4) of the principal Act). We approve these amendments. However, the Committee notes that the 1977 amendments did not deal with the question of interest so that the ordinary rules for subjects as to interest on judgment debts and costs and on damages for the period before judgment do not bind the

Crown. The Committee believes that, in accordance with the principle of parity, these rules should bind the Crown. We favour the enactment of a section similar in purport to Section 19 of the New Zealand Crown Proceedings Act, 1950 (see also s.24 of the U.K. Crown Proceedings Act, 1947) to deal expressly with these matters. An ancillary matter is the Crown's privilege in not having to pay any fee or charge for commencing or taking any step in proceedings whilst nevertheless being entitled to recover costs for such fees and charges in the fiction that the same had been met by the Crown, see 7 (5), Crown Proceedings Act. It might very well be argued that this is inconsistent with the principle of parity. We therefore recommend that unless it can be shown that the cost to the Administration would be unduly increased, this provision should be repealed so that the Crown either pays these fees and charges and claims them when successful or desists from claiming that for which it did not have to outlay.

4. Estoppel

It has been said in some old authorities that the Crown is not bound by estoppel. The matter is not free from doubt. Accordingly the matter should be resolved by legislation.

There are three categories of estoppel. First, estoppel by record (whereby the parties to a suit and their privies are prevented from denying the existence or effect

of an earlier judgment on the same issue); secondly, estoppel by deed or writing (preventing parties to deeds from denying facts stated or cited therein) and finally estoppel in pais (whereby a party's conduct or omission leads another reasonably to understand that he may act in reliance thereon and upon the latter so acting, the former is not permitted to act in a manner inconsistent with the earlier representation.)

The doctrine of equitable or promissory estoppel as appears in and was developed from the foundation decision in the High Trees Case [1947] K.B. 130 (considered and applied in Je Maintiendrai v. Quaglia (1980) 26 S.A.S.R. 101) forms a species of the last category as does estoppel by acquiesence or encouragement (see Legione v. Hateley (1983) 152 C.L.R. 406.)

As we have said, the extent of Crown immunity from these various kinds of estoppel is uncertain. To remove doubts, we recommend the British Columbia approach of amending the Crown Proceedings Act to affirm the applicability of estoppel to the Crown.

A further problem in the context of estoppel is ultra vires (see the detailed discussion in McDonald: "Contradictory Government Action: Estoppel of Statutory Authorities" (1979) 17 Osgoode Hall L.J. 160). Because statutory bodies and persons legal or natural acting under statutory powers cannot arrogate to themselves powers which Parliament has not intended they should have, the principles of estoppel do not apply to ultra vires acts as an estoppel

cannot be used to defeat, contradict or amplify a statutory mandate.

The Committee recommends that an amended Crown Proceedings Act should ensure that the Crown is bound by all types of estoppel except where giving effect to an estoppel would defeat or affect a public duty cast upon the Crown by statute or by the common law although making it clear that the rule that the Crown cannot arrogate to itself powers not conferred on it by the prerogative or by statute remains. This amendment will serve to:-

(a) remind the Crown and private litigants that the Crown is bound in estoppel in exactly those situations where private persons are bound; and

(b) leave flexibility to the courts to explore the possibilities of mitigating the operation of the ordinary ultra vires principles and to develop principles of mitigation in an ordered fashion (similar to that undertaken by Wells. J. in Jurkovic v. Port Adelaide (1979) 23 S.A.S.R. 434 at pp.439-443).

This recommendation is consistent with our later recommendations on the Limitation of Actions Act 1936 and, in particular s.26 of that Act (see infra). (For more detailed discussion of the ultra vires problem see Appendix Two).

5. Time

The South Australian Limitation of Actions Act, 1936, does not expressly bind the Crown although the Nullum Tempus

Act, 1769: 9 Geo. III c. 16 which applies in South Australia does do so in the context of recovery of land by the Crown.

Although Professor Hogg has put a different view in Liability Of The Crown (1971), p. 33 arguing that s.5 of the Crown Proceedings Act makes the Limitation of Actions Act applicable to the Crown, the Committee believes that the Crown probably continues to enjoy the privilege of not being bound by limitation periods. This is because Section 11(1) of the Crown Proceedings Act deals expressly with limitation periods and states that "the time for bringing proceedings against the Crown in tort or contract shall be the same as in the case of proceedings between subject and subject", (our emphasis). As can be seen, the express words of section 11(1) provide purely for actions against the Crown. It is submitted that the common law rule nullum tempus occurrit regi (time does not run against the Crown) is untouched by the statute. The only general statutes binding the Crown as to time are contained in the inherited Imperial Law: the Nullum Tempus Act 1623 (21 Jac. 1c.2) and the Nullum Tempus Act, 1769, mentioned above (9 Geo III, c 16); the latter Act being presumed to apply in South Australia in South Australian Company v. Corporation of Port Adelaide (1914) S.A.L.R. 16. We have previously reported to one of your predecessors on the operation of these statutes in the Fifty-Seventh Report of this Committee and for the purposes of this Report we adopt our earlier recommendations.

A related question is that of laches, the equitable doctrine that delay defeats equities. Glanville Williams in

his book Crown Proceedings (1948) says at p.110 that:-

> "It seems from the authorities that laches cannot be imputed to the Crown, and that the Crown is not prejudiced by the neglect of its officers."

Bell, Crown Proceedings (1948) agrees at p. 77, citing the remarks of Pollock C.B. in R. v. Renton (1848) 2 Ex. 216; 17 L.J. Ex. 204.

This must be so because the Crown is by intendment of law always present in all Courts and so can be no more guilty of laches than it could at common law have been non-suited.

A limited exception to this privilege appears to have been that of relator actions where the Attorney-General, on behalf of the Crown, merely lends his name to a litigant.

The rationale of this rule - that "no laches could be imputed to an impeccable King" (Holdsworth History of English Law Vol. X p.355) or an omnipresent one either, - is no longer appropriate for the reasons given by Professor Street in Governmental Liability, (1975), p. 160 cited with approval by Professor Hogg at p. 36.

With respect to limitation periods, the Committee recommends that our Limitation of Actions Act, 1936 be amended so as to bind the Crown expressly as does its United Kingdom equivalent, see Limitation Act, 1939 (U.K.), s.30.

It might also be advisable to enact a provision in the Crown Proceedings Act in similar terms to s.4 of the New Zealand Crown Proceedings Act, 1950 which reads as follows:

> "The provisions of this Act shall be subject to the provisions of the Limitations Act, 1950 and of any other Act which limits the time within which proceedings may be brought by or against the

Crown."

However, we add a word of caution. If, as we propose, limitation periods henceforth bind the Crown, then provision should be made to exempt from limitation Crown proceedings in matters pertaining to the revenues of the Crown, including the recovery of taxes, duties and other imposts.

We further recommend that the Crown Proceedings Act be amended to recognise that laches may be imputed to the Crown. This reform has already been achieved in Tasmania and indeed as long ago as 1932:- see the Supreme Court Civil Procedure Act, 1932, s.66 (2) (ii). We recommend a similarly worded provision.

In the case of suits by the Attorney-General ex proprio motu or ex relatione on behalf of the public to vindicate public rights or to enforce public duties where an individual has no locus standi to pursue the action himself, we recommend that the rule that delay or laches may not be imputed to the Attorney-General be retained. We believe that in this matter the public interest is paramount and that no delay or laches should affect or defeat the vindication of public rights or the pursuit of remedies on behalf of the public. Just as relator actions are protected from the provisions of the Crown Proceedings Act by s.15(b) (which should be retained) so should the amended Limitation of Actions Act contain a provision similar to s.15(b).

6. Customs and Fictions in Law

No custom binds the King for his person or goods,

though it is otherwise with customs that go with land, see Glanville Williams, Crown Proceedings p.109, Bell, Crown Proceedings (1948) pp. 46, 77 and G.S. Robertson "Civil Proceedings By and Against the Crown" (1908) at p.577.

Thus, the Crown is not bound by a sale of its goods in market overt (see 2 Co. Inst. 713, Chitty Prerogatives of the Crown [1820], p. 376). This should not be so if sale in market overt is to be retained. Nor should the Crown enjoy any other immunity from fictions or implications of law. The principle of parity endorsed by this Committee requires that customs, fictions and implications binding upon subjects should also bind the Crown. There is a detailed discussion of the origins and nature of these customs and fictions prepared by the Chairman and that discussion is annexed to this report as Appendix Three.

7. Execution

Section 8(1) of the present Crown Proceedings Act preserves the Crown's common law privileges with respect to execution, namely that "(n)o execution, attachment or similar process shall be issued ... against the Crown or any property of the Crown." Similarly worded provisions appear in other Crown Proceedings Acts, e.g. s.24(1) of the New Zealand Crown Proceedings Act, 1950 and s.25(4) of the U.K. Crown Proceedings Act 1947. The Committee does not favour any weakening of the Crown's position in this regard. On the contrary, the Committee recommends that the Crown Proceedings Act should be amended to affirm expressly the Crown's privileges with respect to its goods and chattels,

namely that the chattels of the Crown can never be taken under an execution or in distress (see The Secretary of State for War v. Wynne [1905] 2 K.B. 845 and Chitty, Prerogatives of the Crown [1820] p. 376) or detained under a claim of lien (see R v. Fraser (1877) 2 R.&C. 431). Similarly, in relation to realty, no lien should be permitted over land or improvements held by the Crown (this is already the position under the Workmen's Liens Act, 1893, see s.48).

What is of concern to the Committee is that the present wording of s.8 (and, in particular, s.8(3)) appears to vest the Crown with a discretion as to payment out of general revenue of successfully prosecuted claims against Crown instrumentalities. Section 8 is in this respect even less satisfactory than its precursor in the Supreme Court Act, 1935, s.77 (repealed by the Crown Proceedings Act 1972, s. 18). Under either of these sections "(i)t is probable ... that a judgment creditor would be unable to obtain mandamus to compel payment of his debt ..." (per Hogg, Liability of the Crown, (1971), p.125). In the Committee's view, once a judgment is obtained against an instrumentality of the Crown it should follow as a matter of course that that claim be met either directly out of the instrumentality's funds, or where insufficient, out of the general revenue. Section 8 should be amended accordingly.

The Committee makes two further references to Crown privilege in the context of distress. The first is that whilst in many Acts, distress is still a lawful mode of

execution in satisfaction of claims and debts, S.120(1) o: the Law of Property Act 1936 confirms the common la: position that Crown property is not subject to distress and as appears from our earlier recommendations, we do not advocate any change in this position.

S. 8(1) of the Crown Proceedings Act also forbids "attachment" of Crown property, presumably including garnishee proceedings (which would in any event be unavailable against the Crown by virtue of Crown immunity [see Canadian Imperial Bank Of Commerce v. Monette (1972) 1 O.R. 407].) By contrast, S. 175(1) of the South Australian Community Welfare Act, 1972 which deals with attachment of earnings, expressly binds the Crown by virtue of the definition of "employer". We do not think that the Crown should be exempt from garnishee proceedings brought in satisfaction of claims against persons other than the Crown itself. We do not think there is any reason in principle why Crown funds should not be able to be attached where the Crown is a debtor to a person adjudged a judgment debtor. However, the immunity which S. 8(1) affords the Crown from garnishee proceedings directed against the Crown as judgment debtor should be retained in line with our general recommendations on execution.

In the context of attachment we therefore favour the amendment of s.8(1) to accord with the above recommendation, see: s.26 of the New Zealand Act. We would also suggest that the Crown be bound by the attachment of earnings provisions under the Local and District Criminal Courts Act

1926 (see Ss. 184-193) but only insofar as the Crown is the holder of monies for judgment debtors, and not a judgment debtor itself. Amendments to either the Crown Proceedings Act or the Local and District Criminal Courts Act 1926, may accordingly be necessary.

8. Discovery of Documents

Discovery of documents by the Crown is already covered by s.7 of the Crown Proceedings Act which places the Crown upon the same footing, with the exception of Crown privilege or what might more widely be referred to as public policy privilege (see s.7(3)), as obtains between subject and subject. The precise limits of Crown privilege are presently determined by the common law (see Robinson v. State of South Australia (1931) A.C. 704 and Sankey v. Whitlam (1978) 142 C.L.R. 1).

We have made recommendations concerning crown privilege in our Fifty-First Report (pages 48-52) on the law of evidence where proposed rules governing this privilege are codified. Consequently, we do not propose to recapitulate them here. However, we note with interest that a 1972 report of the British Columbia Law Reform Commission proposes a rule on crown privilege virtually identical to the one recommended by this Committee in its earlier report.

9. Venue and Non-Suit

The Crown enjoys the privilege of being able to insist

upon trial of an issue wherever the Crown so chooses (see Chitty, Prerogatives of the Crown [1820] p.370), the reason being that the King is present in all his Courts and can therefore sue wherever he wishes, see R. v. Webb (1699) 1 Sid. 412: 82 E.R. 1187. The subject obviously has no such right.

The principle of parity which we have endorsed requires that choice of venue should be governed by ordinary rules of procedure such as are set out in the relevant jurisdictional statutes (e.g. s.114 of the Local and District Criminal Courts Act). These statutes should, at least for the purposes of venue in civil actions expressly bind the Crown, thereby abrogating what is another outmoded privilege. However, the Committee considers that in all criminal matters the Crown's right to chose its venue should be retained for the purposes of securing a fair trial and the Local and District Criminal Courts Act and other relevant legislation should expressly provide for this. Ensuring the impartiality of juries is ample justification for this proposed exception.

10. Quasi Contract

Section 10(1)(a) of the Crown Proceedings Act recognises the liability of the Crown for "any contract made on its behalf". Quasi-contractual obligations e.g. monies had and received; monies paid under mistake of fact; probably fall outside the sub-section (although a petition of right could always found such an action against the

Crown) and, accordingly, the Committee recommends that s.10(1)(a) be amended to expressly include the subject's right to proceed against the Crown in quasi-contract. We agree with the comments of Professor Street when he says in Governmental Liability that "the failure to provide more explicitly for quasi-contract is reprehensible, but seems to be due to ill-considered drafting, not to deliberate omission", see, for example, s.53 of the South Australian Sale of Goods Act, 1895 (which, by necessary implication, binds the Crown) dealing with failure of consideration. Here, the Crown is already subject to one form of quasi-contractual remedy. The Committee believes that the Crown should be liable in quasi-contract to the same extent as the subject is.

11. Indemnity and Contribution

In accordance with the principle of parity, the law of indemnity and contribution as between subject and subject should bind the Crown. A section in terms similar to s.8(1) of the New Zealand Crown Proceedings Act (see also s.6 of the Canadian Model Code) should be inserted in our Crown Proceedings Act.

12. Punitive or Exemplary Damages

The Committee considers that for the purposes of our Crown Proceedings Act, the law relating to punitive or exemplary damages should be the same as that applying between subject and subject. Indeed, this would already

appear to be the position in this country, exemplary damages having been awarded against the Crown as long ago as 1763 in the case of Huckle v. Money (1763) 2 Wils. 205; 95 E.R. 768 arising out of the illegality of certain warrants. The Committee raises this topic in the light of United States initiatives to render the State immune from punitive awards, see Federal Tort Claims Act (U.S.). We do not favour the United States initiatives.

13. Statutes presumed not to bind the Crown

One of the fundamental prerogative immunities of the Crown is the presumption that legislation does not bind the Crown unless the Crown is bound by express words or necessary implication, see Willion v. Berkley (1561) 1 Plowd 233, 239; 75 E.R. 339,365-6; Province of Bombay v. Municipal Corp. of Bombay (1947) A.C. 58 and Bradken Consolidated Ltd. v. B.H.P. Co. Ltd. (1979) 145 C.L.R. 107. The Committee has considered a proposal that this presumption should be abolished and replaced with a presumption in favour of the Crown being bound. With the exception of Mr. Gray, the Committee has resolved to endorse this proposal.

In Appendix Four to this Report the origins, nature and problems of the Bombay decision on presumption are discussed at length. For present purposes it is enough to say that a majority of the Committee considers that the rule offends against the principle of parity and that statutes should be presumed to bind the Crown in the absence of the legislature's express words to the contrary. The Crown

Proceedings Act should therefore be amended accordingly, embodying a clear statement to the effect that this new presumption operates not only on parent or enabling Acts but also upon consequential rules, regulations, by-laws, orders and proclamations.

It should however, be stressed that the amendment proposed by us would create a presumption in favour of the Crown being bound, not a rule of law. The Crown would nevertheless still be entitled to assert that the legislation on its true construction did not intend to bind the Crown. The effect of the proposed reform would be to transfer the onus of rebutting the presumption from subject to Crown, the latter being the party best qualified to establish why it should not be affected by the legislation in question.

Mr. Gray does not favour the approach endorsed by the rest of the Committee. He has proposed abolition of the existing presumption, replacing it with a statutory requirement (perhaps in the Acts Interpretation Act) that every statute state specifically whether or not it binds the Crown in right of South Australia.

14. Priority of Crown Debts

Whenever there was a question of the competing rights of Crown and subject or concurrence of title, the common law gave preference to the Crown: see Co. Litt. 30b and Chitty Prerogatives of The Crown (1820) pp.288 and 381. The modern consequence of this prerogative is that the Crown's right of

execution against chattels or to distress of chattels enjoys, in the absence of legislation to the contrary, priority over that of the subject. This priority has survived the Crown Proceedings Act in relation to claims under State law although the position differs under federal law where bankruptcy or other proceedings under the Commonwealth Bankruptcy Act 1966 have been taken. The Committee considers that in those areas where the Crown's priority has not already been abrogated by statute, see e.g. the Companies (South Australian) Code, the following restatement of the law is recommended:

1. Where both the Crown and subject are secured creditors, then the ordinary law should apply. If the debtor has sufficient assets to satisfy all claimants, the Crown and subject rank equally but in order of priority of security. But if the debtor does not have sufficient security to satisfy all claimants, the prerogative rule should not (in the absence of legislation to the contrary) operate to confer priority on the Crown.

The same observation applies where both Crown and subject are unsecured creditors;

2. Where either the Crown or the subject ranks ahead of the other, i.e. where either is of unequal degree to the other whether at law or in equity, the ordinary rules of priority as between subject and subject ought to follow.

As previously stated, the common law renders the Crown

as a secured creditor unaffected by a statutory prescription of priorities as between securities and other competing interests, unless legislation to the contrary binds the Crown expressly or by necessary implication.

Accordingly, the principle of parity calls upon us to recommend amendment of the Crown Proceedings Act so as to ensure that:

(1) in proceedings in any jurisdiction the Crown and subject qua unsecured creditors shall rank pari passu;

(2) any Act, regulation, order or rule which deals with the ranking of creditors or the execution or levy of debts shall bind the Crown in right of this State to the intent that the Crown shall rank pari passu with subjects where the debts are of equal degree;

(3) the Crown has to be named in any relevant Act or provision of any relevant Act as a secured creditor or a creditor of preferred status;

and (4) any statutes which make Crown debts specialty debts or any common law Crown debts such as those on some recognizances which have that effect, should be treated as ordinary unsecured debts for the purpose of ranking inter se as between competing creditors' claims though not as against the debtor.

Two qualifications should be made. First, our recommendations on priority are directed solely at the

relationship between the Crown in right of South Australia (i.e.: The State of South Australia) and its subjects and do not concern the problem of competing Crowns within the Federation. Secondly, our recommendations should be made subject to legislation dealing with Crown claims on account of unpaid taxes, imposts, levies, rates or duties on the grounds that the Crown should be entitled to a preferred position so as to ensure the receipt of funds to support the essential services of Government. As McNairn states in Intergovernmental Immunity in Australia and Canada (1978), p. 125: "A tax debt can be distinguished from other debts because of this general public purpose underlying taxation schemes."

We recommend that subject to the statutes hereinafter referred to, any other priority or preference afforded the Crown by this State's statutes should be repealed and we refer to the Commonwealth Bankruptcy Act 1966, the Commonwealth Crown Debts (Priority) Act 1981 and the State Companies (South Australia) Code, 1982. The Bankruptcy Act binds the Crown in right of the Commonwealth and each of the States. Accordingly, Part VI, Division 2 dealing with the order of payment of debts from a bankrupt estate governs the distribution of available assets. Any privileges the Crown may have enjoyed at common law do not apply to bankruptcies.

The Commonwealth Crown Debts (Priority) Act merely subjects the Crown in right of the Commonwealth to any State law governing the distribution of insolvent estates; the Act is an adjunct to the State's Companies Code to ensure

that the Commonwealth Crown is subject to the winding up provisions applying in the States by virtue of their respective Companies Codes.

The South Australian Companies Code binds the Crown in right of South Australia "and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities": S.358. That section of the Code dealing with priorities in claims: sections 437-450, does not confer any privilege or priority upon the Crown (quite the reverse, ranking the Crown eighth in terms of outstanding tax liabilities) and has therefore effectively abolished the common law privileges in the context of the winding up of companies.

None of our recommendations affect the specific operation of the Commonwealth and State Acts to which we have referred insofar as they provide a specific code applicable to the particular arena regulated. Our proposals will operate in the areas not covered by any of this legislation, e.g.: garnishee and workmen's liens, monies held by charge etc.

Reference is made further on in this report to specific statutes at pages 46-48 of this report.

15. <u>The Problem of Independent Functions</u>

The Crown in South Australia presently enjoys immunity from vicarious liability for the torts of its employees, agents and office holders in the performance of their independent powers or duties conferred or imposed by statute

or common law. However, the Crown's employees and offic holders enjoy no immunity from personal liability for torts for which the Crown would have been vicariously liable were the Crown in the same position as any other employer. These principles follow from the maxim that the Crown does not speak to express its will to a servant or agent or office-holder by legislation where the office imports a separate discretion in the office-holder, see Enever v. The King (1906) 3 C.L.R. 969 applying Tobin v. The Queen (1864) 16 C.B., N.S., 310; 33 L.J. C.P. 199; 143 E.R. 1148, and also the recent decision of the High Court if Oceanic Crest Shipping Coy. v. Pilbara Harbour Services Pty. Ltd. (unrepor 26th June, 1986). Vicarious liability is, however, imposed upon the Crown where the acts of a Crown servant or agent are directed by executive command, prompting the New South Wales Law Reform Commission to comment in its 24th Report that "(t)he mode of expression of the will of the State ... ought to be irrelevant."

Although it is the practice of the Crown in South Australia to satisfy judgments against officers in respect of such torts probably in reliance upon s. 27c of the Wrongs Act, 1936 we agree with the New South Wales Law Reform Commission when it recommends, again in its 24th Report, that:

(a) The subject should have redress as of right;

(b) State discretion should not go unsupervised and unchallenged by courts;

(c) the plaintiff may not know the identity of the

wrongdoing officer; failure to identify should not defeat a claim; the State should be made answerable.

In meeting the objection that the proposed amendment would subject the Crown to liability in cases unconnected with the Crown's affairs, the New South Wales Law Reform Commission answers that the Crown should be liable in the same way as a master is in respect of his servant. It would be liable only for conduct of the servant which is in "the course of employment". This formula is comprehensive, well developed by case law and legally understood. The Crown would not be liable for the tort of a servant done for the servant's own end and not for the purposes of his employment. The servant's private frolic does not become the Crown's liability. Similarly, responding to the argument that the personal liability of an officer of the Crown is a salutary sanction for his misbehaviour, that Commission concludes that the officer would possibly remain liable (albeit to the Crown as opposed to the wronged subject) for serious or wilful misconduct. To the argument that it would be difficult to estimate the Crown's contingent liability, that Commission replies that this is the price to be paid for the just settlement of genuine, legally-vindicated grievances.

The Committee adopts the analysis of the New South Wales Law Reform Commission and recommends that the Crown Proceedings Act be amended so as to include the following provisions:

"Where -

(a) any powers or duties (not being powers or duties of a judicial nature) are conferred or imposed by any Act or law upon any servant, agent, office-holder or other person acting or purporting to act in the employment of or on behalf of the Crown;

and

(b) that person commits a tort by any act or omission in the bona fide exercise or discharge or purported exercise or discharge of those powers or duties the liabilities of the Crown in respect of that tort shall be such as they would have been if those powers or duties had been conferred or imposed solely by virtue of instructions lawfully given by the Crown."

We note that legislation in similar terms to that proposed in this recommendation has already been enacted in the United Kingdom (see s. 2(3), Crown Proceedings Act, 1947) and in New Zealand (see s.6(3) of the Crown Proceedings Act, 1950). The latter Act came into force on 1 January, 1952.

We should add that Parliamentary Counsel considers that a proper resolution to the problem of independent functions may only be achieved by an overhaul of the law of torts. Of course, that task lies outside our present remit: c.f., pages 47 ff. However we regard the points made by Mr. Hackett-Jones as of such importance that we have included a copy of his letter as the Sixth Schedule to this report.

16. Immunity

A difficult question is what effect upon Crown immunity, if any, follows from an enactment or rule of law that negatives or limits the amount of liability of an officer of the Crown. If a provision relieves an officer

from tort liability, or, indeed, contractual liability in right of his own person, ought the Crown to be able to avail itself of this shield? The Committee recognises that the answer may depend on the nature of the employee's acts.

We note that the British Columbia Law Reform Commission, in its 1972 report on Crown proceedings, answered this question in the negative. By contrast the New South Wales Law Reform Commission favoured the opposite conclusion.

This Committee's survey of South Australian statute law reveals three different positions on Crown servant's immunity:- first, express immunity of both servant and Crown: see S.48 of the Boilers and Pressure Vessels Act, 1968, as amended; secondly, express immunity for servants: see S. 19d(2) of the Builders Licensing Act, 1967, as amended; thirdly, immunity for Crown servants but express liability of the Crown: see S. 11(3) of the Meat Hygiene Act, 1980.

In the first situation, Crown liability is excluded. In the second, there is silence on the Crown's position and its liability is left to legal argument from the exact terms of immunity (and from s. 27c of the Wrongs Act, 1936). In the third situation, the liability of the Crown is directly imposed.

The Committee recommends that the third situation, where vicarious liability of the Crown is recognised as part of a master-servant relationship, is just and sensible and should be universally adopted. It would also serve to

recognise what has become the Crown's own practice with respect to injury or damage inflicted by Crown employees in the course of their employment.

In addition, where any legislation creates a body, administrative organ or inspectorate but omits to confer any immunity on the persons occupying membership therein, we recommend that those persons be assured of their own immunity from suit where acting in the bona fide or purported exercise of their functions but that liability for their wrongs be imposed upon the Crown as the appointing authority.

Messrs. Morgan and Wicks wish it to be recorded that whilst they accept the principle that a Crown employee is entitled to an indemnity from the Crown as employee (by virtue of s.27c of the Wrongs Act, 1936) they do not believe that Crown employees should be entitled to immunity from suit.

17. Crown Agents and Instrumentalities

Every agency or instrumentality of the Crown will generally carry with it such of the privileges and immunities of the Crown as are appropriate to the body concerned. This follows in part from S.4 of the Crown Proceedings Act which defines the Crown to mean, inter alia, "any instrumentality or agency of the Crown in right of this State".

In so far as our recommendations are aimed at eroding the shield of the Crown by the principle of parity, we

similarly recommend that it be made clear in the Crown Proceedings Act that Crown agents and instrumentalities also lose the shield of the Crown. Whilst we appreciate that it follows that removing Crown immunities per se will also abolish the immunity which Crown agents and instrumentalities derive from their status, we consider that this fact should be expressly stated in the legislation.

The abolition of Crown immunity will nullify the often tortuous task of having to determine whether a Crown agent or instrumentality is within the shield of the Crown.

Further consideration of the problems created by Crown agency and instrumentalities is considered in Appendix Five.

18. Prerogative Orders

In our Forty-Eighth Report dealing with the law of Locus Standi we made recommendations with respect to a new procedure for judicial review of administrative action. New Zealand (Judicature Amendment Act 1972), Ontario (Judicial Review Procedure Act 1971), and other jurisdictions have already enacted separate legislation which now covers the field previously occupied by (and still occupied in this State by) orders in the nature of the old prerogative writs of certiorari, mandamus and prohibition as well as injunctive and declaratory relief. Our law on these topics is substantially covered by the Supreme Court Rules (Order 59 Rules 1-16). We recommend therefore that the new procedure for public law enforcement as proposed in the 48th. Report be embodied in the Crown Proceedings Act as a

separate Part of that Act. This recommendation applies regardless of the final form of the legislation flowing from our Locus Standi Report.

We think that the Crown Proceedings Act is the proper repository for this, what might be called, new "order for administrative review" because we consider that the enforcement of public law rights and remedies should be conveniently located in the one Act.

One of your predecessors referred to us the whole question of administrative appeals. You will be aware that we have already reported to you on this topic in our 82nd. Report relating to administrative appeals (1984).

19. Crown Right of Intervention

Pursuant to S.12 of the Crown Proceedings Act, the Crown as represented by the Attorney-General has the right to intervene in any proceedings, whether civil or criminal, where the Crown is interested. The Committee has no doubt that this right should be retained. However, any trial in which the Crown intervenes should proceed as though it were a trial as between subjects.

However, the Committee does not believe that the retention of the Crown's ancient right to a trial at bar (that is, by a jury before two or more judges) serves any purpose. We note however, that the U.K. Crown Proceedings Act, 1947 does retain the Crown's right to trial at bar (S.40(2)(g)) and we assume that its retention is intended for such matters as treason. In the circumstances we

consider this privilege outmoded, but probably outside our remit.

20. Approbation and Reprobation

The Crown enjoys the further privilege of being able to take advantage of a statute, unless expressly or impliedly prohibited from doing so, even though the Crown itself is not bound by that statute; see Professor Wade's discussion at p. 716 of his Administrative Law and Town Investments Ltd. v. Department of the Environment [1978] A.C. 359.

The Committee considers that the Crown should not be able to rely upon a statute by which it is not bound unless it recognises and complies quid pro quo with the burdens and responsibilities imposed by that statute. We therefore recommend the enactment of the following provision in the Crown Proceedings Act to cover the situation where the Crown is expressly said not to be bound:

> "Where the Crown is expressed not to be bound by a statute it shall not be able to take or use the benefit of any right privilege or advantage conferred by or under such statute unless it fulfils, satisfies or complies with all or any obligations, restrictions, conditions, duties or burdens attendant upon or connected with that right privilege or advantage to the same extent as if it had been bound by the statute in all respects."

21. Breach of Warranty of authority

It is said that an agent of the Crown who acts without the authority of his principal may not be sued for breach of warranty of authority (see Street, supra, p. 93; Treitel, The Law Of Contract, 5th edn. p. 563; Wade Administrative

Law 5th Edn. p. 711.) The only authority in point is Dunn v. McDonald (1897) 1 Q.B. 555, 558. Treitel considers that the rationale of the rule lies in the "enormous value of some government contracts ... (upon which) it would be extremely harsh to impose liability on a civil servant who in good faith and without negligence misrepresented his authority." (p. 563). Whilst this may be so, this privilege in favour of Crown agents clearly offends against our principle of parity. We note also that State contracts are often for small amounts. As Wade states (p. 711-712) of Crown agents:

> "If they exceed their authority, therefore, neither the Crown nor its agent is liable, and the law fails to provide the remedy which justice demands."

The Committee notes a further difficulty (highlighted by Wade at p. 712) relating to unauthorised contracts entered into by Crown agents with ostensible authority. The liability of principals for vesting persons with ostensible authority relies upon the principle of estoppel and we have already seen that estoppel may not be asserted against the Crown. Accordingly, the Committee reaffirms its recommendation that the Crown's privilege against estoppel be removed. Further, we recommend that there be enacted in our Crown Proceedings Act, a provision to the effect that the law on breach of warranty of authority apply to Crown agents in the same manner as those rules apply to private persons. Nothing in this recommendation affects the law in cases where the Crown agent has no official capacity or

power to enter into a contract.

22. Executive Necessity

The Amphitrite doctrine (Rederiaktiebolaget Amphitrite v. The King (1921) 3 K.B. 500) holds that the Crown can rely upon executive necessity by way of defence to an action for breach of contract. Although the references in that case to contract were obiter, the facts showing not an intention to contract but the mere giving of an assurance upon which the private party acted, this case gave birth to a long standing principle which now presents something of a hazard to parties contracting with government. The Committee considers the potential scope of the Amphitrite doctrine a matter warranting legislative reform. Certainly, subjecting the Crown to the principle of estoppel will go some way to resolving the discrepancy between this rule and the principle of parity. However, we propose that executive necessity should no longer be a defence to an action in contract save insofar as the Crown will carry and should satisfy a burden to the civil standard of proving that the Crown was justified in asserting an executive necessity which was or should have been known to the other party at the time of entering into the contract or at the time of performance of the contract as the facts may require. That burden would perhaps more readily be made out in times of war, social unrest or natural disaster.

Where in any action taken against the Crown there are issues of executive necessity, the appropriate remedy

should be damages alone rather than specific performance or injunctive relief. We do not consider that coercive remedies are in the public interest nor consistent with the dignity of the Crown where issues of executive necessity have arisen.

It may be that the Amphitrite doctrine has already been displaced by S. 10 (1)(a) of the Crown Proceedings Act, 1972 (see the Chairman's unreported judgment in the Supreme Court, Manock v. The State of South Australia, 7.6.79) although this provision refers to contracts alone and not to the executive assurances which were at the heart of the facts in the Amphitrite Case. We consider that the Crown Proceedings Act should be amended so as to ensure, beyond doubt, that the Amphitrite doctrine has limited application. This will be achieved by placing the onus upon the Crown to assert and prove facts justifying a plea of executive necessity.

It should be noted that this principle has nothing whatever to do with those questions of Parliamentary privilege and sovereignty which were discussed by the Full Court of South Australia in West Lakes Limited v. The State Of South Australia (1980) 25 S.A.S.R. 389. That case raises questions of Parliamentary privilege and its interaction with contractual obligations. Such matters are not the proper concern of our present remit.

The problem of the rule in The Amphitrite has been raised in closely analogous cases concerning local government bodies exercising statutory powers. Such bodies,

it has been held, cannot enter contracts which would fetter those statutory powers (e.g. William Cory & Son Ltd. v. London Corporation [1951] 2 K.B. 476).

As Hogg remarks:

> "[The] rule that a public authority has no power to contract so as to fetter the future exercise of its powers is objectionable for the same reasons as The Amphitrite rule . . . . The actions of local bodies or other public corporations are never so urgent and necessary that they must act irrespective of costs." (p. 135).

This rule should be abolished and any breach of contract be actionable. Again, the award of normal contractual damages is a proper method of compensation. Coercive remedies should not, as with the Crown, be available to prevent the local government from acting in the public interest.

23. Defamation

Hogg (pp. 112-116) discusses the rule of absolute privilege from defamation proceedings for persons who make statements in the course of judicial proceedings. They are "absolutely" privileged because they are not actionable even if they were made maliciously. It is said that the ascertainment of truth and the administration of justice might well be impeded if free speech were in any way inhibited or prohibited. On balance, the Committee agrees.

But absolute privilege is also accorded to statements made by "high officers of State" where they relate to matters of governmental business and only enjoy a limited circulation within government.

The rationale for the absolute privilege in government is much harder to find, than that with respect to judicial proceedings (see Hogg pp. 114-115).

The Crown already enjoys a privilege from disclosure of certain documents in civil proceedings (see Section 7(3) of the Crown Proceedings Act 1972). As well, the Crown partakes of the general law of defamation where that law accords qualified privilege to persons under a legal or moral duty to make a communication to another person under a corresponding duty to receive it (e.g. see Fleming: The Law of Torts (6th. Edn. 1983) pp. 537-545).

Again, we agree with Hogg when he says:

> "Surely these protections are ample for high officers of State without the further security of the doctrine of absolute privilege.

We would add that the privileged position of statements made during Parliamentary proceedings (again, absolutely privileged) provides further protection, for members of Parliament.

Therefore, we recommend that statements made by and within the executive branch of government (but outside Parliament and not merely repeating in substance what has already been said in Parliament) should only be permitted qualified privilege. Malicious statements or those prompted by ill-will should (subject to the absolute privilege rules) remain amenable to proceedings at the behest of any injured litigant.

24. Imperial Law

The Imperial Statute 25 Geo. III c.35 deals with certain Crown rights against debtors, especially sale by the Crown of their property. As mentioned by the Committee in our Fifty-Fifth Report (see page 40) we think that this Act can be repealed. It was repealed in England as long ago as 1947 (See U.K. Crown Proceedings Act, 1947).

We think that both statute and common law adequately protect Crown interests and guarantees sufficient redress for Crown debts. The terms of the old Act need not be reproduced here in our new Crown Proceedings Act.

25. Undertakings

(i) Appeals:

The cases of Lord Advocate v. Dunglas (Lord) [1842] 9 Cl. & Fin. 173, 8 E.R. 381 (H.L.) and R. v. W.M. Bannatyne & Co. (1901) 20 N.Z.L.R 232) are respective English and New Zealand authorities for the proposition that the Crown is not bound by the rules requiring security to be given in civil appeals. Our Supreme Court rules (e.g. Order 65 Rule 4 dealing with security for costs) are silent on the position of the Crown. As previously stated, our recommendation dealing with reversal of the presumption of bindingness of statutes is to extend to all regulations, orders, by-laws, and rules (i.e. all subordinate legislation) made under any head statute. Thus the Crown would become bound by the Supreme Court Rule for security of costs,in effect overruling the decisions cited above. We see no reason for favouring the Crown in this matter.

However, as in ordinary litigation between subjects, it will be an unusual case in which security is ordered to be given.

(ii) Interlocutory Injunctions:

As previously indicated, the common law has never required the Crown to give the ordinary undertaking as to damages when seeking an interim or interlocutory injunction as is often required of private litigants.

However, as Lord Diplock indicated in his speech in Hoffman-La Roche (F) & Co. v. Secretary of State for Trade and Industry [1975] A.C. 295, the passing of the U.K. Crown Proceedings Act 1947 did not expressly preserve the Crown's former right to obtain an interim injunction without having to give any undertaking as to damages. The Act did not provide any justification for the differentiation between what should be required of the Crown and what should be required of the private litigant.

His Lordship said at page 362:

> "I see no reason why, when the Crown applies for an interlocutory injunction in an action brought against a subject to enforce its proprietary or contractual rights (ius privatum) the Crown should not be put upon the same terms as a subject as respects the usual undertaking as to damages."

His Lordship then went on to say that the undertaking would not necessarily be required for actions to enforce or to protect the ius publicum: it would then be a matter for the Court's discretion. The Hoffman decision was followed by Gobbo J. in Soil Conservation Authority v. Read [1979] V.R. 557, where it was decided that the Authority did not fall within the shield of the Crown and was required to give

an undertaking as to damages when seeking an interim injunction.

Our Act is silent on the point. We therefore presume it must still contemplate the common law position of not requiring Crown undertakings. In the Committee's view, the Crown should be liable for damages occasioned by an injunction which is later seen to have been wrongly granted but as has been previously stated, it is not necessary for the Crown to be required to give the undertaking. The public purse should be ample to meet any damages awarded.

The only legislative amendment required here is one to prevent any defence based on Bardolph v. New South Wales (1934) 52 C.L.R. 455 being raised after such damages have been assessed. Naturally, the second or ius publicum limb of Lord Diplock's decision should mean that the practice and procedure with respect to relator actions should remain unaffected - which our Act expressly preserves intact anyway (Section 15(b)).

26. Taxation Liability of the Crown:

It would be stating the obvious to say that there are many Acts of the South Australian Parliament which impose, directly or indirectly, a tax, rate, duty, levy or impost upon persons. The Crown is not presently liable for any such imposts.

If our recommendations are to be implemented and the Crown presumed bound, many of these statutes would impose a taxation impost upon the Crown. However, we do not consider

that the Crown should be liable for such taxes. A tax upon the Crown's operations would merely lead to a redistribution of government finances within government and pose an administrative burden. Each of these Acts may have to be expressly amended to create an immunity in the Crown from those provisions imposing taxation. Alternatively, a general provision in the Crown Proceedings Act might be enacted to create the necessary immunity.

27. Appeals pending and the Crown

In a number of statutes (e.g. Payroll Tax Act 1971, Land Tax Act 1936 and Waterworks Act 1932, amongst others), the Crown is entitled to pursue recovery of an assessment of tax due to it notwithstanding the taxpayer having lodged an appeal. This position is to be contrasted with that proposed in the yet to be proclaimed Enforcement of Judgments Act, 1978, (which will bind the Crown, see S. 6). By S.21 of that Act a party against whom a judgment has been given may apply for a stay of execution upon showing proper cause. A stay will ordinarily be granted pending the determination of an appeal. Under taxing Acts no such right to a stay pending an appeal from an assessment exists.

It appears to the Committee wrong in principle that a person who has been adjudged a judgment debtor can apply for a stay of execution, whilst one who has not had his liability finally confirmed cannot. Whilst we have recognised the Crown's preferential position as a taxing creditor, we do not consider that tax recovery processes

should be permitted to proceed whilst lawfully constituted appeal or objection proceedings are on foot. Whilst it may be said that the Crown should not be put at risk of loss of anticipated revenues by the widespread lodgment of appeals and stays upon execution, the Committee does not consider that this possibility should displace the principle of parity. The Committee considers that in taxation matters, where a taxpayer can show that he has a prima facie case for re-assessment on appeal, and that his case has not been shown to be frivolous, then a stay of execution should be granted in the court's discretion. Alternatively, were this proposal not thought appropriate, the Committee would advocate that interest at commercial rates be paid on monies returned to a taxpayer upon re-assessment on appeal. Appropriate amendments to the State's various taxation Acts will therefore be necessary.

A number of members of the Committee would recommend the vesting of a broadly based discretion in the Supreme Court to stay the execution of any judgment in favour of the Crown and not just those arising from taxation assessments.

28. Infants and Easements

The Law of Property Act 1936 affords the Crown two privileges by way of Sections 24a and 41a.

S.24a permits the State Bank and the South Australian Housing Trust to hold and bind infants to certain contracts (which, being infants, they might otherwise be able to avoid). S.41a permits the Crown, public and local

authorities, easements over land that is not appurtenant to Crown land.

Both such privileges are defensible in the public interest and we make no recommendation for their repeal.

29. Loan Acts

Three statutes (the Loans for Fencing and Water Piping Act 1938, the Loans for Water Conservation Act 1948 and the Loans to Producers Act 1927, confer certain priorities upon the Crown agency (the State Bank) with respect to advances for specified purposes. Again, these priorities are clearly in the public interest and should be retained.

C. ANCILLARY MATTERS

There are a number of peculiarities associated with the Crown proceedings which do not neatly fall into the category of privileges and we deal with them now.

1. Proceedings

The definition of "proceedings" contained in the Crown Proceedings Act should be amended to ensure that its terms extend beyond proceedings inter partes and proceedings by way of interpleader to embrace expressly all proceedings in which the Crown is or becomes a party including proceedings in the nature of third party and contribution.

In addition, the definition should be reworded so as to include all appeals in civil matters.

2. The Exchequer Procedure

It may be that a special form of equitable relief once obtainable against the Crown in the Court of Exchequer is still available to litigants suing in the Supreme Court of South Australia. Known as the Exchequer procedure, the relief obtainable differs from that flowing from the Petition of Right (which we have elsewhere recommended be retained). The Exchequer procedure probably need no longer be retained. In any event, there is much uncertainty as to whether the procedure has been satisfactorily vested in the South Australian Supreme Court given that the Court inherited its equitable jurisdiction by the Act of 1855-56 whereas the Equity jurisdiction of the Exchequer was transferred to the Court of Chancery in England in 1841 by the statute 5 Vict. c.5, passed after the Ordinance 5 of 1837 setting up the Supreme Court. Nevertheless, a suitable amendment to the Supreme Court Act, 1935, as amended, could ensure the availability of the Exchequer procedure were it considered appropriate. We note that there has never been any such proceeding maintained or attempted in this State.

3. Demise of the Crown

The effect upon legal proceedings (and, indeed, the life of the current Parliament and the authority of public office holders) of the demise of the Crown and proposed solutions to the problems thereby posed, was considered at length by this Committee in its 81st. Report. We do not propose to repeat our recommendations here.

4. Acts providing for their own Procedures

Many Acts of the South Australian Parliament set out their own procedures for actions by and against the Crown: see Part II of this Report detailing those enactments. In relation to each, we recommend the repeal of such clauses and the enactment in each of a provision similar to this:

> "Any action claim suit right or procedure shall be brought and maintained subject to and in pursuance of the provisions of the Crown Proceedings Act, 1972."

5. Person

The word "person" in an Act of Parliament is apt to include the Crown, unless the context indicates otherwise: see Boarland (Inspector of Taxes) v. Madras Electric Supply Corpn. (1953) 2 All E.R. 467, 472; Halsbury's Laws of England, Vol. 8, para 958, p. 610 (4th edition).

The Committee believes that this construction ought to be enshrined in our Acts Interpretation Act 1915. We therefore recommend an amendment to the Section 4 definition in that Act of "person" and "party" accordingly.

6. Trustee Act

Procedures for the enforcement of Charitable Trusts are set out in Part IV A of the Trustee Act 1936, as amended. These include the Attorney-General's parens patriae jurisdiction. We consider that this jurisdiction should be specifically mentioned in S. 15b of the Crown Proceedings Act (along with the Public Charities Funds Act 1935, as amended) for the sake of completeness.

7. Whyalla Hospital Vesting Act, 1969

Sections 5(3) and (4) of this Act constitute a Crown proceedings provision for the purposes of this specific Act. The subsections pre-date the Crown Proceedings Act. The Committee considers they can be repealed and proceedings under this Act proceed as under the Crown Proceedings Act.

8. Judgments in Default

Certain Canadian statutes (e.g.: S.21, Proceedings Against the Crown Act, 1973, New Brunswick) prevent a party from signing judgment against the Crown in default of its having entered an appearance or filed requisite pleadings, except by leave of the Court.

Our earlier recommendations that the Crown be bound by general statutes would entail that the Crown would be bound by the default judgment provisions of the Local and District Criminal Courts Act (Ss. 107 and 108) and Orders 13 and 27 of the Supreme Court Rules.

The Committee does not favour this. The necessity for first obtaining the Court's leave in such matters is a salutary one especially where public monies are at risk and we recommend that the Local and District Criminal Courts Act and Supreme Court Rules be amended accordingly.

9. Joint Rights

The Crown cannot have a joint property with a subject in a chattel or debt. Nor can the Crown be a joint tenant

with a subject in land, given that all estates in land are held mediately or immediately of the Crown. There are however, exceptions to the principle against joint holdings, e.g.: when the subject property is realty and the Crown takes the interest of a joint owner in execution proceedings. And there is no reason why the Crown cannot be a tenant in common with a subject in both realty and personalty.

The Committee believes that if it is the intention of the subject and the Crown to hold property jointly then that intention ought not to be frustrated. As a corollary, the Crown ought not to be allowed to escape any joint liabilities with a subject as a result of any Crown prerogative or privilege. Otherwise, the subject might be left to bear the whole liability. We recommend the enactment of a general provision in the Crown Proceedings Act recognising the right of the Crown to hold property, both real and personal, as a joint tenant and assimilating Crown and subject with respect to the manner, form and incidents of joint proprietal rights and duties. We point out however, that the rule of law that the King never dies might well prevent the subject ever succeeding by survivorship to a joint tenancy between Crown and subject. (See our Eighty-First Report relating to the Demise of the Crown).

D. CONCLUDING REMARKS

We wish to make it clear that nothing in this Report is to affect the principles related to tort liability that have been

and are still being evolved at common law.

Even granted that the potential liability of the Crown is extended by our recommendations, there are yet some areas of Crown activity - whether through Ministers, agencies or instrumentalities - which will remain immune from suit. And indeed this must be so. As one American commentator has stated:

> "... there must be some government acts which are immune from tort liability . . . . [A]cts that constitute "governing", i.e. high level policy decisions for which coordinate branches of government are responsible, are not appropriate for judicial review. Guided by this controlling principle the courts and legislatures have developed a standard for immunity that is most frequently termed the discretionary function exemption."
> (see Wyat - 61 Marq. L.R. 163 at p 185 [1977]).

Although the above quotation relates, strictly speaking, to the American context, the same could be said of English, Canadian and Australian law. Phegan ((1976) 22 McGill L.J. 605) outlines developments in this area in the latter jurisdictions. Decisions made at the "planning level" are usually discretionary functions while "operational level" functions are not - and so attract liability. Hogg (pp. 85 ff.) has also advocated this distinction which was authoritatively recognized and applied by the House of Lords in Anns v. London Borough of Merton [1977] 2 All E.R. 492. The Canadian Supreme Court likewise adopted the distinction in Wellbridge Holdings v. Greater Winnipeg (1972) 22 D.L.R. (3d.) 470 (although recent Australian decisions have tended to cast doubt upon the authority of Anns.)

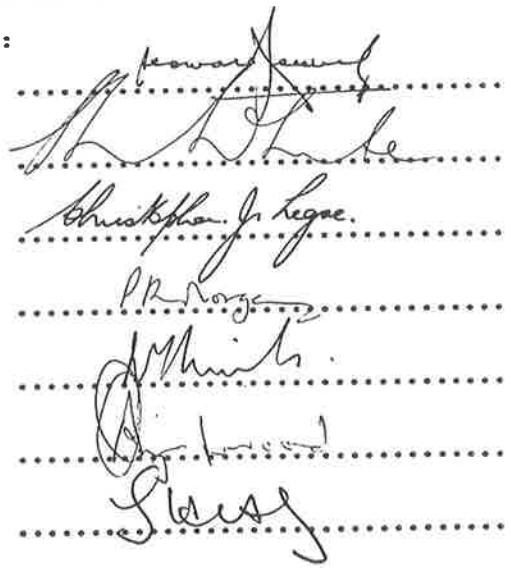
Our Report therefore deals implicitly with liability in tort at the "operational level" of Crown decision-making, acts or omissions. The common law is still working out the nature,

extent and the full implications of this operational level of Crown activity. It is an area of the law which is full of pitfalls and it is one into which we hesitate to venture. The organic nature of the common law is, we suggest, best equipped to grapple with these problems. The time is not yet ripe for legislative formulation of the borderline between the planning and operational levels. No other jurisdiction has, to our knowledge, yet attempted legislation with the intention of formulating it. The real danger is that statutory intervention could prematurely "fossilize" the current judicial endeavours; as Hogg puts the matter:

> ". . . . wherever the line is drawn, there will be difficulties in categorizing the facts of borderline cases, and the facts of two cases which fall just on different sides of the line will appear too close for comfort. It seems to me that the distinction drawn by the courts is as easy as any alternative to apply and that it works a reasonable adjustment of the conflict between freedom of administrative action and protection of the subject."

We agree and leave the matter there

We have the honour to be:



Law Reform Committee of South Australia

APPENDICES

1. ANCIENT PROCEDURES

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3. CUSTOMS AND FICTIONS IN LAW

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APPENDIX ONE:

ANCIENT PROCEDURES

CROWN PROCEEDINGS

ANCIENT PROCEDURES

When discussing the ancient procedures the Committee asked what the English had used to replace:-

(1) capias ad respondendum

(2) diem clausit extremum

(3) Monstrans de droit

(4) Ouster le main

(5) English and Latin Informations

The Committee also asked what the English had thought that Petition of Right covered.

First it should be noted that the First Schedule of the English Act, with the exception of Ouster le main, expressly abolishes the procedures.

Proceedings Abolished by this Act

1. (1) Latin informations and English informations.
   (2) Writs of capias ad respondendum, writs of subpoena ad respondendum, and writs of appraisement.
   (3) Writs of scire facias.
   (4) Proceedings for the determination of any issue upon a writ of extent or of diem clausit extremum.
   (5) Writs of summons under Part V of the Crown Suits Act, 1865.

2. (1) Proceedings against His Majesty by way of petition of right, including proceedings by way of petition of right intituled in the Admiralty Division under section fifty-two of the Naval Prize Act, 1864.
   (2) Proceedings against His Majesty by way of monstrans de droit.

While Ouster le main is not mentioned, to the extent that it means a judgment on a monstrans de droit, then it will have impliedly become obsolete due to the abolition of monstrans de droit. In fact it appears that

monstrans de droit was already obsolete at the time it was abolished by the Act as it had in effect been replaced by Petition of Right.

While some of the other procedures may not have been obsolete they were abolished and replaced by the procedure laid down by the Crown Proceedings Act 1947 and Order 77 of the English Supreme Court Rules.

Section 13 of the Act provides:

> "Subject to the provisions of this Act, all such civil proceedings by or against the Crown as are mentioned in the First Schedule to this Act are hereby abolished, and all civil proceedings by or against the Crown in the High Court shall be instituted and proceeded with in accordance with rules of court and not otherwise.
>
> In this section the expression "rules of Court" means, in relation to any claim against the Crown in the High Court which falls within the jurisdiction of that court as a prize court, rules of court made under section three of the Prize Courts Act, 1894."

Section 23 makes it clear that the general effect of the old procedures can still be obtained under the new Act (as they are included within the definition of proceedings by and against the Crown). Section 23(1) and (2) provides:

> "(1) Subject to the provisions of this section, any reference in this Part of this Act to civil proceedings by the Crown shall be construed as a reference to the following proceedings only:-
>
> (a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 1 of the First Schedule to this Act;
>
> (b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action at the suit of any Government department or any officer of the Crown as such;

(c) all such proceedings as the Crown is entitled to bring by virtue of this Act;

and the expression "civil proceedings by or against the Crown" shall be construed accordingly.

(2) Subject to the provisions of this section, any reference in this Part of this Act to civil proceedings against the Crown shall be construed as a reference to the following proceedings only:-

(a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 2 of the First Schedule to this Act;
(b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney General, any Government department, or any officer of the Crown as such; and
(c) all such proceedings as any person is entitled to bring against the Crown by virtue of this Act;

and the expression "civil proceedings by or against the Crown" shall be construed accordingly."

Other than this I have been unable to find any special replacement of the ancient procedures referred to.

In what instances was Petition of Right available?

Robertson's Civil Proceedings says at page 331 that:

"Petition of right is the process by which recovery is made from the Crown of property of any kind including money, to which the suppliant is legally or equitably entitled, except in cases where this process is ousted by some statutory method of recovery."

Robertson's Civil Proceedings (and see also Bell on Crown Proceedings) enumerate the following particular instances in which a Petition of Right will lie:

- for the recovery of land

  e.g. Doe d. Legh v Roe 8M.&W. 579: 151 E.R. 1169; 11 L.J. Ex. 57.

- for the recovery of Incorporeal Hereditaments
  e.g. Wicks & Dennis' Case (1589) 1 Leon. 190
- for chattels real
  e.g. Viscount Canterbury v A-G. (1843) 1 Ph. 306: 41 E.R. 648; 12 L.J. Ch. 281.
- for specific chattels (and perhaps for their value)
  A.G. v Trustees of the British Museum (1903) 2 Ch. 598.
- for liquidated sums due under contracts
  e.g. Kirk v R. (1872) L.R. 14 Eq. 558.
- for services rendered
  e.g. R. v Doutre (1884) 9 App. Cas. 745.
- for unliquidated damages for breach of contract
  e.g. Thomas v R. (1874) L.R. 10 Q.B. 31.
- by claimants to personal estate in the hands of the Crown's nominee or otherwise in the possession of the Crown, owing to the death of the possessor without known kin
  e.g. Monckton v A-G (1856) 2 Mac.&G. 402, 42 E.R. 1
- for repayment of probate duty
  e.g. In Re Nathan (1884) 12 Q.B.D. 461
- for repayment of estate duty
  e.g. Winans v R. (1907) 23 T.L.R. 705.
- for repayment of customs and excise duty
  e.g. Dickson v R. (1865) XI H.L.C. 175: 11 E.R. 129
- for the recovery of light dues and other sums paid under the Merchant Shipping Act
  e.g. Peninsular & Oriental Steam Navigation Co. v R. (1901) 2 K.B. 686.

- for the return of stamp duty
  e.g. Brown's Petition of Right (1903) cited in Robertson's Civil Proceedings at page 345.
- most probably for the return of land tax, (view expressed in Robertson's Civil Proceedings at page 345).
- for the payment of tolls by the Crown
  e.g. Northam Bridge Co. v R. (1887) 55 L.T. 759.
- for rent and mesne profits from the Crown
  e.g. Ryan v Earl de Grey and Ripon 1865 11 Ir. Jur.(N.S.) 236.
- for compensation for land taken
  e.g. Blundell v R. (1905) 1 K.B. 516
- for recovery or arrears of pension
  e.g. Oldham v Lords of the Treasury cited 6 Sim. 220.
- for recovery of money taken in execution by the Crown
  e.g. In re English Joint Stock Bank (1866) W.N. 199.
- for recovery with respect to acts done to property, either by prerogative or pursuant to a statute
  e.g. A-G v De Keyser's Royal Hotel (1920) A.C.508.
- the Naval Prize Act of 1864 by section 52 permits a petition of right to be intituled in the Admiralty Court when any part of the subject matter of the petition arose out of the exercise of any belligerent right on behalf of the Crown or would be cognisable in a prize court within

the King's dominions if it were a matter of dispute between private persons.

- by section 20 of the Colonial Stock Act 1877, any person claiming to be interested in a colonial stock to which by the provisions of section 1 thereof that Act applies, could present a petition of right in England in relation to such stock or dividend.
- where the claim under a petition of right is based on mixed contract and tort, or is such that it may be based on either, the Crown will probably grant the fiat, in order that it may be decided whether the claim is really in contract, when the Crown will be liable, or in tort, when the Crown will not be liable.

Also Hogg in Liability of the Crown at 141-2, said that the Petition of Right undoubtedly had the capacity to accommodate new causes of action (other than tort) and there is no reason to suppose that all the heads of quasi-contract could not have been accommodated.

Petitions of right were of course abolished in England by the First Schedule to the Crown Proceedings Act (Eng) 1947. However, section 1 of that Act provides that if a claim might have been enforced if the Act was not passed, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by the Act, then the claim may be enforced as of right, and without the fiat of His Majesty by proceedings taken against the Crown for that purpose in accordance with the provisions of the Act.

The extent to which a petition of right at common law is available in South Australia is difficult to know, for example in The Crown v Dalgety & Co. Ltd. (1944) 69 C.L.R. 18 a majority of the High Court held that a common law petition of right is no longer available to the subject in respect of a claim against the Crown in Western Australia, and that such a claim can only be prosecuted by way of a petition under and in accordance with the Crown Suits Act 1898 (W.A.).

The availability or not of a petition of right at common law however was not quite so important in the past as it is perhaps now, for the Claimant's Relief Ordinance - Ordinance No. 6 of 1853 and section 74 of the Supreme Court Act 1935 had expressly provided for petitions of right. However, in 1972 the Crown Proceedings Act repealed section V of the Supreme Court Act 1878 and the new Act makes no specific reference to petitions of right.

Thus the question of whether the Crown Proceedings Act covers all the matters formerly covered by a petition of right becomes relevant. The relevant provisions of the Act appear to be the definition of proceedings in section 4(1) namely:

> ""proceedings" means civil proceedings at law or in equity including proceedings in respect of a set-off or counterclaim, or by way of interpleader."

also section 5(1):

> "Subject to this Act, and any relevant rules of court, proceedings by or against the Crown may be instituted and prosecuted in any court in accordance with the ordinary practice and procedure of the court in proceedings between subject and subject."

and section 10(1):

> "Subject to this Act and any other Act:
>
> (a) the Crown shall be liable in respect of any contract made on its behalf in the same manner and to the same extent as a private person of full age and capacity is liable in respect of his contracts;

and

(b) the Crown shall be liable in tort in the same manner and to the same extent as a private person of full age and capacity:

(i) for any tort committed by a servant, agent or other person acting in the employment, or on behalf, of the Crown;

(ii) in respect of any breach of duty that would, as between subjects, give rise to liability in tort.

In any proceedings in tort against the Crown no defence based upon an actual or presumed independent discretion on the part of the person whose act or default is alleged to constitute the tort shall be admitted unless a similar defence would be admitted in the case of proceedings between subject and subject.

The South Australian Crown Proceedings Act has two major advantages over the procedure of Petition of Right, in that the Crown can be liable for tort, and the fiat of the Monarch or his representative is not required. However, it could be argued that in some aspects the Crown Proceedings Act does not cover all matters that the Petition of Right did cover or was capable of covering. For example, section 10 only deals with tort and contract, and some of the matters capable of being dealt with under a Petition of Right fall into neither of these categories - for example, acts done to property either by prerogative or pursuant to a statute - see for example:

A-G v De Keyser's Royal Hotel (1920) A.C. 508

Tasmania has tackled the difficulty by putting in a detailed list of causes of action which includes quasi-contract and recovery with respect to property requisitioned etc. by the government under or by virtue of the Royal Prerogative.

Section 64(1) of the Supreme Court Civil Procedure Act 1932 of Tasmania provides:

"Subject to the Commonwealth of Australia Constitution Act, and any Commonwealth Act, the Court and every judge thereof shall have jurisdiction to hear and determine any claim or demand by any person, public officer, public authority, or body politic, against the Government of this State:

(a)

(i) which is founded on, or arises out of, any contract, express or implied, lawfully entered into or made by or under the authority of the Government of this State, whether such authority was express or implied;

(ii) which is founded on, or arises out of, any omission, neglect, or default of the Government of this State, or any act, omission, neglect, or default of any officer, servant, or agent of the Government of this State;

(iii) to recover any property in the possession of the Government of this State, or to establish a title to any property against the Government of this State;

(iv) to recover any compensation, damages, interest, rent, issues, or profits (whether such interest, rent, issues, or profits have been actually received by the Government of this State or not) in respect of any property which is or has been in the possession of, or which has been entered upon, used, occupied, or enjoyed by or on behalf of, the Government of this State;

(v) which is founded on, or arises out of, any obligation imposed by law quasi ex contractu;

(vi) to recover any compensation, rent, or other monetary recompense in respect of any property requisitioned, resumed, taken, entered upon, used, occupied, or enjoyed by or on behalf of the Government of this State under or by virtue of any statute,

and which claim or demand would, if it were made by a subject against a subject and this act had not passed, have been the ground of an action at law or a suit in equity between subject and subject;

(b)

(i) to recover any compensation, rent, or other monetary recompense for or in respect of any property requisitioned, resumed, taken, entered upon, used, occupied, or enjoyed by or on behalf of the Government of this State under or by virtue of His Majesty's Royal Prerogative;

(ii) to recover or establish a title to any property which has been granted or disposed of by the Government of this State, and to which the claimant is entitled, either at law or in equity;

(iii) to recover or establish a title to any property which has been seized, got in, or taken possession of, or is claimed by the Government of this State as having escheated to or devolved upon His Majesty in right of this State by reason of default of heirs or next-of-kin (whether or not there has been a finding in favour of His Majesty on an inquest of escheat in respect of such property), and to which property the claimant is entitled either at law or in equity;

(iv) to recover any compensation, damages, rent, issues, mesne profits, or interest (whether such rent, issues, mesne profits, or interest have been actually received by the Government of this State or not) in respect of, or any proceeds of, any property to which the claimant was entitled, either at law or in equity, and which has been seized, got in, taken possession of, sold, granted, or disposed of, as having escheated to or devolved upon His Majesty in right of this State by reason of default of heirs or next-of-kin, whether or not there has been a finding in favour of His Majesty on an inquest of escheat in respect of such property;

(v) to recover any rent, issues, mesne profits, or interest in respect of, or any proceeds of, any property which has been seized, got in, taken possession of, sold, granted, or disposed of as having escheated to or devolved upon His Majesty in right of this State by reason of default of heirs or next-of-kin where, upon a traverse of any finding on an inquest in favour of His Majesty, there has been judgment of amoveas manus or other like judgment, whether such rent, issues, mesne profits, interest, or proceeds shall have been actually received by the Government of this State, or any officer, servant, or agent of the Government of this State, or not;

(vi) to recover compensation in respect of any salvage service rendered (whether within this State or elsewhere) to:

(A) any vessel;
(B) any apparel of or other property belonging to any vessel;
(C) the life of any person (including any passenger) belonging to any vessel,

which, at the time such service was rendered, was owned by, or under charter to, or in the service of, or being used by, the Government of this State:

(D) any wreck which, immediately before it was abandoned or lost, was owned by, or under charter to, or in the service of, or being used by, the Government of this State; or

(E) any cargo which, at the time such service was rendered, was owned by the Government of this State or in which the Government of this State then had any interest,

but the jurisdiction referred to in paragraph (vi) shall be dependent on the existence of the conditions in division (a) of subsection (5) of this section.

As well as this fairly comprehensive list, Tasmania provides in the next section a catch-all to pick up anything not expressly mentioned but formerly covered by the petition of right or bill in equity. Section 65 provides:

"In any case (not included in section sixty-four) arising after the commencement of this Act, in which a bill in equity could, if the case had arisen before the commencement of this Act, have been filed against the Attorney-General as representing His Majesty in right of this State, and in all cases, if any, not included in section sixty-four arising after the commencement of this Act in which proceedings could, if the case had arisen before the commencement of this Act, have been taken by petition of right, and in all cases in which any statute passed after the commencement of this Act shall, either expressly or by implication, authorize any proceedings to be instituted in the Court against the Government of this State, the proceedings therein shall (subject to the provisions of subsection (16) of section sixty-four, and any statute passed after the commencement of this Act and the Rules of Court) be instituted against the Attorney-General by filing in the Court a statement of claim in the form prescribed by the Rules of Court, and not otherwise, and, except as otherwise provided by this Act or the Rules of Court, every such action shall be subject to the Rules of Court, and shall as far as possible be conducted in the same manner as an action between subject and subject."

Whitmore & Aronson in Public Torts and Contracts state at page 27:

> "There is no restriction on the causes of action to which the Crown is now liable in the Acts of New South Wales (see South Coast Road Metal Quarries v Whitfield (1914) 14 S.R. (I.W.W.) 300), Western Australia, Queensland, and the Northern Territory."

The Acts in those States give a right of action to any person having or deeming himself to have any just claim or demand whatever against the Government; once the proceedings are commenced, it is provided that the proceedings and rights of parties therein shall be as nearly as possible the same and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject.

In the South Coast Road case (supra) the then Chief Justice, Sir William Cullen held that those words were used as the most comprehensive method of expressing every imaginable kind of process necessary for the assertion of the rights of a person who has already been described as having, or deeming himself to have, any just claim or right whatever against the Government - see pages 305-6.

In contrast the South Australian and Victorian Acts appear to be a little more restricted, Whitmore & Aronson: Public Torts and Contracts say at page 28:

> "The governments of South Australia and Victoria are liable only in tort and contract. This includes liability to pay interest on a debt. An assignee of a chose in action arising out of a contract can sue under the formula exposing the Crown to liability in contract. A right given by a Land Act to select and purchase certain Crown land upon fulfilling certain conditions and paying the prescribed fee is enforceable as a right in contract. It has been held that a person who holds a miner's right (equivalent to a tenancy at the Crown's will) is not suing in contract if he seeks an order restraining the Crown from granting a mining lease of the same piece of land to another, even though the Act forbids the granting of such leases where the land is occupied by the holder of a miner's right. A suit for the return of money wrongfully demanded and obtained by government

officials has been classified as a "contract" claim. But in R. v Dalgety & Co. Ltd., a claim for money had and received was treated by the High Court as not amounting to a claim in contract for present purposes. A suit by a co-contractor to set aside a collusive settlement of a dispute on the contract made by the other parties to the contract is a suit in contract. Where costs are awarded by a tribunal against the Crown, the Crown's liability to pay is for present purposes treated as a liability in contract. But an undertaking made by Crown counsel to the Court has been said not to give rise to a contractual liability.

Hogg in an article entitled Victoria's Crown Proceedings Act 7 M.U.L.R. 342 said at page 352:

"But if the words of section 23(1)(a) can be interpreted as including quasi-contract, they cannot be interpreted as extending beyond contract and quasi-contract. Therefore the Victorian Act does not enable the Crown to be sued for breach of trust, or for breach of other proprietary rights which are neither contractual nor quasi-contractual. Once again, it is pertinent to ask whether this is simply the result of bad drafting, or whether it represents a deliberate decision to retain Crown immunity. The former alternative-bad drafting-seems incredible, considering that the Crown proceedings statute of every other jurisdiction avoids the trap. The latter alternative-a deliberate decision- is open to the same criticism as the decision to restrict Victoria's tortious liability. It places Victoria behind every other comparable jurisdiction; it creates injustice by denying a remedy to a subject who suffers loss in circumstances in which a remedy would be available against a fellow-subject; and it benefits the Crown only by saving a trivial amount of the consolidated revenue."

Similar criticisms are apparently applicable to the South Australian legislation. One way to remedy this defect of unduly restrictive scope would be to include expressly various types of action against the Crown, as is done in section 64(1) of the Tasmanian Supreme Court Civil Procedure Act cited earlier.

A second method, which could also be used as a supplimentary to the first, would be to have a catch-all provision either along the lines of Tasmania's section 65 of the Supreme Court Civil Procedure Act (which includes cases in which previously a bill in equity or petition of right could have been

brought), or alternatively to include some expansive phrase along the terms of that included in the Acts of New South Wales, Queensland and the Northern Territory. However, whatever catch-all phrase is put in there may be some additional matters which could have been dealt with by petition of right but will not be available under the Crown Proceedings Act. For example, the State may be the petitioner itself, or the petitioner may believe that the only way to get a remedy is to petition the Queen as the State has not inherited the relevant jurisdiction.

The first example is illustrated by the Western Australian secession movement in the early nineteen-thirties, where the petition was addressed directly to the King.

Apparently the right of withdrawal from the Commonwealth was not contemplated when the federation was created, however, the demand was expressly made by Western Australia in 1933 when, under authority of a referendum contemporaneous with a general election which was fought in part on the issue, addresses from both Houses of Parliament were presented to the King and to the houses of the British Parliament asking for legislation allowing the State to sever Western Australia's connection with the Commonwealth. The reasons adduced were many and of varying strength. However, the vital point was that the system of federal economics worked essentially for the benefit of the industrial eastern States.

Berriedale Keith in The Dominions as Sovereign States (1938) at pages 522-523 gives an account of the subsequent history of the secession move:

> "All these arguments and counter-arguments, however, were not weighed by the two houses, to which a Joint Select Committee reported that the petition was not proper to be received by either simply because it

did not fall within the constitutional exercise of the paramount legislative power to enact such a Statute as that proposed. It was pointed out that in such a matter the initiative must rest with the Commonwealth, which alone could suggest to the British Parliament the annulment of its provisions. Hence, as no one desired to press the issue further, the matter dropped, and the State has had to remain content with the not ungenerous subsidies provided for all the weaker States by the Commonwealth.

The Joint Committee incidentally expressed the view that the power of amendment does not amount to a power to alter the federal character of the constitution in view of the purpose of the constitution to create an indissoluble federal Commonwealth. This seems a sound attitude to adopt, and is supported by the fact that under section 128 any alteration of any provision of the constitution affecting any State must be carried out with the assent of that State's voters in the referendum, so that the dissent of even one State would prevent a complete destruction of the federal system. It has been argued that the power to amend applies to that section itself, so that the requirement of the assent of each State could be destroyed by a majority of the States, and, when that had been eliminated, the unification of the Commonwealth might be carried by a majority. But there would be very serious objection to any such procedure, which Sir E. Mitchell has pronounced to be unconstitutional."

Fajgenbaum & Hanks in Australian Constitutional Law 2nd. ed. at page 143 commented in the following way on the end result of the secession attempt:

"The law officers of the Crown gave as their opinion that the United Kingdom parliament could amend or repeal the Commonwealth of Australia Constitution Act 1900: "The provisions for the alteration of the Constitution which are contained in the Constitution itself (s.128) in no way affect the sovereign powers of the United Kingdom parliament": O'Connell and Riordan (1971) page 416. The opinion says nothing about the power of the Commonwealth Parliament to effect this change through the s.128 procedure, but it is consistent with the general tone of the opinion and earlier correspondence that no such power existed; indeed Lumb and Ryan assert that the law officers believed that "to enact succession legislation was within the power of the imperial parliament alone".

See also Lumb and Ryan (1977) 383.

Nevertheless, the petition was returned: let right be done in the Supreme Court of Western Australia saving the right of the Crown to object to the competency of this petition.

One further situation in which a petition may have to be directed to the Queen, is if the Aboriginal people of Australia wished to establish that they had owned South Australian land, and had been wrongfully deprived of it and were thus entitled to compensation.

Although the South Australian government could of its own volition grant some form of compensation, the courts may not be able to do so. One reason for this would be that the Imperial Statute 4&5 William IV Chapter 95 which empowered His Majesty to create South Australia and to provide for the colonization and government thereof states in section 1 that the proposed colony consists of "waste and unoccupied lands".

Thus as this Imperial Act in effect says that nobody previously occupied or owned the land and the Province of South Australia was established on that basis, it may not be possible to get an order of the court in ordinary proceedings which states otherwise. Therefore it may be that the only way that the Aboriginal people could get a remedy would be to petition the Queen direct so as to take proceedings to go behind the original Act to establish their preexisting ownership.

A further area in which difficulties may at some stage arise is with respect to the land and buildings which are held by trustees for various churches pursuant to Ordinance 10 of 1847 which was passed to promote the Building of Churches and Chapels for Christian Worship, and to provide for the Maintenance of Ministers of the Christian Religion.

The Ordinance provides for money to be given and schedule B deals with the conveyance of land to the trustees of the Church and their Heirs and Successors, the land to be used

for a church or Minister's dwelling or to be used as glebe or burial land.

Section 20 provides that the Church and Minister's dwelling shall for ever be dedicated for the uses of the Ordinance. The section also provides that if the buildings are no longer used that the Governor can require the Trustees to refund to the Colonial Treasurer the amount given, and also the seatholders can elect that the Church be taken over by another Church or religious persuasion.

However, there does not appear to be any provision providing for the sale of the property so that it can be exchanged for more desirable property. This power was granted by the Imperial Glebe Acts - namely:

55 Geo. 3 c.147 Glebe Exchange Act 1815

56 Geo. 3 c.52 Glebe Exchange Act 1816

1 Geo. 4 c.6 Glebe Exchange Act 1820

6 Geo. 4 c.8 Glebe Exchange Act 1825

Whether or not these Acts were received in South Australia is not clear. It is probable that they were not. The principal Glebe Act (1815) speaks in terms of glebe lands in divers ecclesiastical benefices, perpetual curacies, and parochial chapelries being at a distance from and inconvenient to be occupied with the parsonage or glebe houses. In such cases the Act provides that the glebe land and parsonage or glebe houses thereof could be by law exchanged for other lands of greater value or more conveniently situated, and for more convenient houses.

Although the relevance of these Imperial Acts may have become greater at a later stage (especially when in 1847 a South Australian Ordinance was enacted to promote the building of Churches,)

at the time of settlement the Acts may not have been either necessary or relevant to the new colony and thus not received. We note that Tasmania apears to believe that the Glebe Acts were inherited. Their Church of England Constitution Act 1973 in the 1st schedule repealed a number of Imperial Acts dealing with religion and among them were the Glebe Acts, while section II of the Act gives a power to sell and lease, exchange mortgage or otherwise dispose of lands.

However, it may also be relevant that the Tasmanian Act. No. 4 of 1892 amended the Church of England Constitution Act by inserting a power to sell, lease, exchange and mortgage etc. It therefore is possible that at the time there was some doubt about whether or not the Glebe Acts were received, and that the 1973 Act repealing the Glebe Acts was merely to make absolutely sure that the Glebe Acts did not apply.

As there is some uncertainty as to whether the Glebe Acts apply, it is desirable that some method be available to gain authorisation to deal with church properties which were granted under the 1847 Act, particularly as these grants were made under an Ordinance made before self-government when the control and disbursement of all Colonial monies still remained in London.

One possibility would be to authorise dealings as in the Glebe Acts themselves, and also in the Tasmanian legislation. However, as the problem is likely to arise very infrequently it may not be worthwhile to deal specifically with the potential problem but rather allow it to be dealt with by

petition of right. The Crown Proceedings Act as at present constituted would not give a remedy as the problem sounds neither in contract or in tort.

A further reason why petitions may still be required is due to the fact that it is quite possible that the Courts in this State do not in fact possess the extent of jurisdiction possessed by the English Courts despite the quite expansive statement of the jurisdiction placed in Part II of the Supreme Court Act of 1935.

Castles averts to the limitations on our Ecclesiastical Jurisdiction in his text "An Australian Legal History" when he says at page 314:

> ".... even South Australia, was a "free" colony, the long accepted policy of excluding colonial courts from using a broadly-based ecclesiastical jurisdiction meant that the Supreme Court was limited to dealing with probate matters and the administration of intestate estates."

That this is so is evident from section 9 or Ordinance 5 of 1837, and in Exparte King (1861) 2 Legge 1307 the New South Wales Supreme Court in Banco held that Ecclesiastical law is no part of the common law of any colony and the Privy Council came to the same decision in In re Bishop of Natal (1864) III Moo. P.C. (N.S.) 115: 16 E.R. 43. So ecclesiastical matters dating from before self-government may still have to go by petition of right.

A further instance where a petition of right may still be necessary is if (as seems possible) a declaration is not obtainable against the Crown pursuant to the Supreme Court Act.

There are two major reasons for this possibility. One reasoning derives from the fact that possibly the relevant jurisdiction to grant a declaration, otherwise than by

petition of right was never received by the Court at all.

This difficulty arises from the fact that even in England there was for some time controversy over the power of the various courts to make declarations against the Crown.

In order to examine this proposition further it is necessary to take a look at the history of declaratory judgments against the Crown. One useful text dealing with this is a book by Zamir entitled "The Declaratory Judgment".

At page 17 Zamir points out that in England before the Crown Proceedings Act of 1947, proceedings against the Crown could be instituted in two main ways and in both declaratory relief was claimable. The first method was by petition of right which could only be brought if the consent of the Crown was given through the Attorney-General. The second way of obtaining equitable relief against the Crown was on a bill, in an ordinary action, instituted against the Attorney-General in the Court of Exchequer.

Zamir states that the jurisdiction to issue ordinary bills in equity against the Crown was probably assumed by the Court of Exchequer by virtue of its special powers as a Court of Revenue, and was not shared by the Court of Chancery.

In 1841 the jurisdiction of the Court of Exchequer as a Court of Equity was transferred by statute to the Court of Chancery. It was not however clear whether the practice of suing the Attorney-General for a declaration upon a bill of equitable relief was peculiar to the Court of Exchequer as a Court of Revenue (and, therefore, not affected by the transfer) or rather part of the general equitable jurisdiction of the Court of Exchequer (and, as such, transferred to the

Court of Chancery).

As a practical result of this uncertainty, the Court of Exchequer ceased to exercise this jurisdiction; yet the Court of Chancery did not assume it and went on granting equitable and (inter alia) declaratory relief against the Crown upon petitions of right only.

Thus it came somewhat of a surprise when after more than a half a century, the old practice of claiming declaratory relief against the Crown in an ordinary action instituted against the Attorney-General was revived. In Dyson v Attorney-General (1911) 1 K.B. 410 the plaintiff had sued the Attorney-General in the King's Bench Division for a declaration that he was not bound to comply with a certain administrative notice. The Attorney-General objected that the plaintiff could only proceed by petition of right. The decisive question was whether the practice of suing the Attorney-General as representing the Crown was transferred by the statute of 1841 from the Court of Exchequer to the Court of Chancery and consequently by the Supreme Court of Judicature Act 1873 to all branches of the High Court.

Cozens-Hardy M.R. said in that case at pages 416-417:

> "No doubt the Court of Exchequer on the Revenue side had peculiar functions which are not transferred by the Judicature Act to all branches of the High Court, but its equity jurisdiction had nothing peculiar as distinguished from the Court of Chancery, to which by statute this jurisdiction was transferred. What the old Court of Chancery could do can now be done by both Divisions of the High Court.
>
> But then it is urged that in the present action no relief is sought except by declaration, and that no such relief ought to be granted against the Crown, there being no precedent for any such action. The absence of any precedent does not trouble me. The power to make declaratory decrees was first granted to the Court of Chancery in 1852 by s.50 of

> 15 and 16 Vict. c86, under which it was held that a declaratory decree could only be granted in cases in which there was some equitable relief which might be granted if the plaintiff chose to ask for it: see Rooke v Lord Kensington (1856) 2 K.&J. 753. The jurisdiction is, however, now enlarged, for by order XXV r 5 "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order, is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not". I can see no reason why this section should not apply to an action in which the Attorney-General, as representing the Crown, is a party."

One further issue in the case which was not highlighted in the quotation from the judgment of Cozens-Hardy M.R. was whether or not declarations were only available when the rights of the Crown were only incidentally affected, and not where such rights were the immediate and sole object of the suit (where a petition of right should be used).

The Court in Dyson's case was not unanimous on this point. Cozens-Hardy M.R. said that there was no such restriction on the availability of declarations, Farwell L.J. said that there was, while Fletcher-Moulton L.J. did not make his position clear.

For a long time this problem of the respective spheres of the petition of right and declaratory judgments as remedies against the Crown remained obscure. Zamir says at page 22 that in practice the courts adopted the test suggested by Farwell L.J. in the Dyson case, that is that "where the estate of the Crown is directly affected the only course of proceedings is by petition of right" (1911) 1 K.B.410, 421.

The apparent limitation on the scope of declaratory relief against the Crown was removed in England by the Crown Proceedings Act, 1947. The Act abolished proceedings by way of petition of right, and provided for one procedure - "in

accordance with rules of court and not otherwise" - applicable to all cases in which, prior to the Act, relief might be obtained by petition of right or by an action against the Attorney-General. Thus it would appear to follow that no declaratory claim can be refused on the ground that the issue is one proper for a petition of right.

How then does all this confusion over the availability of declarations against the Crown affect the situation in this State? The original legislation granting jurisdiction to the Supreme Court was Ordinance Number 5 of 1837. Although section VII of that Act refers to the jurisdiction of the Court of Exchequer the section also refers to the Courts of King's Bench and Common Pleas and appears to be dealing only with civil and criminal matters. Equity is referred to in section VIII, where it is said that the Supreme Court can exercise all of the powers held by the Lord High Chancellor. However, as the Ordinance was pre-1841 the equitable jurisdiction of the Exchequer had at that stage still not been transferred to Chancery. Thus the Act of 1837 appears not to have conferred the equitable jurisdiction of the Court of Exchequer, which included the power to grant declarations against the Crown.

The Supreme Court Act 31 of 1855-56 is in almost identical terms to the 1837 Ordinance; section 8 repeating that the Court shall be a Court of Equity and having the jurisdiction of the Lord High Chancellor of Great Britain. However, by this time (by the Act of 1841) the equitable jurisdiction of the Exchequer had been transferred to the Lord High Chancellor in Great Britain.

Unfortunately this fact was not acknowledged in the Act of 1855-56, thus it is not absolutely certain that the jurisdiction was conferred by the South Australian Act of 1855-56 and the Crown in fact took the point in the South Eastern War Service Settlers' case in 1967 and the plaintiff had to proceed by petition of right.

However, even if it is assumed that we got the jurisdiction by the Act of 1855-56, further complications exist with respect to the power to grant declarations against the Crown especially in ordinary actions. First, some appear to hold the view that the power to make declarations was part of the Revenue area of the Court of Exchequer, and thus not transferred to the Court of Chancery in 1841 when the equitable jurisdiction of the Court of Exchequer was transferred. Indeed between 1841 and Dyson's case in 1911 both the Court of Exchequer and the Court of Chancery were unsure who had the power to make declarations against the Crown in ordinary actions. Thus at the time the Supreme Court Act of 1855-56 was enacted, declarations were not granted in ordinary actions against the Crown by either court due to the uncertainty as to which had jurisdiction.

Due to the dual complication of jurisdiction being transferred in England without mention being made of the fact in the South Australian Supreme Court Act of 1855-56, and the fact that even in England there was confusion as to the extent of the effect of the transfer of jurisdiction, there is a possibility that the Supreme Court may not have the power to grant declarations in ordinary actions (as opposed to an action by way of petition of right) against the Crown. This of course

would mean that if petitions of right were done away with, declarations may not be available at all against the Crown.

It should be noted that there is a further even more compelling argument suggesting that declarations are not available against the Crown. This arises from the fact that although section 31 of the Supreme Court Act grants a general power to make declarations, the Supreme Court Act does not appear to bind the Crown.

This possibility was referred to by Zamir in The Declaratory Judgment where he said at page 23:

> "There is in the Dyson Case yet another important point which seems not to have been noticed by the court. Speaking of Order 25, rule 5, Cozens-Hardy M.R. said "I can see no reason why this section should not apply to an action in which the Attorney-General, representing the Crown, is a party". It is doubtful, however, whether the court addressed its mind to the principle that legislation does not bind the Crown if this is not expressly or impliedly stated. The court, invoking the former jurisdiction of the Court of Exchequer, could indeed entertain an action against the Attorney-General; but could Order 25, rule 5, be applied to such an action? However, any doubt on this matter has been resolved by a rule made in 1947, which expressly provides that the Rules of the Supreme Court shall, with some exceptions, apply to all civil proceedings by or against the Crown."

In 1909 Cooper J. of the Supreme Court of New Zealand reached the conclusion that he could not grant declaratory relief against the Crown pursuant to reasoning similar to that expressed by Zamir.

In New Zealand Times Co. Ltd. v Commissioner of Police 29 N.Z.L.R. 56, Cooper J. pointed out that the Declaratory Judgments Act does not expressly state that the Crown cannot therefore be bound by a declaratory order and that such an order, would therefore be merely waste paper and not bind either party. As a result Cooper J. held that the Court had no jurisdiction.

In relation to petitions of right under the Prize Act 1864, these can now effectively be abolished given the United Kingdom Parliament's recent repeal of the application of the Colonial Laws Validity Act 1865 in its relation to the Australian States by the U.K. Australia (Request and Consent) Act 1986.

Given the possible gaps in jurisdiction of the Supreme Court, it may be necessary to preserve petitions of right, both to the South Australian Supreme Court, and to the Queen.

This is especially so, since the examples discussed here, are just that - examples and there could well be a number of other instances where there will be no appropriate mechanism whereby relief can be sought against the Crown other than by petition of right.

APPENDIX TWO:

ULTRA VIRES

ULTRA VIRES

On the problem of ultra vires in the context of estoppel we make reference to an excellent article entitled "Contradictory Government Action: Estoppel of Statutory Authorities" by McDonald in (1979) 17 Osgoode Hall L.J. 160 where the issue is discussed at length.

The problem which we see is this: A statutory body (and in this expression we include persons natural or legal acting under statutory powers) cannot assume as of right powers that Parliament has not given it. It is for the legislature, and for it alone, to extend the body's range of powers. It cannot do so of its own volition. This principle of vires therefore imports a very significant limitation on the operation of the principles of estoppel where statutory bodies are concerned because an estoppel cannot be used to defeat or contradict or amplify a statutory mandate; as McDonald (supra) says:

> "Whatever freedom the government enjoys to contradict itself may be considered a product of the very principle that limits the freedom of executive action. That principle is the subordination of executive to legislative authority. Where legislation is not involved, the Crown as a legal person is subject to the principle of estoppel" (our emphasis)

Or as the late Professor de Smith stated:

> "The general rule .... is that the ambit of a public authority's powers can neither be enlarged nor abridged by its own conduct or the conduct of its agents or servants or any other person."

(see his Judicial Review of Administrative Action (3rd Edition) at page 90).

Professor Hogg makes reference to the converse situation when he says:

> ".... the rule against divesting applies to estoppel: a public body cannot by any representation divest itself of its discretion to exercise statutory powers in the public interest." (see page 147).

A simple example should suffice to explain this sometimes perplexing problem. A Crown servant to whom the necessary powers have not been given or delegated assures a prospective builder that planning permission is not required for what he proposes to do. Even though that builder may act to his detriment upon that assertion by the Crown servant, the proper Crown authority is not estopped or prevented from arriving at and acting upon a quite contrary decision. Why? The reason is the supremacy of statute. As McDonald says (page 161):

> "Ex hypothesi, legal relations arising from legislation are independent of official action. Consequently, nothing can be made to hinge on the conduct of officials without disturbing the legal consequences called for by the statute. It really has nothing to do with any privileged position of the Crown." (again, our emphasis).

In any event, this overriding principle has effect for any public body acting under statutory power, e.g. even for local councils. Estoppel cannot extend its powers. On the other hand estoppel will attach well enough to a discretionary exercise or non-exercise within power: see Brickworks Ltd. v. The Council of the Shire of Warringah (1963) 108 C.L.R. 568.

It should be made clear that the principle under present discussion is, although similar, not identical with that discussed by us later in the Report under the heading of "Executive necessity" (page 34). For generally the latter principle relates to contracts which have actually been concluded. The Amphitrite dilemma is often resolved by making

damages available for breach but disqualifying the aggrieved litigant from obtaining the coercive remedies of specific performance or injunction. The present question relates to representations (of present or furture facts or intentions) in the absence of an attendant contractual relationship between the representor and representee where the latter has no remedy in contract against the public authority which reneges on its prior assertions or representations. The rigidity and potential injustices flowing from the general principle have been mitigated, as Professor de Smith says, by "exceptions of indeterminate scope". In fact, McDonald's article is really a critique of those exceptions and an honest endeavour to divine general principles justifying them.

Thus where Lord Denning, M.R., in R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 Q.B. 299, 308 grappled with the problem his Lordship decided that where any undertaking was compatible with the public duty to perform it, the public body was bound to honour it. At the very least, no undertaking should be revoked without the aggrieved party being heard. Whether this statement will become enshrined as law is still very much moot, see Gardner v. Dairy Industry Authority (1977) 1 N.S.W.L.R. 505 at 520-1.

It need hardly be said that this whole area of law is still very much in a state of flux. The courts have not fully explored the problem.

It is for the reasons outlined above that we have recommended that the new section should bind the Crown in all types of estoppel and make it quite clear that nothing in it will

affect any rule of law that the Crown cannot arrogate to itself powers not conferred on it by the prerogative or by statute.

APPENDIX THREE:

CUSTOMS AND FICTIONS IN LAW

CUSTOMS AND FICTIONS IN LAW

The comment from which the matter in the paper is taken comes from Chitty: Prerogatives of the Crown (1820) page 381:

"The King is not bound by fictions or relations of law"

and the reference given in Chitty is to Sheffield and Ratcliff's case dated in the reports in Jenkins and Hobart as being decided in 13 James I (i.e. 1615-1616) although it is dated in a report in Godbolt page 301 as being in Easter Term of 21 James I, i.e. 1624, but this is a mistake and the dating in Godbolt refers to the report of Sir Edward Coke's case with which I shall deal later. So it is of some importance to see what those two cases which are both referred to, along with other cases to which I shall return, by Higgins J. in Sargood Bros. v. The Commonwealth (1910) 11 C.L.R. 258 at 309 do decide, as Richard Kleinig has relied on them for this area of the paper.

I shall therefore deal first with Sheffield's case and Sir Edward Coke's case. The case of Lord Sheffield and Ratcliff was heard in the Exchequer Chamber and is reported very shortly in Jenkins and at much greater length both in Hobart and in the report in Godbolt attached to the report of Sir Edward Coke's case. However the facts are quite simple and they are these:- In 17 Edw. II (i.e. 1324) John de Mulgrave entailed the castle and manor of Mulgrave on his issue. The land descended in tail to Sir Ralf Bigod and thence by his will to Sir Francis Bigod so that the entail must have been in tail general. In 21 Hen. VIII (i.e. 1529) Francis Bigod made a feoffment to John Conyers and others which was in effect a family settlement. By statute 26 Hen. VIII c.13 estates tail were made forfeitable for treason.

Three years later Bigod was attainted of high treason and executed. Bigod's daughter Dorothy married Roger Ratcliff whose grandson, also Roger Ratcliff, sued out a monstrans de droit in the Exchequer to recover the land in the entail from Lord Sheffield to whom the land had been granted as Crown property by Queen Elizabeth I. The argument does not appear very clearly from the reports but obviously it must have been that because of the feoffment and the common recovery which constituted the family settlement, the estate comprised in the entail had already been alienated prior to the attainder and therefore that there was nothing upon which the attainder could operate. According to the short report in Jenkins at page 287 (also found in 145 E.R. at page 208):

> "The King is not bound by abeiance; nor by a common recovery where he has a reversion expectant upon an estate tail; nor by a collateral warranty of his ancestor, without assets: he is not bound by fictions of law."

As appears from the much longer report in Hobart contained in 80 E.R. 475 at pages 479-480, page 338 of Hobart, where the matter is set out in detail, it is obvious that the point is quite different:

> "But for states (sc. estates) that are of their own nature, in their original perfect and entire, (as this is), the law permits not vain affected abeyances, or fictions, by the voluntary act of the party, that served to no good, as this, which should be to preserve a right to serve the heir, and to defraud the King; which is one of the principal reasons which moved the statute of 27 H.8. to confound uses into possessions, uses being but a kind of abeyance and shift to keep the profits to the cestui que use, and to defraud the King and lords of their escheats, and them that have right to demand of their actions."

When it is put that way the position is quite clear. A recovery was a fictitious real action pursued through all its stages to final judgment to defeat an entail and was known to be fictitious by everybody concerned. The matter is discussed in detail in Holdsworth: An Historical Introduction to the Land Law (1935) pages 57-58. A fine barred merely the conusor of the fine, i.e. the tenant in tail, whereas a recovery barred not only the tenant in tail but the issue and therefore barred the whole entail effectually. That as I have said was done by a process which was known by everybody concerned to be a fiction. The King was not possessed by being a descendant of the tenant in tail. He came in by title paramount namely the Act of attainder. Accordingly what the report is saying is that the King is of course not bound by the fiction because the fiction was only there to bind the issue in tail. It could not possibly bind the King because his title derived not from the assurance in tail but by forfeiture consequent upon an act of attainder; in other words by title paramount.

Sir Edward Coke's case is referred to in Godbolt page 289; 78 E.R. 169. In that case Lord Chancellor Sir Christopher Hatton entered into a deed of family arrangement during his lifetime in favour of members of his family. He died indebted to the Crown for monies in Chancery in his hands as Lord Chancellor for which an account had not been rendered to the Crown. The Crown not being paid sued out a writ of extent and extended the lands and on the extent the land passed by sale to Sir Edward Coke. The heir of John Hatton, the son of Sir Christopher Hatton, sued claiming that the extent was invalid because, as in the previous case, there had been an alienation prior to the extent and accordingly the extent did not bind the land which was already

alienated under the deed of family settlement and that he should have possession back from Coke. The Court of Wards decided in Coke's favour on the basis that the extent, being for debts due to the Queen, took priority and accordingly Sir Edward Coke's title under the extent was good and Hobart C.J. said at page 295 of Godbolt; 175 E.R. :

> "The King is not bound by estopels, nor recoveries had betwixt strangers, nor by the fundamental jurisdiction of courts . . . .".

Now that of course is perfectly good law. The Queen's title did not come in by the recovery; it came in by the writ of extent, and so the Crown was not bound by "recoveries had betwixt strangers" as the report said. So understood, the comment is good sense and good law.

I turn then to the judgment of Higgins J. in Sargood's case, to which I have already referred. In addition to referring to Sheffield's case, Sir Edward Coke's case and Chitty's Prerogatives of the Crown, to all of which I have already referred, Higgins J. also refers to the judgment of Molesworth J. in Lorimer v. The Queen [1861] 1 Wyatt & Webb (Law) 244 at 247. That however is no authority for the point for which Higgins J. cites it. What it says is that if a petition of right does not lie for a tort (and it of course did not in those days) then you cannot circumvent that prohibition by waiving the tort and suing in contract as was sought to be done in Lorimer's case. That however has nothing to do with the question before us. The last case to which he refers Théberge v. Laudry [1876] 2 App. Ca. 102, a Privy Council appeal from Quebec, is authority only for the general proposition, which is not in dispute, that the prerogative of the Crown cannot be taken away unless by express words, and it does not touch the point which we are now discussing

In any case the point as Higgins J. himself seems to recognize further down the page has no validity. The only other case in which there is the slightest doubt as to whether implied contract lies against the Crown, notwithstanding that it is fictional, is in the judgment of Dixon J. (as he then was) in Werrin v. The Commonwealth (1938) 59 C.L.R. 150 at page 164 where he says it is unnecessary to consider the correctness of the assumption that he has made that the action does lie against the Commonwealth Whatever doubts he then had must have been laid to rest by the time he gave judgment in Mason v. The State of New South Wales (1959) 102 C.L.R. 108 because there recovery was obtained in quasi-contract against the Crown in right of the State of New South Wales, for taxes which had been held to be illegally levied by reason of Section 92 of the Constitution. The point does not appear to have been even argued in McClintock v. The Commonwealth (1947) 75 C.L.R. 1 although the plaintiff failed on a different point, namely that the plaintiff's action was voluntary and he had acted under a mistake of law. In the most recent case that I can find on the subject: Air India v. The Commonwealth (1977) 1 N.S.W.L.R. 449, there appears to have been no argument that the Commonwealth could not be sued in quasi-contract although again the plaintiff failed on the ground that the payments were not made involuntarily. The English cases show the same position. The plaintiff failed in the leading case of Brocklebank Limited v. The King [1925] 1 K.B. 52 on the same ground as Molesworth J. had decided earlier, namely that you could not by waiving a tort of illegal exaction and suing for money had and received get round the prohibition that petitions of right in those days did not lie for actions in tort. Similarly the plaintiff failed in National Pari-Mutuel Association Limited v. The King (1930) 47

T.L.R. 110 on the basis that the mistake was a mistake of law, but in neither case is it suggested that the action would not have lain against the Crown in quasi-contract if the cause of action had been established. Hogg: Liability of the Crown (1971) pages 140-145 clearly assumes that the Crown can be sued in quasi-contract, notwithstanding that as Isaacs J. said in Smith v. William Charlick Limited (1924) 34 C.L.R. 38 at 57 following Lord Haldane L.C. in Sinclair v. Brougham [1914] A.C. 398 at 417 that "the action only lay where the law could consistently impute to the defendant at least the fiction of a promise". The topic of quasi-contract is dealt with passim in Cheshire & Fifoot: Law of Contract (4th Australian Edition) (1981) paragraphs 2801 and following and it is not suggested anywhere there that quasi-contract, notwithstanding its fictional nature, does not lie against the Crown.

For these reasons it is I think certain that the statement in Chitty is stated too broadly and is not supported by the authorities upon which he relies and that the use of it by Higgins J. in Sargood's case was mistaken. As far as custom is concerned, the reference in Robertson is very carefully guarded and deals only with market overt and with the custom of London to which I refer next.

Williams certainly does lay down the doctrine in the breadth referred to by Richard Kleinig in the paper. Williams relies first on a case in 1457 (35 Hen. VI) reported at 145 E.R. page 59 where it is said that no custom binds the King for his personal goods such as pontage, murage, waifs, strays, toll, lapse, alienation of a villein before seizure; but that it is otherwise of customs which go with the land. That was a comment which was not necessary for the decision of the case. The King

pawned some of his jewels for one hundred pounds. The jewels came into the possession of A. who pleaded that the jewels could lawfully be detained by the person pawned until the sum lent upon the pawn was paid (which seems reasonable). He pleaded further that the hundred pounds was not paid. It was held that the custom of London, which enabled a pawnbroker to hold goods pawned until payment, did not bind the King and the King had his jewels back and the defendant for his pains was fined and imprisoned. The comment as to market overt certainly appears further down the same page of the report in 145 E.R. 59, but it is not suggested in the comment that a sale in market overt would not bind the Crown. The reference in Robertson at page 577 is based on Manning's Exchequer Practice (2nd Edition) page 48 and cases there cited. On a reference to the passage in Manning which is referred to in Williams, we find that Manning is very careful not to speak of customs in general not binding the Crown; he says simply "As no laches is imputable to the King, he is not bound by an intervening sale in market overt. Or by a custom in London for the pledgee to retain goods against the true owner". The principal authority that I can find on the subject is in 2 Coke's Institutes (1642) page 713 where Coke says that the statute 31 Eliz. c.12 concerning the selling of horses in fairs and markets does not bind the King for any of his goods sold in market overt and he refers to 35 Hen. VI pl. xxix, and that case is also referred to in the case in Jenkins reported in 145 E.R. 59. As Coke is a book of authority, one must assume that however the matter originally arose, the custom as to sale of goods in market overt does not bind the Crown.

The comment in Jenkins at 145 E.R. 59 case lxii is of course explicable by the fact that the King could not be sued in his own Courts, and could not be made to pay any of the various tolls or the other customary rights referred to therein because taxes are levied on the subject, not on the Crown. It is however not suggested that if the King had the prerogatives of waifs and estrays in his own hand, as he did unless they were alienated by grant or prescription to some lord, that he could not enforce his own rights of waifs and estrays. The thrust of the passage is that they could not be enforced against him and that of course is true because he could neither be sued nor taxed. Accordingly the comment contained in Glanville Williams, though it may originally have been right, is not necessarily so today when the Crown can be sued in the same way as a subject can.

It would indeed be strange today if the Crown were not bound by fictions. Deeming clauses are found literally by the hundreds in statutes and one use of such deeming clauses is to create a statutory fiction: see the judgment of Griffith C.J. in Mueller v. Dalgety & Company Limited (1909) 9 C.L.R. 693 at 696. Fictions in truth today operate at different times both in favour of and against the Crown.

APPENDIX FOUR:

THE TEST FOR WHETHER THE CROWN IS BOUND BY STATUTE

THE TEST FOR WHETHER THE CROWN IS BOUND BY STATUTE

Since the inception of the common law, the courts have recognised that the king has certain rights in the sphere of justice and administration which constituted his prerogative and were to be free from interference. In view of this and the close link between the king and his judges, it is not surprising that the courts, in furtherance of the statutory rule of interpretation that statutes bound those to whom they extended, would declare that he was not bound by statutes which would take away any of his prerogative rights.

However, this rule has been extended by later judicial authority (although one does see mention of it as early as 1561 in the case of Willion v. Berkley (1561) 1 Plowd. 223, 239; 75 E.R. 339, 365-6) and now the Crown is not bound by statute except by express words or necessary implication. In the nineteenth and early twentieth centuries, the aim of the statute was recognised by the courts as the important factor in determining whether the Crown was bound by statute (See: Moore v. Smith (1859) 1 El. & El. 598). In Attorney-General v. Donaldson (1842) 10 M. & W. 117, Alderson B. at page 124 stated that, "It is a well-established rule, generally speaking, in the construction of Acts of Parliament, that the king is not included unless there be words to that effect".

The courts in the twentieth century have looked to a more literal interpretation of the statute rather than having regard to the policy of the statute. Cotton L.J. said in In re Henley & Co. (1878) 9 Ch.D. 468 at 482, that, "in general, the Crown is not bound by a statute unless expressly mentioned or referred to by necessary implication". The issue for the courts was then to determine the interpretation to be given to the expression "necessary implication".

In Gorton Local Board v. Prison Commissioners [1904] 2 K.B. 165n., the issue was whether government property was affected by local by-laws. Day J. said, "In the absence of express words the Crown is not to be bound, nor is the Crown to be affected except by necessary implication. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning. That is what I understand by "necessary implication" (see page 167n.). This definition was used extensively in later cases.

However it must be remembered that this rule is one of construction, as was said in Minister for Works for Western Australia v. Gulson, (1944) 69 C.L.R. 338 where Latham C.J. at page 347 pointed out that "this principle is not a hard and fast rule, but a rule of construction intended to give effect to the intention of the legislature.

The leading case on this issue is Province of Bombay v. Municipal Corporation of the City of Bombay [1947] A.C. 58. The Privy Council had to determine whether a statute giving the municipality power to carry water mains through the city bound the Crown. Lord du Parcq, on behalf of the Committee, said:

> "It was contended on behalf of the respondents that whenever a statute is enacted for the 'public good' the Crown, though not expressly named, must be held to be bound by its provisions, and that, as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown. ... The proposition ... is supported by early authority, and is to be found in Bacon's Abridgement and other text-books, but in their Lordships' opinion it cannot now be regarded as sound except in a strictly limited

> sense. Every statute must be supposed to be 'for the public good' at least in intention, and even when, as in the present case, it is apparent that one object of the legislature is to promote the welfare and convenience of a large body of the king's subjects by giving extensive powers to a local authority, it cannot be said, consistently with the decided cases, that the Crown is necessarily bound by the enactment ... If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficient purpose must be wholly frustrated unless the crown were bound, then it may be inferred that the crown has agreed to be bound".

The test, therefore, is whether the beneficent purpose of the statute would be wholly frustrated. As Hogg, "Liability of the Crown" points out at page 170 "Statutes regulating an activity which is exclusively or predominantly an activity of the Crown occasionally fail to state expressly that the Crown is bound. It is clear that Crown proceedings statutes, public service statutes and statutes regulating the armed forces bind the Crown by necessary implication, for their purpose would be frustrated if they did not".

There is, however, one class of case where the courts have been prepared to construe a statute in a way which prejudices the Crown. In Attorney-General v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508, the House of Lords held that where a statute authorised the Crown to do something which was also authorised by the prerogative, and the statute imposed conditions or restrictions on the exercise of the power, then the prerogati

power was superseded by the statute so that the power could only be exercised subject to the statutory conditions or restrictions.

It should also be noted that where there is a section in a statute which exempts the Crown from some of its provisions but the rest of the statute is silent as to whether the Crown is bound, the Courts have treated the exempting section as having been inserted only out of caution and as not giving rise to any implication as to the meaning of the rest of the statute: See North Sydney Council v. Housing Commission (1948) 48 S.R. N.S.W. 281 at page 285 where Jordan C.J. said "... and in a few cases a section expressly provides that it shall not apply to the Crown. It is, however, impossible to infer from the existence of sections of the latter type that it was intended in all other cases that the Crown should be bound".

Acts such as the "Public Service Act, 1967-1975" and the "Audit Act, 1921-1975" bind the Crown by necessary implication. Apart from these the tendency of the Courts has been to adhere to the rule of construction strictly, often to the public detriment. In Downs v. Williams (1971) 126 C.L.R. 61, the High Court had to determine whether the Crown had been in breach of the statutory duty which the Factories, Shops and Industries Act, 1962 imposed upon the occupiers of factories to fence dangerous machinery. The High Court held that the Act, which was not expressed to bind the Crown did not, properly construed, bind it by implication. It further held that as the Crown did not have the statutory duty in question the plaintiff's claim for damages, so far as it was based upon a breach of that duty, failed.

APPENDIX FIVE:

"THE SHIELD OF THE CROWN" - CROWN AGENCY OR INSTRUMENTALITY

"THE SHIELD OF THE CROWN" - CROWN AGENCY OR INSTRUMENTALITY

The activities of government have increased substantially during the nineteenth and twentieth centuries and the government now plays an important role in many spheres of daily life. The administration of the governmental activities can be divided into three distinct categories of bodies. First are the various ministries. These ministries are the traditional vehicles of government administration under direct executive control and are a part of the Crown.

The second category consists of regulatory and advisory agencies separate from the ministries but not independent of them. A list of these bodies and their constituting statutes are set out. These boards and committees are agents of the Crown. In only one instance (see: Poultry Farmer Licensing Committee - Section 8(3) of the Egg Industry Stabilisation Act, 1973-1974) does the statute expressly state that the Committee is not to represent the Crown. As agencies of the Crown these bodies generally enjoy the shield of the Crown.

The third category consists of those public authorities which are often involved in some economic activity or development which is shared with the private sector.

> "For facilitating the conduct of business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued. . . . . There is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies." (Graham v. Public Works Commissioners [1901] 2 K.B. 781, per Phillimore J. at pp. 790-1).

These bodies corporate, as Crown instrumentalities are entitled to the benefit of prerogative rights and privileges of the Crown - the shield of the Crown.

However a problem arises where the relevant legislation fails to expressly provide that a particular body corporate is entitled to Crown immunity, and it becomes necessary to determine whether in fact such a public authority is a Crown instrumentality. This is of special importance in the case of a body corporate claiming the immunity of the Crown from not being bound by legislation unless the Crown is expressly named or by necessary implication. The legal issue to be resolved is whether the nature of the relationship between the corporation and the Crown entitles the corporation to the particular Crown attribute which is claimed. This question is resolved by an examination of the statute empowering the corporation. It must also be determined whether the application of the statute to the corporation would impair some interest or purpose of the Crown.

Hogg, "Liability of the Crown" at page 208 states that the three factors of incorporation, the power to sue and be sued, and the source of the corporation's funds are only relevant in determining the issue in so far as they bear on the independence of the Corporation. The trend of decisions indicates that the important consideration is whether the corporation is tightly controlled by the Executive. It is noticeable that in recent legislation it is becoming the practice to state that the body corporate is subject to "the control and direction of the Minister

1. Whether a body corporate is a Crown agency or instrumentality.

In Metropolitan Meat Industry Board v. Sheedy [1927] A.C. 899 the Privy Council concluded that the Board was not a Crown agency because it possessed wide powers which it exercised at its own discretion and any interference by the Minister was not sufficient to make the acts of administration those of the Minister rather than those of the Board.

The High Court examined this question in Grain Elevators Board (Victoria) v. Dunmunkle Corporation (1946) 73 C.L.R. 70 when deciding whether the Board was liable to pay rates. The High Court looked to the empowering Acts to determine the rights and duties of the Board. Latham C.J. at page 79 considered that it was a body which in doing its business exercised an independent discretion of its own and though a Minister of the Crown may prevent the Board acting in certain cases, he does not control or direct the acts of the Board. Dixon J. stated that the acts appeared to intend to constitute a body, for the conduct of what may be regarded as a public utility, as a separate responsible entity, owning its own undertaking both in law and in equity. Starke J. considered that the Board had wide discretionary powers for carrying on its operations. Its property was not the property of His Majesty, nor was it used for public purposes. Only Rich J. at pages 79-80 considered that the Board was in the control of the Crown and that the land was used for public purposes.

The High Court concluded that the Board was not a Crown instrumentality. Emphasis was placed on the "control test".

The Full Court of the Supreme Court of Victoria (Herring C.J., Lowe and Fullagar JJ.) in Victorian Railways Commissioner v. Herbert [1949] V.R. 211 were prepared to accord a statutory body immunity for some of its functions but not for others. At page 213 their Honours stated that "The fact is, we think that where statutory bodies are set up to conduct governmental undertakings, it may be that they should be treated as representing the Crown or as agents of the Crown for one purpose and not for another. . . . . These questions have to be determined by reference to the statute that has established the body in question

and in accordance with its true interpretation. The nature of the function performed and whether previously connected with an office of State is also a matter of moment. . . . But all these things must be looked at with due regard to the nature of the immunity or privilege of the Crown that is claimed, so that attention may be directed to what is relevant to the particular inquiry, which is being made".

In Electricity Trust of South Australia v. Linterns Ltd, [1950] S.A.S.R. 133, the Electricity Trust as the registered proprietor of land claimed that, as an instrumentality of the Crown, it was not bound by the provisions of the Landlord and Tenant (Control of Rents) Act, 1962. In concluding that the Electricity Trust was an instrumentality of the Crown, Ligertwood J. emphasised the distinction between a Crown agent or servant and an instrumentality. His Honour saw the object of the Act as being to divest the undertaking of the Adelaide Electric Supply Co. Ltd. from that company and to vest it in the Crown to be carried on as a governmental activity.

While, therefore, the Electricity Trust was not a servant or agent of the Crown because it had independent powers and was not subject to the control of the Governor in Council or any Minister of the State, it was a Crown instrumentality because it served the purpose of the Crown in managing Crown assets in the interest of the public.

In Tamlin v. Hannaford [1950] 1 K.B. 18 the Court of Appeal had to decide whether the British Transport Commission was a servant or agent of the Crown. Denning L.J., who read the judgment of the Court, said at page 22 that "In considering whether any subordinate body is entitled to this Crown privilege, the question is not so much whether it is an "emanation of the Crown", . . . but whether it is properly to be regarded as the

servant or agent of the Crown. In the case of the British Transport Commission, this depends upon the true construction of the Transport Act, 1947."

Denning L.J. had regard to the following factors:

i) it is a statutory corporation with defined powers which it cannot exceed and is directed by a group of men whose duty it is to see that those powers are properly used.

ii) it may own property, carry on business and borrow and lend money within its bounds.

iii) there are no shareholders or profits. The duty of the corporation is to make revenue and expenditure balance one another.

iv) the taxpayer, the user and the beneficiary is concerned in seeing it properly run, and their interests are entrusted by Parliament to the Minister of Transport.

v) the Minister appoints the directors and fixes their remuneration. He is given power to give them directions of a general nature, in matters which appear to him to affect the national interest.

However, at page 24 Denning L.J. proceeded that while the Minister's powers were great, in the eyes of the law, the corporation was its own master and answerable as fully as any other person or corporation. Its servants are not civil servants and itsproperty is not Crown property. It is not the Crown and is not entitled to the immunities of the Crown. Denning L.J. pointed out at page 24 that "It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government. The court considered that the control exercised by the Minister of Transport was insufficient to make the British

Transport Commission a servant or agent of the Crown. In an often quoted statement at page 25 the Court said obiter, "When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly . . . . In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department."

This strict approach to the control test and the reference to the intention of Parliament has been followed in recent cases.

The Full Court of the High Court considered whether the Commissioner of Railways was an instrumentality of the Crown in Bradken Consolidated Ltd. and Bradford Kendall Foundries Pty. Ltd. v. Broken Hill Proprietary Co. Ltd. 24 A.L.R. 9. The Court first examined the wording of the constituting Act which stated that: 1) "The Commissioner, representing the Crown, shall be a corporation sole . . .". 2)"The Commissioner . . . shall and may exercise all the powers, privileges, rights and remedies of the Crown." The wording, therefore, indicated that the Commissioner was intended to be treated as an agent of the Crown and entitled to its immunities.

Secondly, the Court drew upon the control test enunciated in the Grain Elevators Board case - whether the body whose status is in question is subject to direct ministerial control, or is independent of the government and has discretiona powers of its own.

Finally, the Court considered that the conduct of railways is a function of government. While this in itself is not conclusive, for a body which discharges public functions is

not necessarily an agent of the Crown, it does provide some assistance to the view that the Commissioner is acting on behalf of the Crown. The majority of the Court concluded that the Commissioner of Railways is an agent of the Crown.

In Renmark Hotel Incorporated v. Federal Commissioner of Taxation (1949) 79 C.L.R. 10, the High Court draw a distinction between a body corporate constituted to provide a community benefit and corporations which performed public functions. The appellant company claimed exemption from the Income Tax Assessment Act as being a public authority constituted under an Act. The committee of management of the hotel was especially elected and the profits of the hotel went to the promotion of the Renmark settlement. Latham C.J. said at pages 22-23, "In my opinion, all these provisions amount to a set of special provisions for controlling the sale of liquor in a particular area and the disposition of the profits arising from such sale; but . . ., the appellant company is not given any power or authority by law in the form of a state statute to do any acts in relation to the public which otherwise would be beyond its power or unauthorised."

An appreciation of these cases leads to the conclusion that in determining whether a body corporate is a Crown instrumentality, one must have regard to the empowering statute and consider the nature of the authority, the function it performs, the source of its membership and revenue but, overriding all these factors, it is necessary to determine the degree of control exercised by the Executive and whether that control fetters the actions of the corporation in question. In view of the increasing reluctance the Courts are showing to clothe public corporations with Crown immunity, the control must be directly exercised by the Minister on the corporation.

Support for this conclusion is also drawn from an examination of the Canadian cases on this topic. The "nature a extent of control" test was used in two recent Canadian cases: Fidelity Insurance Co. of Canada v. Workers Compensation Board et. al. 102 D.L.R. 3d. 255 and R. v. Achtem 11 Alta. L.R. 151.

2. Whether a Minister as a Corporation sole is entitled to the shield of the Crown.

The control test as enunciated by the judiciary has been extended to apply to those instances where Parliament has incorporated a Minister of the Crown for the purposes of the Act in question. This aspect of Crown privilege was examined by the Full Court of the Supreme Court of New South Wales in Chief Secretary of New South Wales v. Oliver Food Products Pty. Ltd. [1960] 60 S.R. N.S.W. 435. The Chief Secretary as a corporation sole had the duty of administering the Fisheries and Oyster Farms Act, 1935-1949 which dealt with all aspects of fishing and oyster farming in New South Wales. This was a demurrer by the plaintiff to the defendant's plea which relied upon the Statute of Limitations.

Herron J. at pages 437-439 stated that to determine whether the Minister as a corporation sole is a servant or agent of the Crown must depend upon the purpose and effect of the constituting Act. Herron J. referred to the Grain Elevators Board case, and said that Latham C.J. laid down the following tests in that case.

i) Is the function of the Corporation a traditional function of government? If so, an intention to alienate it to such an authority would not be assumed.

ii) Is it an incorporated body functioning as a governmental department.

iii) Is financial control of the body in the Crown so that its revenues go into consolidated revenue? If so, this is an element which indicates its identity with the Crown.

iv) Is the authority subject to direct ministerial control so that it acts under the direction of a minister?

The Court concluded that, since it was the Minister who was made the corporation sole and who was authorised to carry out the purpose of the Act, of necessity the corporation was completely under the control of the Minister. The Minister, therefore, was an agent of the Crown.

3. Whether lesser officers are entitled to the privileges of the Crown.

This question was considered in a lengthy analysis by the House of Lords in Bank Voor Handel En Scheepvaart v. Administrator of Hungarian Property [1954] A.C. 584. Again, the ultimate emphasis was placed on the degree of control exercised on the person claiming immunity by the relevant Minister. The issue was whether the custodian of enemy property was bound to pay income tax or was entitled to the Crown prerogative of immunity from such.

Lord Reid at pages 616-618 said that the question depends upon the degree of control which the Crown through its Minister can exercise over him in the performance of his duties. The fact that a statute has authorised his appointment is immaterial, but the definition in the statute of his rights, duties and obligations is highly important. Lord Reid continued "While it may be that a Crown servant could not claim Crown immunity in respect of his performance of statutory duties which served no Crown purpose at all, I can find nothing to justify the argument that Crown immunity can only be claimed by the Crown

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21 May, 1986

The Honourable Mr. Justice Zelling, C.B.E.,
The Chairman,
Law Reform Committee of South Australia,
Judges Chambers,
Supreme Court,
ADELAIDE. 5000

Dear Judge,

[Crown Proceedings - Liability of the Crown for the torts of its officers]

The draft report deals with the desirability of reversing the principle of Enever v. the King (1906) 3 CLR 969 in which the Crown was held not to be liable for the torts of its officers. There are passages, particularly in the judgment of Barton J., which suggest that the Crown suffers from a kind of radical schizophrenia; its personality is divided or compartmentalized into its legislative, judicial and administrative capacities. The fact that the Crown is a trinitarian, rather than a unitary, entity has the consequence that what it does in its legislative capacity is not binding on it in its administrative capacity. If it were not so "the whole fabric of the State (would be involved) in confusion and disaster" (Barton J. p.983). Your solution to the problems posed by Enever v. the King is to substitute for the trinitarian doctrine a unitarian doctrine: that is to say, statutory directions to the Crown's agents are assimilated to administrative directions so that the Crown can no longer

(or its servants on its behalf) if it is required to protect some direct or financial interest of the Crown; and still less can I find any support for the argument that immunity cannot be claimed by the Crown unless the Crown alone is interested in the benefit which it will bring. Lord Reid concluded that the custodian was the servant of the Crown.

At page 267 Lord Tucker formulated the following propositions to assist in solving the issue.

1) The immunity extends at least to include all those officers of State and their subordinates who now perform, pursuant to statutory authority, functions of public government which were formerly the peculiar prerogatives of the Crown.

2) Such functions include the making and carrying on of war and the making of treaties of peace and other consequential international arrangements and the performance thereof.

3) It is immaterial whether the person in respect of whom the immunity is claimed is himself an officer of state with ministerial capacity or is a subordinate official of such minister or is himself an executive officer of lower status than that of a minister.

4) The immunity extends to such persons only so long as they are acting in the capacity described above.

5) This immunity also extends to persons who do not come within the class above described but are the owners or occupiers of property exclusively used for the purposes of government. The immunity only protects such persons in respect of liability or disability arising in respect of the ownership or occupation of such property. These people can be said to be in consimili casu to the Crown.

Lord Asquith at page 631 stated that "The Courts will lean against including in any of the exempted categories an

aggregation of commercial undertakings brought under some degree of public statutory control, and they will (if the other requirements are satisfied) lean in favour of exemption for persons or bodies who are mere ministerial instruments of the Crown's will lacking in themselves any discretion or initiative."

These tests have been used by the writer to determine whether the corporate bodies constituted by South Australian Statute can be given the status of a Crown instrumentality.

APPENDIX SIX:

PARLIAMENTARY COUNSEL'S LETTER ON THE LIABILITY OF THE CROWN FOR THE TORTS OF ITS OFFICERS

exercise its protean capacity to change its personality and thus elude the unfortunate subject. This certainly counters Barton's argument, but I wonder whether it disposes completely of this case.

Griffith C.J. bases his judgment on an entirely different principle. He asserts that a principal is not vicariously liable for the torts of his agent unless he is in a position to supervise or control the agent's actions. When the actions of the agent lie beyond the scope of the principal's supervision or control, the doctrine of respondeat superior will not apply. Griffith C.J. mentions, by way of analogy, the position of the master of a ship at sea: the employer is not (according to Griffith C.J.) responsible for the master's torts because the employer is not in a position to supervise or control the master's actions. The question of whether the agent's authority arises from a legislative or administrative act is irrelevant (see p. 976). The argument put forward by Griffith C.J., seems to have been accepted by the other two judges - at least as an alternative ground for their own judgments. It is clear that it has implications extending far beyond the area of the Crown's liability for the torts of its agents.

If there is validity in what Griffith C.J. says, I wonder whether we should not attempt to lay the matter to rest by some general amendment to the law of tort. There are, for example, cases where the manager of a factory has independent discretions and responsibilities in relation to matters affecting the safety of those working in the factory. It would be unfortunate if an industrialist could escape liability by alleging that the independent discretion of the manager breaks the chain of responsibility.

Yours sincerely,

Geoff Hartnett.

Parliamentary Counsel.

APPENDIX SEVEN:

MEMORANDUM CONCERNING THE SCOPE OF ACTIONS MAINTAINABLE AGAINST THE CROWN

MEMORANDUM CONCERNING THE SCOPE OF ACTIONS MAINTAINABLE

AGAINST THE CROWN

1. Section 10 of the Crown Proceedings Act, 1972 makes the State of South Australia liable in contract and in tort in the same manner as individual persons are liable. Two questions arise, namely whether the Crown was ever liable under other heads of action and if so, which? And secondly, if such other actions exist, does s.10 serve to abolish all causes of action other than contract and tort and with what consequences?

2. It is clear that the Crown has always been liable in contract, at least where the action was maintained by petition of right, see Thomas v. R. (1874) L.R. 10 Q.B. 31; Windsor and Annapolis Ry. Co. v. R. (1886) 11 App. cases 607, esp. 613-4. The petition of right was always available against the Crown in quasi-contract also, see Feather v. R. (1866) 122 E.R. 1191, 1204-5 and 6 B. & S. 257 at 293-4, where the dicta of Cockburn C.J. is clearly wide enough to let in most claims against the Crown in quasi-contract. These remarks were affirmed in Windsor supra at pp. 614-615.

3. Crown liability in tort is wholly a creature of statute. Early attempts to rely upon the petition of right to found a claim in tort were unsuccessful, see Canterbury (Viscount) v. A-G (1842) 1 Ph. 306 and Tobin v. The Queen (1864) 16 C.B. N.S. 310; see also Professor Wade in his ADMINISTRATIVE LAW, 5th edn. page 700; de Smith, CONSTITUTIONAL AND ADMINISTRATIVE LAW, 5th edn., page 630.

4. That causes of action (other than tort) could have been accommodated by the petition of right appears from the decision in A-G v. de Keysers Royal Hotel Ltd. (1920) A.C. 508 where a petition of right was used to recover an unliquidated sum of compensation payable not under contract (or tort) but under statute. See esp. pages 530-531 and 545-546. It is clear from the remarks of their Lordships at the pages referred to that provided a claim pursued against the Crown by petition of right is known to law and is other than in tort then the claim is well-founded. Liability in tort was excluded by the maxim "The King can do no wrong".

5. What other actions could be maintained against the Crown and by what procedure? We know that at common law the only methods of redress against the Crown were

(1) petition of right

(2) by declaration against the A-G

(3) by statutory right.

See Halsbury 4th edn., Vol. 11, para 1401, pg. 743.

The petition of right was the procedure most commonly used prior to its abolition in 1947 by the U.K. CROWN PROCEEDINGS ACT. It supported any action to recover property of any kind, including money or damages, from the Crown and whether the basis of the claimants title was legal or equitable: Tobin v. R. (1864) 16 C.B.N.S. 310 at 357.

The petition of right lay also for recovery of

* lands

* hereditaments, both corporeal and incorporeal

* chattels (and their value where converted)

* money claims in general, including liquidated and unliquidated sums under contracts, for services rendered, for dues and duties of all kinds paid to the Crown, including the recovery of interet due on Government bonds see Franklin v. A.G. (1974) 1 Q.B. 185.

* compensation for interference to property (see de Keysers Hotel (1920) A.C. 508).

A more extensive list appears at Halsbury, 4th edn., vol. 11, page 747-8 para 1411 and footnotes.

It may safely be said that the petition of right might support every conceivable action against the Crown. In th words of Lord Atkinson in Hollinshead v. Hazelton (1916) 1 A.C. 428 at 450: "A petition of right is merely an amicable litigation taken by the consent of the Crown against the Crown itself".

The only limitations upon the petition of right appear to have been in the realms of:

(1) tort (where it never lay)

(2) actions maintained against Crown dominions

(3) the Crowns treaty obligations with other nations

6. On the assumption that the petition of right remains in force in South Australia (unlike the U.K., where it has been abolished by the Crown Proceedings Act, 1947) this procedure will support any action against the Crown other than those in tort (which are, in any event now permitted by s.10 of our Act).

In the absence of the petition of right, the extent of Crown liability in actions other than contract and tort is less clear. The U.K. Act creates a right to sue the Crown wherever that right could have formerly been pursued by petition of right (s.1). Section 2 creates (for the first time) Crown liability in tort. Our Crown Proceedings Act, 1972 carries no equivalent to the U.K.'s s.1. The reason for the U.K. provision is to ensure that their abolition of the petition of right (by the 1947 Act) does not deprive litigants of actions previously maintainable against the Crown. Our Crown Proceedings Act, 1972 has presumably been enacted upon the footing that the petition of right remains as an option for litigants whose claims do not fall into the categories contract and tort. It is submitted that if there is some doubt as to whether the petition of right still exists in S.A. then, on some views, actions outside s.10 of our Act may not be actionable against the Crown.

Professor Hogg discusses these issues at page 142 of his work LIABILITY OF THE CROWN (1971). The author raises the question whether the express reference in Crown Proceedings Acts to contract and tort necessarily exclude other causes of action. Reference is made to the decision of Adams J. of the Victorian County Court in Froelich v. Howard (1965) A.L.R. 1117 where in considering s.56 of the Commonwealth Judiciary Act, 1903 His Honour held that the expression "a claim ... whether in contract or in tort" was exhaustive of the claims which lay against the Commonwealth Crown, thereby excluding many claims which might otherwise have been maintained against the Crown such as breach of trust (which is otherwise actionable).

Applying the reasoning of Adams J. it might be said that our Acts reference to contract and tort in s.10 excludes other causes of action against the Crown.

Hogg is critical of Adams J.'s analysis and rejects it at page 143. The better view is that s.10 is not intended to be exhaustive but merely states explicitly that in relation to proceedings in contract and in tort the Crown shall be liable in the same manner as a private person. The words and tenor of s.5 of the Act would not appear to contemplate any reading down by s.10.

Further, nothing in our Act can be taken as serving to abolish the petition of right which, as is said in the Report, should be retained on the assumption that it may still have certain residual functions, namely to support causes of action which might, on some views, fall outside

the Crown Proceedings Act. If the petition of right has in face been abolished in South Australia then the issue raised in Froelich's Case becomes a live one.

.....

NICHOLAS ILES

17th June, 1986

D. J. Woolman, Director and Government Printer, South Australia