

## STATUTORY CORPORATIONS AND ‘THE CROWN’

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### I INTRODUCTION

The expression ‘the Crown’ derives from the course of constitutional development in England. There, it was used at various times and in various senses to describe the King or Queen in person, the executive, and a loose class of entities that exercised ‘government functions’ and were under the control of the executive and the State as a body politic. The expression was used in yet another sense ‘during the course of colonial development in the nineteenth century’ to identify ‘the paramount powers of the United Kingdom, the parent State, in relation to its dependencies’.<sup>1</sup>

The ambiguities associated with the expression ‘the Crown’ often resulted in misunderstandings and confusion on the part of the English courts.<sup>2</sup> In Australia, there are more fundamental problems associated with the use of that expression. The *Australian Constitution* recognises the distinct existence of the components of the federation. It conceives of them as ‘politically organised bodies having mutual legal relations’,<sup>3</sup> but does not apply the appellation ‘the Crown’ to those bodies. On the contrary, they are identified and referred to by the *Constitution* as ‘the Commonwealth’ and ‘the States’ respectively. Moreover, as will appear, it is clear that the construct of ‘the Crown’ is not synonymous with those constitutional expressions.

The difficulties in applying a concept developed in a unitary system, ambiguous even in that context, to a federal system in which the components of that system are distinct bodies capable of suing each other, suggests that use of the expression ‘the Crown’ ought to be avoided in Australia.<sup>4</sup> Unfortunately, as

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1 *Sue v Hill* (1999) 199 CLR 462, 499.

2 See, eg, *Mersey Docks v Cameron* (1865) 11 HL Cas 443, 508; 11 ER 1405, 1430; *Town Investments Ltd v Department of Environment* [1978] AC 359, 381, 400.

3 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363.

4 Recent statements in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 346–7, suggest that the High Court shares this view.

the expression 'the Crown' appears in numerous federal and state statutes, it is unrealistic simply to demand that it be replaced. Moreover, such a demand would immediately encounter the obstacle 'replace it with what?'. A more achievable goal is to introduce some certainty as to the meaning which, prima facie at least, the expression should bear when used in the modern Australian context.

With this in mind, the first part of this article examines the scope of the expression 'the Crown' and, in particular, considers whether, and if so in what circumstances, a statutory corporation may be 'the Crown'. This issue is of significance given the role played by statutory corporations in many facets of commerce and the fact that statutes often purport to confer concessions or impose obligations upon 'the Crown'.

The second part of this article is concerned primarily with the related expression 'statutory corporation representing the Crown'. That expression frequently appears as a statutory extension to, or perhaps clarification of, the phrase 'the Crown'. This article will examine the legislative history of the expression and its judicial exegesis in an attempt to offer some guidance as to the meaning of the expression.

## II 'THE CROWN'

Historically, the expression 'the Crown' was linked to the royal prerogative and to the person of the King. With the development in England of responsible government, the scope of the term 'the Crown' began to shift or broaden to encompass the meanings referred to earlier. Moreover, as Professor Pitt Cobbett explained:

In England the prerogative powers of the Crown were at one time personal powers of the Sovereign; and it was only by slow degrees that they were converted to the use of the real executive body, and so brought under control of Parliament.<sup>5</sup>

In Australia, the situation was different. The Sovereign in person played no role in the constitutional development of the colonies and, later, of the Commonwealth and the States. However, the settlers brought with them to the colonies the common law of England, or so much of it as was applicable to conditions in the colonies.<sup>6</sup> The royal prerogative, a construct of the common law, was introduced to the colonies through that mechanism and through the granting of letters patent and royal instructions, which conferred certain prerogative powers upon the Governor.<sup>7</sup> Later, as in England, the development of responsible government meant that the Governor came to exercise prerogative powers upon the advice of the Executive Council.<sup>8</sup> Of course, the law concerning

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5 Pitt Cobbett, 'The Crown as Representing the State' (1904) 1 *Commonwealth Law Review* 145, 146–7, cited by Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill* (1999) 199 CLR 462, 499–500.

6 *Australian Courts Act 1828* (Imp) s 24. See also the discussion in Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337, 339.

7 Anne Twomey, *The Constitution of New South Wales* (2004) 584, 629–31.

8 *Ibid* 584.

prerogative powers required adaptation to the novel circumstances encountered in the colonies. For example, the royal prerogative was split between those prerogatives that, ‘with the evolution of responsible government, [were] gradually converted to the use of the local executive, and so brought under the control of the local legislature’<sup>9</sup> and those prerogatives that continued to be exercised on the advice of British ministers.<sup>10</sup>

Of significance for this paper are the ideas that the royal prerogative was vested in ‘the Crown’ and what appears to have been the corollary, that a body entitled to the benefit of a prerogative right, privilege or immunity was properly described as ‘the Crown’. Thus, it is not uncommon to see judicial reference to, for example, a statutory corporation that is ‘entitled to the rights, privileges and immunities of the Crown’.

It is possible to classify the rights, privileges and immunities that historically comprised the royal prerogative into three broad categories:<sup>11</sup>

- (1) executive powers, such as the right to declare war and make peace, coin money, seize the property of subjects during wartime, the prerogative of mercy, the right to incorporate companies by Royal Charter and to issue letters patent in respect of inventions and the right to confer honours;
- (2) immunities and preferences of the King, including, for example, the priority of the Crown to be paid before all other unsecured creditors, the immunity of the Crown from execution against its property, adverse costs orders and orders for discovery, the principle that the ‘King can do no wrong’ and the ‘rule’ or presumption that legislation does not ‘bind the Crown’ in the absence of express words or necessary implication; and
- (3) property rights, including the right to minerals below the surface, the right to Royal fish, and ownership of the foreshores and of the ocean bed.

In Australia, historical and legal considerations have had a significant impact upon the existence, nature and distribution of those rights, privileges and immunities. It is useful to make a number of preliminary observations on the impact of the *Australian Constitution* on the royal prerogative, ‘the Crown’ and executive power.

First, the *Constitution* does not mention the words ‘royal prerogative’, nor does it refer to any rights, privileges or immunities of ‘the Crown’. That is not surprising given the nature of the polities established by the *Constitution*.<sup>12</sup> Indeed, one of the reasons for, or effects of, the development in England of the

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9 Pitt Cobbett, ‘The Crown as Representing the State’ (1904), above n 5, 146–7.

10 The distribution of prerogatives between the colonies and the British ‘Crown’ is beyond the scope of this paper. So too is the difficulty associated with the application of the now discarded principle of ‘indivisibility of the Crown’ to the Australian federal structure. See generally Anne Twomey, above n 7, 598–606; Pitt Cobbett, ‘The Crown as Representing the State’ (1903) 1 *Commonwealth Law Review* 23 and (1904) 1 *Commonwealth Law Review* 145.

11 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278, 320–1. See also H V Evatt, *The Royal Prerogative* (1987) 30–1.

12 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363. See also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 291.

construct of 'the Crown' was the avoidance of the need to recognise 'the State' as a distinct body with its own legal existence.<sup>13</sup> In Australia, recognition of the separate legal existence of 'the Commonwealth' and 'the States' as bodies politic was mandated by the *Constitution* itself. This is why, in *Commonwealth v Cigamatic Pty Ltd (in liq)*,<sup>14</sup> ('Cigamatic') Dixon CJ thought it more correct to describe the Crown's priority over unsecured creditors as 'a fiscal right belonging to the Commonwealth as a government and affecting its treasury'. It also explains why in *Bass v Permanent Trustee Co Ltd*,<sup>15</sup> six members of the High Court emphasised that 'expressions such as "shield of the Crown", "binding the Crown" and, more particularly, "binding the Crown in right of the Commonwealth" and "binding the Crown in right of the States"' are 'inappropriate and potentially misleading when the issue is whether the legislation of one polity in the federation applies to another'.<sup>16</sup>

Second, the establishment by the *Constitution* of the Commonwealth and the States as 'organisations or institutions of government possessing distinct individualities' and 'having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the *Constitution* rests'<sup>17</sup> leads to the possibility of conflict between the legislative power of one polity and the executive power of another or between the executive power of two polities.<sup>18</sup>

Third, the *Constitution* and federal, state and territory legislation have abrogated, removed or placed upon a statutory footing many of the rights, privileges and immunities referred to above. For example, the *Constitution* itself has significantly abrogated the operation of the maxim that the 'King can do no wrong' through the conferral upon the High Court of original jurisdiction in respect of all matters to which the Commonwealth is a party (s 75(iii)) and all matters between States and between a resident of one State and another State (s

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13 See Pitt Cobbett, 'The Crown as Representing the State' (1903), above n 10, 25–6. See also W Harrison Moore, 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 351, particularly at 360–2.

14 (1962) 108 CLR 372, 378.

15 (1999) 198 CLR 334, 347.

16 See also *Commonwealth v Western Australia* (1999) 196 CLR 392, 410.

17 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 363. See also *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219, 229; *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 66.

18 The 'Cigamatic doctrine' is concerned with one aspect of this conflict, namely conflict between the executive power of the Commonwealth and State legislative power. *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 concerned a different aspect: conflict between the legislative or executive power of one State (the judgments did not make it clear which) and the legislative power of another State.

75(iv)).<sup>19</sup> The Crown Proceedings legislation of the Commonwealth, the States and the Territories has further abrogated the doctrine.<sup>20</sup>

It is apparent that the royal prerogative, or so much of it as remains applicable in the Australian context, is a component of executive power, rather than legislative or judicial power.<sup>21</sup> Thus, it has been said that ‘the executive power includes ... “the benefit of certain preferences, immunities and exceptions which are denied to the subject”’.<sup>22</sup> One such preference is the Crown’s priority over unsecured creditors. Another is the entitlement to the benefit of the presumption that legislation does not ‘bind the Crown’. Here, the term ‘the Crown’ identifies ‘the executive as distinct from the legislative branch of government, represented by the Ministry and the administrative bureaucracy which attends to its business’.<sup>23</sup> This accords with the development of the principle of responsible government and with the enumeration of the components of the executive in Chapter II of the *Australian Constitution*. It also accords with what has been called the ‘modern sense’ of the presumption that legislation does not ‘bind the Crown’, namely ‘the Executive Government of the State is not bound by Statute unless that intention is apparent’.<sup>24</sup>

It is for this reason that it is suggested that in Australia, under the federal system created by the *Constitution*, prima facie the expression ‘the Crown’, if it

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19 *Commonwealth v Mewett* (1997) 191 CLR 471, 545–52 (Gummow and Kirby JJ).

20 *Judiciary Act 1903* (Cth) s 64; *Crown Proceedings Act 1988* (NSW); *Crown Proceedings Act 1958* (Vic); *Crown Proceedings Act 1980* (Qld); *Crown Proceedings Act 1992* (SA); *Crown Suits Act 1947* (Cth); *Crown Proceedings Act 1993* (Tas); *Court Proceedings Act 2004* (ACT); *Crown Proceedings Act 1993* (NT) pt 4. Section 64 of the *Judiciary Act 1903* (Cth) may play a prominent and, to date, a largely unexplored role in determining the ‘rights, privileges and immunities’ to which the Commonwealth executive itself is entitled in any particular situation: cf *Maguire v Simpson* (1977) 139 CLR 362, 402, 404; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, 474.

21 See, in addition to the cases referred to below: *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 437–9; *Re Richard Foreman & Sons Pty Ltd*; *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 531; *Barton v Commonwealth* (1974) 131 CLR 477, 498; *Davis v Commonwealth* (1988) 166 CLR 79, 93; *Re Diftort*; *Ex parte Deputy Commissioner of Taxation (NSW)* (1988) 19 FCR 347, 369; *Ruddock v Vadarlis* (2001) 110 FCR 491, 537–9.

22 *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, 464 (Gummow J) referring to *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278, 321.

23 *Dixon v London Small Arms Co Ltd* (1876) 1 App Cas 632, 651; *Sue v Hill* (1999) 199 CLR 462, 499; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 210 ALR 312, 356. See also *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813, 832, where Lord Simon referred to the terms ‘the Crown’ and ‘Her Majesty’ as ‘terms of art in constitutional law’ corresponding ‘though not exactly, with terms of political science like “the Executive”... barely known to the law’.

24 *Roberts v Ahern* (1904) 1 CLR 406, 418; *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, 393; *Commonwealth v Western Australia* (1999) 196 CLR 392, 410; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 347; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 210 ALR 312, 356.

is to be used at all, should now be equated with the executive of the relevant polity as distinct from the judicature and the legislature.<sup>25</sup>

### A Scope of the Executive

The question arises whether those rights, privileges and immunities may be exercised by and for the benefit of a statutory corporation. That question forms part of a larger issue identified by Finn J concerning 'the Constitutional status and standing in our system of government of statutory corporations that by statute are subject to prescribed (hence, presumably correspondingly limited) powers of Ministerial direction. Do they fall within the executive? Or are they the fourth arm of government?'<sup>26</sup>

It is submitted that whatever once may have been the position, statutory corporations should not now be treated as forming part of the executive. It is further submitted that this means that a statutory corporation cannot claim the benefit of the rights, privileges and immunities of 'the Crown', although it may, depending on the terms of the relevant statute, be able to claim the benefit of rights, privileges and immunities that are equivalent to those to which 'the Crown' is entitled, but which are founded on statute.

There are a number of reasons why, as a matter of principle, statutory corporations should not be treated as forming part of the executive of any polity. First, and most importantly, Chapter II of the *Constitution* defines, in the federal sphere, the components and powers of the executive arm of government. In particular, the federal executive is comprised of the Governor-General in Council, Ministers of State and Departments of State.<sup>27</sup> Moreover, it is 'for the Governor-General in Council, acting pursuant to s 64 of the *Constitution*, to establish any new departments of State of the Commonwealth'.<sup>28</sup> The creation of a statutory corporation is an act of the legislature, not of the Governor-General in Council acting under s 64 of the *Constitution*.

Second, if a statutory corporation is part of the executive, presumably the principle that a person may not contract with him- or herself would prevent the executive from entering into contractual relations with the statutory corporation. However, both principle and authority suggest that there may be a valid contract between the statutory corporation and the executive and that proceedings may be

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25 Of course, this is merely a starting presumption. Statute may require a different meaning to be given to the expression. For example, a context in which the statutory expression 'the Crown' must be equated with the Sovereign and not the Executive is provided by s 49A of the *Constitution Act 1902* (NSW), which deals with demise of the Crown. Other statutes may require different meanings.

26 *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 179 (Finn J). See also *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 262 (Gummow J).

27 A similar enumeration is contained in the various State constitutions: see eg, pt 4 of the *Constitution Act 1902* (NSW), pt 3 of the *Constitution Act 1934* (SA) and ch 3 of the *Constitution of Queensland 2001* (Qld).

28 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 469.

brought for the enforcement of such a contract.<sup>29</sup> That is, it is well recognised that a statutory corporation has a legal existence separate and distinct from the executive.

Third, the conclusion that a statutory corporation may form part of the executive is inconsistent with the historical considerations explained by Professor Finn in his book *Law and Government in Colonial Australia*.<sup>30</sup> For example, it appears that one reason behind the extensive use by colonial governments of statutory corporations and bodies to conduct what otherwise might be considered ‘governmental functions’ was a desire to remove areas of administration from direct interference by the executive and to afford third parties dealing with, or damaged by, such bodies full rights in contract and tort (including for breach of statutory duty), which at that stage would not have been available against the executive itself.<sup>31</sup>

Fourth, in establishing a statutory corporation the legislature may expressly confer upon that corporation any (statutory) rights, privileges and immunities which are considered appropriate.<sup>32</sup> Why, as a matter of policy, should the courts go beyond the terms of the statute and equate a statutory corporation with the executive for the purpose of recognising rights, privileges and immunities not expressly or impliedly provided for in the statute itself?

Fifth, the financial structure imposed by the *Constitution* itself, and the arrangements put in place by the Commonwealth concerning that structure, suggest that statutory corporations do not form part of the executive. Section 81 of the *Constitution* provides that ‘all revenues or moneys raised or received by the *Executive Government of the Commonwealth* shall form one Consolidated Revenue Fund’.<sup>33</sup> The purpose of s 81 was ‘to ensure that the revenues of the Crown, including taxes, were brought together in one Consolidated Revenue Fund under the control of Parliament’.<sup>34</sup> That control is achieved through s 83 of the *Constitution*, which prohibits the drawing of money from the Treasury of the Commonwealth except under appropriation made by law.<sup>35</sup> In 1901, Quick and Garran stated that the consolidated revenue fund prescribed by s 81 of the *Constitution* was the fund ‘into which flows every stream of the public revenue, and whence issues the supply for every public service’.<sup>36</sup> Since then, however,

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29 *Commonwealth v Silverton Ltd* (1997) 130 ACTR 1, 17. See also Nicholas Seddon, *Government Contracts* (3<sup>rd</sup> ed, 2004) 118.

30 Paul Finn, *Law and Government in Colonial Australia* (1987) 58–61 (New South Wales), 95–102 (Victoria), 128–32 (Queensland).

31 See *Sweeney v Board of Land and Works* (1878) 4 VLR 440, 447; *Victorian Woollen & Cloth Manufacturing Co v Board of Land and Works* (1881) 7 VLR 461, 468. See also *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, 470–2.

32 This issue is discussed in detail below.

33 Emphasis added.

34 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 503.

35 Other relevant provisions include the restrictions on origination and amendment of appropriation and taxation bills (ss 53–6 of the *Constitution*) and the requirement in s 82 of the *Constitution* that ‘the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth’.

36 John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 812; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 506.

the Commonwealth frequently has removed from the scope of s 81, and thereby from the direct control of Parliament,<sup>37</sup> 'public' revenues and expenses by channelling them through statutory corporations.

An example is provided by the body formerly known as the Civil Aviation Authority and now known as Airservices Australia.<sup>38</sup> The federal legislation establishing that Authority was designed to ensure that it was 'an autonomous financial entity' which held assets in its own right, was capable of borrowing money from, and owing debts to, both the Commonwealth and commercial entities, and which had its own independent sources of revenue.<sup>39</sup> The essentially financial nature of the Commonwealth's interest in the Authority is emphasised by three features of the legislative scheme. The first is that profits of the Authority, in the form of dividends, are to be paid 'to the Commonwealth, as opposed to the direct passage of all the revenues of the Authority into the Consolidated Revenue Fund'.<sup>40</sup> This avoids the need for parliamentary appropriation to cover the expenses of the Authority; instead, the Authority earns revenue, pays expenses and only then distributes profits (or part of them) to the Commonwealth in the form of dividends. Secondly, the Authority is subject to the suite of federal legislation dealing with audit requirements and administration of 'public finances'.<sup>41</sup> Thirdly, the Authority is exempt from federal, state and territory taxation.<sup>42</sup>

The result is that the legislative scheme establishing and governing the activities of the Authority serves a dual purpose: it provides for the Authority's financial independence from the Commonwealth whilst still maintaining the Commonwealth's financial interest in the Authority in the manner described above, and it provides for a degree of regulation and control over the provision of services by the Authority.

For present purposes, it is important to emphasise that the financial structure of many of the Commonwealth's statutory corporations serves to underline the point that modern statutory corporations stand outside the sphere of the executive. If they did not, that financial structure would contravene the strictures imposed by ss 81 and 83 of the *Constitution*. The point was made by Gummow J as follows:

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37 The principle of responsible government, and the position of the minister in relation to the statutory corporation, typically will ensure that at least indirect parliamentary control is maintained: cf *Egan v Willis* (1998) 195 CLR 424.

38 See *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133.

39 Formerly pt VI of the *Civil Aviation Act 1988* (Cth), now the *Air Services Act 1995* (Cth). See particularly the discussion by Gummow J in *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 267–9.

40 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 268. See pt 5 div 1 of the *Air Services Act 1995* (Cth).

41 *Auditor-General Act 1997* (Cth); *Financial Management and Accountability Act 1997* (Cth); *Commonwealth Authorities and Companies Act 1997* (Cth).

42 *Air Services Act 1995* (Cth) s 52.



The Authority is not financed, except in limited circumstances, by appropriations under s 83 of the *Constitution*, nor do the revenues or moneys raised or received by the Authority form part of the Consolidated Revenue Fund. The Authority stands apart from the financial structure imposed by the *Constitution* on the Executive Government of the Commonwealth. The Authority is a hybrid entity. It owes its life to statute and does not form part of the Executive Government of the Commonwealth. It derives its funding principally from sources other than appropriations by law from the Consolidated Revenue Fund, in particular, charges fixed by determination under s 66 of the Act.<sup>43</sup>

At first glance, the doctrine of separation of powers<sup>44</sup> may be thought to underpin any analysis regarding whether or not a statutory corporation may form part of the executive. For example, it may be argued that the vesting in a statutory corporation of the duty to administer legislation<sup>45</sup> or the power to make regulations requires the conclusion that the statutory corporation form part of the executive lest the principle of separation of powers be breached. However, it is well established that the legislature may ‘as part of its legislation, endow a subordinate body, not necessarily the Executive Government, with power to make regulations for the carrying out of the scheme described in the statute’.<sup>46</sup> This is because the power thereby conferred is a component of legislative power, not executive power.<sup>47</sup>

Alternatively, it may be thought that as a statutory corporation must, by definition, exercise statutory powers it cannot form part of the executive which, so the argument would go, must exercise executive power. However, in Australia there has never been any objection to the executive exercising powers, functions or duties conferred upon it by statute.<sup>48</sup> It follows that the doctrine of separation of powers does not have any material impact on the question whether a statutory corporation should be treated as forming part of the executive. Whichever conclusion is reached, the doctrine will not be infringed.

## B Historical Treatment

It is axiomatic that the rights, privileges and immunities of ‘the Crown’ inhere in, and are for the benefit of, ‘the Crown’ and not for the benefit of private persons or subjects of the Crown. It follows that there are two logical ways of

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43 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 261.

44 For an explanation of the doctrine of separation of powers, see eg, *Victorian Stevedoring and General Contracting Co Pty Ltd v Meakes and Dignan* (1931) 46 CLR 73 96–8 (Dixon J); *R v Kirby*; *Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

45 The fact that a statutory body was entrusted with a function of this kind has in the past been treated as a strong indication that the body is relevantly ‘the Crown’: *Repatriation Commission v Kirkland* (1923) 32 CLR 1, 8, discussed below.

46 *Victorian Stevedoring and General Contracting Co Pty Ltd v Meakes and Dignan* (1931) 46 CLR 73, 118–9 (Evatt J).

47 ‘The true nature and quality of the legislative power of the Commonwealth Parliament involves, as part of its content, power to confer law-making powers upon authorities other than Parliament itself.’: *Victorian Stevedoring and General Contracting Co Pty Ltd v Meakes and Dignan* (1931) 46 CLR 73, 119 (Evatt J).

48 See *Victorian Stevedoring and General Contracting Co Pty Ltd v Meakes and Dignan* (1931) 46 CLR 73, which held that the doctrine of separation of powers did not stand in the way of the executive exercising legislative power.

concluding that the 'rights, privileges or immunities of the Crown' are engaged in a particular case. The first is to conclude that the relevant body itself is, or is to be equated with, 'the Crown'. The second is to conclude that, notwithstanding a negative answer to the first question, the rights or interest of 'the Crown' nevertheless are affected in some relevant way.<sup>49</sup> This second approach is what is sometimes known as 'derivative immunity'.

Historically, the first approach was often adopted to conclude that particular statutory corporations were or were not relevantly 'the Crown' or were or were not entitled to the 'rights, privileges or immunities of the Crown'. Thus, for example, in *Repatriation Commission v Kirkland*,<sup>50</sup> the Repatriation Commission was held to be entitled to the Crown's immunity from distraint. Much later, a majority of the High Court appeared to consider that the Defence Housing Authority, a federal statutory corporation, was entitled to the immunities of 'the Crown' under the *Cigamic* doctrine, although in the event it was held that the state legislation did not conflict with that immunity.<sup>51</sup>

The conclusions that the expression 'the Crown' should be used, if at all, to identify the executive and that a statutory corporation does not form part of the executive suggest that the approach of the courts in this respect is incorrect as a matter of principle. The point was made by Kitto J in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*<sup>52</sup> ('*Wynard Investments*'), who said that:

[w]here the immunity is claimed by a subject of the Crown, whether an individual or a corporation, the question to be decided, whatever may be the language in which for convenience it may be expressed, cannot really be whether the subject is within a class of departments, organizations and persons generically (and loosely) described as the Crown.

Nevertheless, as indicated, it is clear that the courts frequently have accepted that a statutory corporation is relevantly 'the Crown' or is entitled to the 'rights, privileges or immunities of the Crown'. To explain the reasoning that underlies this approach, it is necessary to examine the position prior to the federation of the Australian colonies. As Professor Finn has demonstrated,<sup>53</sup> a prominent feature of colonial government was the extensive use of statutory boards and statutory corporations to carry out 'what otherwise might simply have been considered as governmental functions'.<sup>54</sup> It was not uncommon for legislation establishing a statutory board to constitute it as a body corporate and to expressly deem it to be a 'Public Department' subject to the control of the executive.<sup>55</sup> The attribution of 'Crown status' to such bodies was understandable. However, it would be wrong

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49 See *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 210 ALR 312, 357–8.

50 (1923) 32 CLR 1.

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

52 (1955) 93 CLR 376, 393.

53 Paul Finn, *Law and Government in Colonial Australia* (1987) particularly at 58–61.

54 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 470.

55 Examples of such legislation are provided in Paul Finn, *Law and Government in Colonial Australia* (1987) 47, 50, 63, 129.

to conclude that only those bodies deemed to be public departments were accorded 'Crown status'.

Two competing principles appear to have played a significant role in shaping the court's approach to the status of statutory bodies as 'the Crown'. On the one hand, was the idea that the mere fact that 'the Crown' had chosen to utilise a body corporate to perform its governmental functions should not as a policy matter subject the body performing those functions to liabilities or obligations to which 'the Crown' itself would not be subject.<sup>56</sup>

On the other hand, it was thought desirable that statutory corporations placed in the commercial or industrial arena ought to compete with private persons upon an equal footing. This led to a 'strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless Parliament has by express provision given it the character of a servant of the Crown'.<sup>57</sup> In *Townsville Hospitals Board v Townsville City Council*,<sup>58</sup> Gibbs CJ (with whom the rest of the Court agreed) emphasised that 'no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them'.<sup>59</sup>

The same tension may be discerned in the application to Australian conditions of the 'rule' that legislation does not 'bind the Crown' other than by express words or necessary implication. The extensive use of statutory corporations to perform 'government functions' led to acceptance of the proposition that a particular statutory corporation might be entitled to the benefit of that rule on the basis that it was sufficiently closely identified with 'the Crown'. However, it also led to a reduction in the strength of the principle from a 'rule' to a mere presumption which is displaced if an examination of the statute discloses, upon application of ordinary principles of statutory construction, a different intention.<sup>60</sup> Thus, the position in Australia now is that if an intention to 'bind the Crown' appears 'from the provisions of a statute when so construed, it must necessarily prevail over any judge made rule of statutory construction including the rule relating to statutes binding the Crown'.<sup>61</sup>

In determining whether a statutory corporation was entitled to any right, privilege or immunity of 'the Crown', it appears that the courts had regard primarily to the relationship between the statutory corporation and the executive and to the nature of the functions entrusted to the corporation.<sup>62</sup>

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56 *Repatriation Commission v Kirkland* (1923) 32 CLR 1, 8, discussed below.

57 *Launceston Corporation v Hydroelectric Commission* (1959) 100 CLR 654, 662.

58 (1982) 149 CLR 282.

59 *Ibid* 291.

60 *Bropho v Western Australia* (1990) 171 CLR 1, 21–2.

61 *Ibid* 22.

62 See, eg, *Rural Bank v Hayes* (1951) 84 CLR 140, 146. See also the general discussion in Nicholas Seddon, *Government Contracts* (3<sup>rd</sup> ed, 2004), 132–6.

In considering the nature of the corporation's functions, a distinction was drawn between governmental and non-governmental,<sup>63</sup> or public and non-public, functions. The importance of that distinction diminished over time, no doubt due to the fact that a 'governmental function' was simply any function carried on by, or on behalf of, the government, a point made by Latham CJ in *South Australia v Commonwealth*.<sup>64</sup> Nevertheless, the nature of the functions performed by a statutory corporation was often a significant pointer to the status of the corporation. Thus, the entrustment to a statutory corporation of the administration of an Act, ordinarily a function peculiar to the executive, suggested that the corporation was entitled to the 'rights, privileges and immunities of the Crown'. For example, the High Court considered that the Repatriation Commission was 'in the strictest sense a department of Government, or at all events so practically identified with it as to be indistinguishable' on the basis that it was 'a statutory corporation charged with the administration of an Act'.<sup>65</sup> According to the High Court, this meant that the Commission was entitled, 'in respect of the property vested in it pursuant to the Act, to the same privileges and immunities as the Crown itself would have had if the property had been vested in it'.<sup>66</sup>

In considering the sufficiency of the relationship between the corporation and the executive, control was perhaps the most significant element of that relationship. The reason for this was drawn out by Higgins J in the following passage from *Repatriation Commission v Kirkland*:

The Commission is a corporation, and is charged with the general administration of the Act; but the administration is *subject to the control of the Minister*. The Minister is a member of the Executive Council which advises the Governor-General in the Government of the Commonwealth, in exercising the executive power of the Commonwealth ... The Minister is one of the advisers of the Governor-General; the Commission is under the control of, is subordinate to, the Minister ... The links of the chain, therefore, seem to be complete; the Commission is an agent or instrument of the executive power in administering the Act; and whatever hinders the Commission in the exercise of its legitimate functions hinders the Crown.<sup>67</sup>

Subsequently, in *Grain Elevators Board (Vic) v Dunmunkle Corporation*<sup>68</sup> ('*Dunmunkle*') Latham CJ drew a distinction between statutory corporations that 'are subject to direct ministerial control so that they act under the direction of a Minister' and those that are 'independent of the Government with discretionary powers of [their] own, so that [they] are not ... mere agent[s] of the

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63 For example, in *Grain Elevators Board v Dunmunkle Corporation* (1946) 73 CLR 70, 75, Latham CJ referred to cases 'in which it has been held that some functions are inalienable functions of government so that any body which discharges them is necessarily entitled to the privileges and immunities of the Crown.'

64 (1942) 65 CLR 373, 423. See also *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282, 288-9.

65 *Repatriation Commission v Kirkland* (1923) 32 CLR 1, 8.

66 *Ibid* 8.

67 *Ibid* 13.

68 (1946) 73 CLR 70.

Government'.<sup>69</sup> In the former case, but not the latter, the Corporation 'act[s] on behalf of the Crown and any provision, whether express or implied, for Crown exemption is applicable to them.'<sup>70</sup>

The absence of ministerial control over the performance by the Grain Elevators Board of its statutory functions led a majority of the Court to conclude that the Board's land did not fall within the statutory exemption to the imposition of rates in favour of 'land the property of His Majesty'.<sup>71</sup> This was so notwithstanding that 'the members of the Board were appointed by the Government in Council [and] many of its powers and functions were subject to the approval of the responsible Minister'.<sup>72</sup>

Similar reasoning was employed to reach the conclusion that the Forestry Commission<sup>73</sup> was not 'the Crown' on the basis that, except in limited circumstances, the Commissioner was 'entitled to act at his own discretion within the limits imposed by the Act'. Again, in *Townsville Hospitals Board v Townsville City Council*,<sup>74</sup> Gibbs CJ held that the Townsville Hospitals Board was 'bound' by a particular by-law because it did not 'in all respects act merely at the behest of the Crown'.

It follows that the subjection of the statutory corporation to the direct control of the Minister in respect of its activities was a powerful, and often decisive, factor towards concluding that the corporation was relevantly 'the Crown' or was entitled to rights, privileges or immunities of 'the Crown'. In the absence of direct control by the Minister, other factors tending to suggest practical control might be sufficient. The most obvious example is a power to appoint directors to the board of the statutory corporation. However, the authorities suggest that the power to appoint directors, at least where those directors are removable only upon the expiry of a fixed term or for misbehaviour, was not sufficient control and that in order to identify the corporation with 'the Crown' additional control was required.<sup>75</sup> As Gibbs CJ pointed out with respect to the Townsville Hospitals Board, '[m]ost of the members of the Board are appointed by the Governor in Council (s 13(3)), but that does not mean that they are subject to the direction or control of the Governor in Council except in so far as *The Hospitals Act* provides'.<sup>76</sup> Such additional control might, for example, take the form of a

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69 Ibid 76.

70 (1946) 73 CLR 70, 76, citing *Fox v Government of Newfoundland* [1898] AC 667; *Repatriation Commission v Kirkland* (1923) 32 CLR 1 and *Re Forestry Commission; Ex parte Graham* (1945) 45 SR (NSW) 379. See also *Skinner v Commissioner for Railways* 1937) 37 SR (NSW) 261, 269–70.

71 (1946) 73 CLR 70, 79, 82, 86, 90.

72 Ibid 82.

73 *Re Forestry Commission; Ex parte Graham* (1945) 45 SR (NSW) 379, 382.

74 (1982) 149 CLR 282, 289.

75 See, eg, *Re Forestry Commission; Ex parte Graham* (1945) 45 SR (NSW) 379, 382; *Re Australasian Performing Right Association Ltd* (1982) 65 FLR 437, 443; *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330, 341 (Stephen J), 366 (Aickin J).

76 *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282, 289.

provision that the directors hold office at the pleasure of the Minister as opposed to holding office for a fixed term.<sup>77</sup>

### C Statutory Rights, Privileges and Immunities

To the extent that cases such as those discussed above suggest that statutory corporations are capable of forming part of 'the Crown' or the executive, it is submitted that they should no longer be treated as correctly stating the applicable principles. It is, of course, the case that a statutory corporation may have conferred on it, by its constituting statute, rights, privileges and immunities which mirror all or some of those rights, privileges and immunities that inhere in 'the Crown' or executive. But such rights, privileges and immunities have their source in statute rather than in the prerogative or executive power. Thus, the statutory corporation would enjoy those rights, privileges and immunities by force of statute and not by reason of its forming part of 'the Crown' or its being controlled by 'the Crown'. This was explained by Gummow J in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*<sup>78</sup> ('*Residential Tenancies*'). His Honour said that statutory corporations:

may bear statutory obligations akin to those of the Executive Government with respect to such matters as financial accountability to and dependence upon the legislature ... However [this] does not mean that the Parliament in creating such a body necessarily imparted to it the preferences, immunities and exceptions ... which are enjoyed by the Executive Government and denied to citizens and corporations and their dealings inter se.<sup>79</sup>

Further, as Dixon J noted in the *Bank Nationalisation Case*, the question whether a statutory body is intended to enjoy the rights, privileges or immunities of 'the Crown' depends 'in the end upon the intention ascribed to the legislature establishing the corporate agency'.<sup>80</sup> Thus, statute may expressly provide that a statutory corporation 'enjoys the status, immunities and privileges of the Crown', as in *Bropho v Western Australia*,<sup>81</sup> or may confer upon the corporation particular privileges or immunities.<sup>82</sup> Alternatively, the intention to be derived or implied from the statutory scheme as a whole may be to place a statutory corporation on the same footing as 'the Crown', or to so closely identify the corporation with 'the Crown' as to be practically indistinguishable from it.<sup>83</sup> In either case, the statutory corporation does not form part of 'the Crown' or, more accurately the executive, but may enjoy statutory rights, privileges and

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77 See, eg, *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330, 367, where Aickin J explained why the court held that the Superannuation Board was 'the Crown' in *Goodfellow v FCT* (1977) 13 ALR 203.

78 (1997) 190 CLR 410.

79 *Ibid* 471–2.

80 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 359. See also *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330, 349 (Stephen J).

81 (1990) 171 CLR 1, 11.

82 See, eg, *Air Services Act 1995* (Cth) ss 17, 52, which confer upon Airservices Australia immunity from state and territory 'land use' laws and from federal, state and territory taxation respectively.

83 *Repatriation Commission v Kirkland* (1923) 32 CLR 1.

immunities equivalent to those enjoyed by the executive. Whether it does so is a question of statutory construction and often will involve consideration of the interaction between the statute constituting the corporation and the legislative scheme containing the express or implied exemption of which the corporation seeks to avail itself.

An interesting example of legislation conferring a particular immunity on a statutory body is s 26 of the *Superannuation Act* 1990 (Cth) and s 42(5A) of the *Superannuation Act* 1976 (Cth). In broad terms, those statutes established the Public Sector Superannuation Board and the Commonwealth Superannuation Scheme Board respectively to manage and administer complying superannuation funds established for the benefit of Commonwealth employees. The sections identified above provide that the relevant Board and superannuation fund are not 'subject to ... taxation under a law of a State or Territory to which the Commonwealth is not subject'. The intention clearly is to place the Boards in the same position as the Commonwealth with respect to liability to state and territory taxation.<sup>84</sup> It should be noted that the legislation refers to 'the Commonwealth' rather than 'the Crown in right of the Commonwealth'. No doubt such commendable precision was motivated by a desire to ensure that the legislation replicated for the benefit of the Boards the effect of the constitutional protections conferred upon 'the Commonwealth'.

#### D Statutory Exemptions or Concessions

A related issue arises where the statute itself provides for a concession or exemption in favour of 'the Crown'. Common examples include an express statement that the Act does or does not 'bind the Crown' and an exemption from the imposition of rates in respect of 'land owned by the Crown'.<sup>85</sup> Does the statutory expression 'the Crown' refer only to the executive or does it include certain statutory bodies which, whilst not forming part of the executive, are placed by their constituting statutes in relevantly the same position as the executive? Here, the question is one of statutory construction. The range of considerations which will be relevant to that issue may be different from or wider than those factors, discussed above, which were historically relevant to the

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84 This intention may be discerned from the amendments to the 1976 Act following the decision in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330. It should be noted that the precise operation of those sections is somewhat unclear. The sections do not purport to exempt the Boards from taxation to which the Commonwealth is not subject. Rather, the focus is on the application of the relevant law. If the Commonwealth is not subject to the State or Territory law, the Boards are exempt from taxation under that law. The question of whether the Commonwealth is subject to a law, such as state stamp duty legislation, is very different from the question of whether, in any given situation, the Commonwealth is liable for a tax imposed under that law. The former question involves resolution of an issue of statutory construction (ie, does the law purport to 'bind' the Commonwealth?) and an issue of constitutional power (ie does the State have the 'power' to 'bind' the Commonwealth?): *Commonwealth v Bogle* (1953) 89 CLR 229, 259 (Fullagar J). In contrast, the latter question raises the potential application of various express and implied constitutional protections, such as ss 114 and s 52(i) of the *Constitution*, the *Cigamic* doctrine and the 'reverse' *Melbourne Corporation* doctrine.

85 *Rural Bank of New South Wales v Bland Shire Council* (1947) 74 CLR 408.

determination whether a body was entitled to the 'rights, privileges and immunities of the Crown'. In particular, the purpose of the legislation that uses the expression 'the Crown' and the statutory context in which that expression appears often may prove decisive. A few obvious examples may be provided by way of illustration. If legislation imposes obligations upon a named statutory corporation but is expressed not to 'bind the Crown', the statutory corporation will not be permitted to avoid those obligations on the basis that it is 'the Crown' for the purposes of that statute. So too, a statutory corporation would be unlikely to be exempt on the basis that the statute does not 'bind the Crown' from the application of a particular statutory scheme the primary purpose of which is to place statutory authorities on the same footing as private persons.

It should be emphasised that the conclusion that a statutory corporation is 'the Crown' for the purposes of a particular Act does not suggest that the corporation forms part of the executive or is generally entitled to the 'rights, privileges and immunities of the Crown'. Thus, in *Rural Bank of New South Wales v Bland Shire Council*,<sup>86</sup> Rich and Williams JJ observed that the Rural Bank

is included in the definition of 'Crown' where the Crown is expressly mentioned in the Act. But it is not a branch of any department of State, and does not perform its functions, powers and duties as part of the Executive government of New South Wales. It is a body corporate which derives its powers from [particular legislation].<sup>87</sup>

This is consistent with the treatment of the issue by Dixon J in *Dunmunkle*<sup>88</sup> and by Kitto J in *Wynyard Investments*.<sup>89</sup> In the first case, Dixon J was concerned with an express exemption from rates in respect of 'land the property of His Majesty'. His Honour rejected the idea that the question of whether land owned by the Grain Elevators Board fell within the exemption was to be determined by asking whether the Board was entitled to the Crown's privileges and immunities such that land vested in the Board 'would enjoy the exemption conferred upon land the property of His Majesty'.<sup>90</sup> Justice Dixon considered that the Board was an independent corporation, established by statute and distinct from the Crown.<sup>91</sup> His Honour held that the subjection of the Board to ministerial control and the close relationship between the Board and the executive were

insufficient to overcome the plain intention of the legislation that ... the Grain Elevators Board should be an independent corporation owning its own property legally and beneficially and acquiring its own rights and incurring its own obligations.<sup>92</sup>

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86 (1947) 74 CLR 408.

87 Ibid 417.

88 (1946) 73 CLR 70.

89 (1955) 93 CLR 376.

90 (1946) 73 CLR 70, 84.

91 Cf *ibid* 85, where his Honour suggests that it 'is probably correct to say ... that it falls within the Department of the Minister of Agriculture of the State of Victoria'.

92 *Ibid* 84.



The conclusion that a statutory corporation is not ‘the Crown’ does not, however, fully dispose of the possibility that the application of the legislation to the statutory corporation may enliven some immunity or privilege of ‘the Crown’ itself. An example, discussed by Dixon J, is where land is held by a statutory corporation on trust for the Crown. Such land may be ‘land the property of His Majesty’ for the purposes of a rating exemption, despite the fact that legal title is vested in a body that is not ‘the Crown’. Here, the central task is to identify the rights or interest of ‘the Crown’ that would be affected by application of the legislative scheme to the statutory corporation. The point was emphasised by Kitto J in *Wynyard Investments*.<sup>93</sup> His Honour explained that the statute governing the statutory corporation is examined ‘not to ascertain whether there is in some vague sense an approximation of the corporation to a government department’ but rather

to ascertain whether the Crown has such an interest in that which would be interfered with if the provision in question were held to bind the corporation that the interference would be, for a legal reason, an interference with some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown.<sup>94</sup>

This is the concept of ‘derivative immunity’ referred to earlier. Following the decision of the High Court in *NT Power Generation Pty Ltd v Power and Water Authority*,<sup>95</sup> the concept must be understood as being confined to a direct adverse affectation or ‘divesting’ of ‘proprietary, contractual [or] other legal rights’, including prerogative rights, of ‘the Crown’.<sup>96</sup> Mere economic affectation, if not the consequence of a breach of the legal rights of ‘the Crown’, is not sufficient to attract the immunity. Thus, for example, the immunity may be attracted where statute prevents one party to a contract from fulfilling its obligations if the other party is ‘the Crown’, but is unlikely to be attracted if neither party is ‘the Crown’.<sup>97</sup>

In light of the foregoing, it is submitted that the issue whether legislation applies to a statutory corporation, or whether a statutory exemption or concession is available in favour of a statutory corporation, should not be approached by asking whether there is in some vague sense an approximation of the corporation to ‘the Crown’ for the purpose of attracting the ‘rights, privileges and immunities of the Crown’. Rather, it is suggested that three questions should be asked.

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93 (1955) 93 CLR 376.

94 *Ibid* 396.

95 (2004) 210 CLR 312.

96 *Ibid* 358 (McHugh ACJ, Gummow, Callinan and Heydon JJ). In that case, the issue of derivative immunity arose in the context of a body which was not a statutory corporation but rather a wholly owned subsidiary, incorporated under the general law, of a statutory corporation. However, once it is accepted that a statutory corporation is not ‘the Crown’, it must follow that the same principles with respect to derivative immunity apply. This should not be taken to derogate from the point made above that the legislation establishing the statutory corporation may expressly or impliedly confer statutory rights, privileges and immunities on the corporation which render it unnecessary to consider issues of derivative immunity.

97 *Ibid* 359–63.

The first is whether, on its proper construction, the legislation applies to, or the exemption is available in favour of, the corporation.<sup>98</sup> The second question is whether there are any express or implied statutory rights, privileges or immunities upon which the corporation may rely. Often this question will involve resolving a conflict between, on the one hand, the legislation which purports to 'bind' the corporation or to deny availability of an exemption or concession and, on the other hand, the legislation conferring the statutory right, privilege or immunity upon which the corporation relies.<sup>99</sup> It is important to emphasise that the first two questions do not involve any question of 'Crown immunity' or of the 'rights, privileges and immunities of the Crown'; rather they turn on the construction of, and resolution of, any conflict between the relevant legislation. The third question, which arises only if the first two are answered unfavourably to the statutory corporation, is whether application of the legislation to the corporation would otherwise adversely affect, 'for a legal reason ... some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown'<sup>100</sup> in the sense in which that expression was explained in *NT Power Generation Pty Ltd v Power and Water Authority*.<sup>101</sup>

### E The Residential Tenancies Decision

As the preceding discussion indicates, the case law on the entitlement of statutory corporations to 'Crown status' is confused. That confusion was manifested in the judgment of Dawson, Toohey and Gaudron JJ, with whom Brennan CJ agreed on this point, in *Residential Tenancies*.<sup>102</sup>

The issue in that case was whether the Residential Tenancies Tribunal had power to make an order authorising the landlord to enter premises leased to the Defence Housing Authority, a Commonwealth statutory corporation, and an order requiring a copy of a key to those premises to be given to the landlord.<sup>103</sup> One of the arguments raised by the Defence Housing Authority was that it was entitled to the rights, privileges and immunities of the 'Crown in right of the Commonwealth' and was therefore not subject to the operation of the State Residential Tenancies legislation by reason of the immunity of the Commonwealth executive embodied in the *Cigamatic* doctrine.<sup>104</sup> The joint judgment held that the Defence Housing Authority was entitled to the benefit of that immunity but that properly understood, the immunity prevented State

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98 The judgment of six members of the High Court in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, particularly at 347–9, supports, and provides an example of, this approach.

99 Typically, this will be the legislation establishing and governing the statutory corporation. Further, the conflict may be between legislation of the same polity or between legislation of different polities.

100 *Wynyard Investments* (1955) 93 CLR 376, 396.

101 (2004) 210 CLR 312. A conclusion that there is such an adverse affectation may give rise to a conflict between the executive power of the polity whose rights are affected and the legislative power of the polity responsible for the particular legislative scheme purporting to affect those rights.

102 (1997) 190 CLR 410.

103 *Residential Tenancies Act 1987* (NSW) ss 24(4), 29(5)(c).

104 *Cigamatic* (1962) 108 CLR 372. That case established that the priority of the Commonwealth executive over unsecured creditors upon insolvency or bankruptcy of a debtor could not be removed by State legislation.

legislation from affecting ‘the capacities of the Crown ... by which we mean its rights, powers, privileged and immunities’ and not ‘the exercise of those capacities’.<sup>105</sup> As their Honours considered that the State Residential Tenancies legislation purported to affect only the exercise of the ‘capacities of the Crown’, the immunity was held not to apply. It is apparent that the joint judgment considered the Defence Housing Authority to be entitled to at least some of the rights, privileges and immunities which this article suggests inhere solely in and for the benefit of, the executive.

Justices McHugh and Gummow, in separate judgments, forcefully and, it is respectfully submitted, correctly criticised the reasoning of the majority. Their Honours emphasised the distinction between, on the one hand, those rights, privileges and immunities which historically formed part of the royal prerogative and which are now incidents of executive power and, on the other hand, those rights, privileges and immunities which are created by statute. The distinction is of particular importance when dealing with the application of legislation of one polity to another polity or to a creature of another polity. Thus, as Gummow J pointed out, the federal judicature is protected from State interference by the paramount and exhaustive nature of Chapter III itself and the activities of the legislature are protected from State interference by the mechanism provided for in s 109 of the *Constitution*. In the context of that scheme, the ‘*Cigamic* doctrine protects the executive Government and, in particular, directs attention to the content of the executive power of the Commonwealth’.<sup>106</sup> Both McHugh J and Gummow J held that the Defence Housing Authority was not part of the Commonwealth executive and therefore was not entitled to the benefit of the immunity embodied by the *Cigamic* doctrine. As Gummow J explained:

In constituting the authority and vesting it with its own legal personality, the legislature was not adding to the executive arm of the Commonwealth. It is for the Governor-General in Council acting pursuant to s 64 of the *Constitution*, to establish any new departments of state of the Commonwealth.

... The Authority is the immediate product of federal legislation. The rights and liabilities created by the Authority in respect of third parties such as [the landlord] are the immediate product of the exercise of the statutory functions of the Authority.<sup>107</sup>

The point that Gummow J and McHugh J are making is that which I have made above, namely that where the body in question is a creature of statute, the rights, privileges and immunities to which that body is entitled should depend upon the provisions of the relevant legislation and not upon any extension to that body of the rights, privileges or immunities enjoyed by the executive.<sup>108</sup>

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105 (1997) 190 CLR 410, 438.

106 *Ibid* 463.

107 *Ibid* 463.

108 In the *Residential Tenancies* case, the federal legislation establishing the Defence Housing Authority expressly exempted that body from certain state taxation but was silent on the application of the ‘general law’, including the New South Wales Residential Tenancies legislation: *Defence Housing Authority Act 1987* (Cth) s 63(1); see also (1997) 190 CLR 410, 432.

Subsequent decisions of the High Court show a trend away from the analysis of the joint judgment and towards the reasoning in the dissenting judgments of McHugh J and Gummow J. For example, in *The Commonwealth v Western Australia*,<sup>109</sup> McHugh J expressly reserved the question of the correctness of the views expressed by the joint judgment in the *Residential Tenancies* case. Again, in *Austral Pacific Group Ltd (in liq) v Airservices Australia*<sup>110</sup> ('*Airservices Australia*') in language similar to that employed by Gummow J in the *Residential Tenancies* case, Gleeson CJ, Gummow and Hayne JJ said that Airservices Australia

is a body which, while it is charged with the performance of what may be classed as governmental functions, is not part of the Executive Government of the Commonwealth. Airservices is sued by Austral Pacific as the Commonwealth within the meaning of s 75(iii) of the *Constitution* but it does not necessarily follow that Airservices attracts the preferences, immunities and exceptions enjoyed by the Executive Government in respect of state laws and identified with the *Cigamic* doctrine.<sup>111</sup>

### III REPRESENTING THE CROWN

Statute may define the expression 'the Crown' in a manner which extends beyond the executive Government of a polity and thereby rebuts the starting presumption discussed above. A common example is legislation which defines 'the Crown' to include a 'statutory corporation representing the Crown'.<sup>112</sup>

In order to understand what is meant by the expression 'representing the Crown', it is useful to briefly summarise the legislative history of that expression and then to discuss the meaning which the courts have attributed to the expression in particular legislative contexts.

#### A Legislative History

In New South Wales, it appears that the expression 'representing the Crown' first arose in s 4 of the *Local Government Act 1919* (NSW).<sup>113</sup> That section defined 'Crown' to include 'any statutory body representing the Crown'. The latter expression was defined to include certain named authorities and 'any public body proclaimed under this Act as a statutory body representing the Crown'.

109 (1999) 196 CLR 392, 421.

110 (2000) 203 CLR 136.

111 (2000) 203 CLR 136, 143. See also *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 73–4 and *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 80 (Gummow J).

112 See, eg, *Crown Proceedings Act 1988* (NSW) s 3; *Duties Act 1997* (NSW) ss 163ZU(2)(a)(ix), 259(1)(a), 308(6); *Pipelines Act 1967* (NSW) ss 3, 4; *Local Government Act 1993* (NSW), Dictionary; *Building and Construction Industry Long Service Payments Act 1996* (NSW) s 38(1); *Dividing Fences Act 1991* (NSW) s 25(3); *Land Tax Management Act 1956* (NSW) s 3.

113 *Wynyard Investments* (1955) 93 CLR 376, 386 (Williams, Webb and Taylor JJ). Cf *Railways Act 1914* (Qld) s 8(1), considered in *Bradken Consolidated Ltd v Broken Hill Proprietary Company Ltd* (1979) 145 CLR 107.

Land owned by the ‘Crown’, as defined, generally fell within the definition of rateable land under the *Local Government Act 1919* (NSW) as originally enacted.<sup>114</sup> In 1931, the *Rating (Exemption) Act 1931* (NSW) amended a number of statutes to provide for exemptions from the imposition of rates in favour of the ‘Crown’. The *Local Government Act* was amended so that land (i) owned by the ‘Crown’ and leased to any person for private purposes; and (ii) occupied and used by the Crown in connection with particular industrial undertakings, was carved out of the definition of rateable land.<sup>115</sup> The *Rating (Exemption) Act* also amended the *Sydney Corporation Act 1902* (NSW),<sup>116</sup> the *Metropolitan Water, Sewerage, and Drainage Act 1924* (NSW) and the *Hunter District Water and Sewerage Act 1892* (NSW). In respect of each statute, the *Rating (Exemption) Act* did the following:

- (1) defined ‘Crown’ to include a ‘statutory body representing the Crown’;<sup>117</sup>
- (2) defined ‘statutory body representing the Crown’ to mean ‘any body defined by or proclaimed under the Local Government Act 1919, as amended by subsequent Acts, as a statutory body representing the Crown’;<sup>118</sup> and
- (3) provided that, subject to limited exceptions, no land or building owned by the Crown ‘shall be liable to be assessed or rated in respect of any rates under’ the relevant Act.<sup>119</sup>

Subsequently, in 1932, the *Transport (Division of Functions) Act 1932* (NSW) divided the Ministry of Transport into ‘departments’, the Department of Railways, the Department of Road Transport and Tramways and the Department of Main Roads, each of which was to be administered by the relevant Commissioner.<sup>120</sup> Each Commissioner was constituted as a body corporate and it was stated that ‘for the purposes of any Act’ each Commissioner ‘shall be deemed a statutory body representing the Crown’.<sup>121</sup>

The issue arises as to the effect of deeming each Commissioner to be a ‘statutory body representing the Crown’. Was it intended to bring each Commissioner within the scope of ‘the Crown’ where that phrase was expressly defined in other legislation to include a ‘statutory body representing the Crown’, or was it intended to operate more broadly to confer on the Commissioners all the ‘rights, privileges and immunities of the Crown’, including the benefit of the presumption that legislation does not ‘bind’ the Crown.

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114 See s 132. Land vested in the Crown that was used for certain public purposes was not rateable.

115 Again, there was an express provision that such land, if vested in the Railway Commissioners or the Sydney Harbour Trust Commissioners, ‘shall be rateable’: s 4(2A).

116 *The Sydney Corporation Act 1932* (NSW), which repealed the 1902 Act, re-enacted materially the same provisions.

117 *Rating (Exemption) Act 1931* (NSW) ss 5(1)(a)(i), 6(a)(i), 7(1)(a)(i).

118 *Rating (Exemption) Act 1931* (NSW) ss 5(1)(a)(iii), 6(a)(vi), 7(1)(a)(v).

119 *Rating (Exemption) Act 1931* (NSW) ss 5(1)(b), 6(b)(i), 7(1)(b).

120 *Transport (Division of Functions) Act 1932* (NSW) s 3.

121 *Transport (Division of Functions) Act 1932* (NSW) ss 4, 5, 6.

The case law is not clear on this issue. The first decision to consider the meaning and effect of the deeming provision was *Skinner v Commissioner for Railways*<sup>122</sup> ('*Skinner*') The question in that case was whether the Commissioner for Railways, which was deemed to be a 'statutory corporation representing the Crown', was entitled to the traditional immunity of 'the Crown' from orders for discovery, in circumstances where the immunity of 'the Crown' itself had been legislatively removed by the *Common Law Procedure Act 1970* (NSW). It is not surprising, given that the Commissioner for Railways was relying on an argument designed to place it in the same position as 'the Crown', that the claim for immunity was rejected. Sir Frederick Jordan, who delivered the judgment of the Full Court of the Supreme Court of New South Wales, explained the effect of the deeming provision as follows:

Whatever might be the position of the Commissioner for Railways apart from this special provision [of the *Transport (Division of Functions) Act*], it is at least clear that he must now in New South Wales *for the purposes of any Act be deemed a statutory body representing the Crown, and entitled to all such immunities as flow from that status*.<sup>123</sup>

No one would disagree with the first part of the emphasised passage. However, it is by no means clear what immunities are to flow from the status of a statutory body as one 'representing the Crown'. In particular, it should not be assumed that the immunities of 'the Crown' flow from that status.

The next case to consider the issue was *Bland Shire Council v Rural Bank of New South Wales*<sup>124</sup> That decision concerned the question whether land owned by the Rural Bank was land owned by the 'Crown' so as to be exempt from the rating of provisions of the *Local Government Act 1919* (NSW) in the manner described above. The Council admitted that the Rural Bank was a 'statutory body representing the Crown'.<sup>125</sup> The basis of that admission appears to have been a proclamation in the New South Wales Government Gazette on 14 May 1920 by which the Government Savings Bank of New South Wales (later renamed the Rural Bank of New South Wales) was proclaimed to be a statutory body representing the Crown.<sup>126</sup>

Sir Frederick Jordan, again delivering the judgment of the Court, said:

The Rural Bank, though it is admitted to be a statutory body representing the Crown, is not the Crown in a sense that would entitle it to the benefit of any privilege which the Crown may have of not being bound by all or some of the provisions of the Act ... By the definition [in] s.4 it is provided that the word 'Crown' where it appears in the Act, includes any statutory body representing the Crown; but it is nowhere stated that a statutory body representing the Crown shall be deemed to be the Crown.<sup>127</sup>

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122 (1937) 37 SR (NSW) 261.

123 *Ibid* 272 (emphasis added).

124 (1946) 47 SR (NSW) 245; affirmed by the High Court on different grounds: (1947) 74 CLR 408.

125 (1946) 47 SR (NSW) 245, 248; (1947) 74 CLR 408, 415.

126 *Rural Bank of New South Wales v Hayes* (1951) 84 CLR 140, 147; cf *Electricity Trust of South Australia v Linterns Ltd* [1950] SASR 133, 141.

127 *Bland Shire Council v Rural Bank of New South Wales* (1946) 47 SR (NSW) 245, 248–9.

Two points should be made. First, it does not deal with the issue alluded to, but not decided, in *Skinner*; namely what immunities flow from the status of the Rural Bank as ‘representing the Crown’.<sup>128</sup> Secondly, the effect of the proclamation was to bring the Rural Bank within the express definition of ‘Crown’ in the *Local Government Act 1919* (NSW) on the basis that it was a ‘public body proclaimed under this Act as a statutory body representing the Crown’. The question, therefore, was not whether the Rural Bank was entitled to the benefit of any privilege of the Crown, but rather whether it fell within the express statutory meaning of the term ‘Crown’, such that land owned by it was exempt from the definition of rateable land. Both Jordan CJ and the majority of the High Court on appeal (Latham CJ dissenting) recognised this and decided the case against the Rural Bank on the basis that the Rural Bank was a mortgagee in possession and therefore was not the ‘owner’ of the relevant land for the purposes of the exemption.<sup>129</sup>

Subsequently, in *Wynyard Investments*,<sup>130</sup> the question arose whether the Commissioner for Railways was subject to restraints imposed by the *Landlord and Tenant (Amendment) Act 1948* (NSW) on the bringing of proceedings against a tenant for ejection. Section 5 of that Act stated that ‘this Act shall not bind – (a) the Crown in Right of the Commonwealth or of the State; or (b) the Housing Commissioner of New South Wales’.

The majority (Williams, Webb and Taylor JJ, Fullagar and Kitto JJ dissenting) referred with apparent approval to the statement of Jordan CJ in *Skinner* set out above, and concluded that the effect of the provision deeming the Commissioner for Railways to be a statutory body representing the Crown was to place the Commissioner ‘in the same position as the Crown for the purposes of any Act and one of the principle advantages would appear to be his immunity from any act which did not bind the Crown’.<sup>131</sup> Their Honours expressly rejected the argument that the words ‘for the purposes of any act ... shall be deemed a statutory body representing the Crown’ confined the deeming rule to those statutes that used the term ‘statutory body representing the Crown’. In contrast, Kitto J (with whom Fullagar J agreed) held that ‘the natural meaning’ of the deeming provision ‘would seem to be that whenever you find in an Act a provision dealing with statutory bodies described as representing the Crown, you are to deem the Commissioner for Railways to be such a body and apply the Act

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128 One possible, although not satisfactory, explanation for the difference in approach in the two cases is that in the earlier case the Railway Commissioners were deemed by statute to ‘represent the Crown’ whereas in the later case there was merely a proclamation that the Rural Bank ‘represents the Crown’ for the purposes of the *Local Government Act 1919* (NSW). However, if this is the correct explanation it perhaps fails to give appropriate effect to the words ‘for the purposes of any Act’ in the statutory deeming provision.

129 (1946) 47 SR (NSW) 245, 248; (1947) 74 CLR 408, 416, 419, 420. The passage of Jordan CJ set out above was directed not to the availability of the express exemption but to an alternative argument raised by the Bank that, by virtue of being deemed to be a ‘statutory corporation representing the Crown’, it was entitled to the rights, privileges and immunities of the Crown and therefore was not ‘bound’ by the *Local Government Act 1919* (NSW).

130 (1955) 93 CLR 376.

131 *Ibid* 388.

to him accordingly'.<sup>132</sup> On that view, it followed that because the *Landlord and Tenant (Amendment) Act* did not use the expression 'statutory body representing the Crown', the statutory deeming provision did not decide the question whether the Commissioner for Railways fell within the meaning of the 'Crown' as defined in s 5 of the *Landlord and Tenant (Amendment) Act*.

There are a number of arguments in favour of the construction adopted by Kitto J. First, the deeming provision does not provide that the Commissioner for Railways 'shall be deemed to be the Crown',<sup>133</sup> nor does it provide that the Commissioner 'shall be deemed to represent the Crown'. Rather, the Commissioner is deemed to be 'a statutory body representing the Crown', which, as Kitto J observed, 'has about it the ring of a stereotyped formula used in statutes as a generic description of public bodies of a more or less fixed class which are repeatedly grouped with the Crown as a subject of legislation, that is to say as the subject of specific exempting provisions'.<sup>134</sup> Secondly, the words 'for the purposes of any Act', when coupled with the 'stereotyped formula', enhance the impression that what is intended is that where the expression 'statutory body representing the Crown' appears in an Act, the Commissioner for Railways shall be deemed to be a statutory body answering that description. Thirdly, such a construction is consistent with the legislative scheme for the imposition of rates and the exemptions in favour of 'the Crown' referred to above. Fourthly, the statement of Williams, Webb and Taylor JJ that the statutory deeming provision entitles the Commissioner to the immunities of 'the Crown' relied heavily on the statement of Jordan CJ in *Skinner* set out above; a statement which on one reading says nothing about the nature or content of any immunities which flow from the status of the Commissioner as a statutory body 'representing the Crown'.

One indication that points the other way is, however, that the *Local Government Act 1919* (NSW) and the other statutes referred to above include within the definition of 'statutory body representing the Crown' any 'public body proclaimed under [the relevant Act] as a statutory body representing the Crown'. If the construction adopted by Kitto J is to be preferred, it is difficult to see why there would be any need for a statutory deeming provision when the making of a proclamation would have the same effect. Perhaps the justification lay in the convenience of having a single statutory deeming rule which would obviate the need for the making of multiple proclamations under various statutes.<sup>135</sup>

In addition, it may be observed that some statutes use an expression such as 'for the purposes of *this Act* the relevant authority shall be deemed a statutory body representing the Crown', notwithstanding that the 'stereotyped formula'

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132 Ibid 401.

133 *Bland Shire Council v Rural Bank of New South Wales* (1946) 47 SR (NSW) 245, 249.

134 *Wynyard Investments* (1955) 93 CLR 376, 401.

135 However, it should be noted that the definition of 'statutory body representing the Crown' contained in a number of pieces of legislation referred to above, incorporated by reference the definition in the *Local Government Act 1919* (NSW). The result is that a single proclamation under the *Local Government Act 1919* (NSW) would bring the Railway Commissioners within the definition of 'statutory body representing the Crown' for a number of different statutes.



does not appear elsewhere in the Act.<sup>136</sup> In that context it is perhaps difficult to ascribe to the legislature any intention other than to place the statutory body in the same position as ‘the Crown’ for the purposes of that statute.

It should be noted that the New South Wales legislature appears to have legislated in a manner which is more consistent with the approach adopted by Kitto J in the *Wynyard Investments* case. An example is provided by s 308 of the *Duties Act 1997* (NSW). Section 308 of the *Duties Act* is headed ‘Application of Act to Crown’ and, in sub-section (1), provides that the Act ‘binds the Crown in right of New South Wales and, in so far as the legislative power of the Legislature of New South Wales permits, the Crown in all its other capacities’. Subsection (2) goes on to provide that the ‘Crown in right of New South Wales is not liable to pay duty’ unless such liability is expressly imposed and sub-section (6) states that for ‘the avoidance of doubt, in this section, the ‘Crown’ includes any statutory body representing the Crown’.<sup>137</sup> Subsection (3) empowers the Governor, by order published in the Gazette, to apply the whole or specified provisions of the *Duties Act* to any specified body, notwithstanding that it is otherwise exempt from duty as a ‘statutory corporation representing the Crown’. *The Duties (Crown Immunity – Application of Act) Order 1998* purports to apply the whole *Duties Act* to a number of specified bodies.<sup>138</sup>

At the time the Order was promulgated,<sup>139</sup> the legislation constituting each of the bodies listed in the Order expressly provided that ‘for the purposes of any Act’, each such body was or was deemed to be a ‘statutory corporation representing the Crown’.<sup>140</sup> The effect of the Order was therefore to remove the exemption from liability to duty in respect of certain bodies that the legislature considered would fall within the statutory definition of ‘the Crown’ in the *Duties Act 1997* (NSW) by reason of the express deeming provisions in their constituting statutes.

It is interesting to note that in the years following promulgation of the Order, the bodies listed therein,<sup>141</sup> or their more recent incarnations, have generally been

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136 An example is provided by the *State Coal Mines Act 1912* (NSW), which established ‘the State Mines Control Authority’, provided that ‘for the purpose of this Act the authority shall be deemed a statutory body representing the Crown’ and then did not refer again to a ‘statutory body representing the Crown’.

137 For example, the Sydney Olympic Park Authority is not liable to pay duty under the *Duties Act 1997* (NSW) because the Authority ‘is for the purposes of any Act, a statutory corporation representing the Crown’: *Sydney Olympic Park Authority Act 2001* (NSW).

138 Namely, the Darling Harbour Authority, the Electricity Transmission Authority (TransGrid), Landcom, the Railway Services Authority, the Forestry Commission trading as State Forests, the State Transit Authority, the Sydney Cove Redevelopment Authority and the Waste Recycling and Processing Service.

139 The Order was published in the Gazette on 1 July 1998 and commenced on that date.

140 *Darling Harbour Authority Act 1984* (NSW) s 6; *Sydney Cove Redevelopment Authority Act 1968* (NSW) (each of the foregoing Acts was repealed with effect from 1 January 2001 by the *Sydney Harbour Foreshore Authority Act 1998* (NSW)); *Electricity Transmission Authority Act 1994* (NSW) s 4(2); *Housing Act 1985* (NSW) s 20(1)(e); *Transport Administration Act 1988* (NSW) s 4(2)(b); *Transport Administration Act 1988* (NSW) s 20(2); *Waste Recycling and Processing Service Act 1970* (NSW) s 7(2)(b).

141 Other than the *Sydney Harbour Foreshore Authority Act 1998* (NSW). That Act established the Sydney Harbour Foreshore Authority and expressly provided that ‘the Authority is, for the purposes of any Act, a statutory corporation representing the Crown’ (s 11).

incorporated into the 'statutory state owned corporations' regime under the *State Owned Corporations Act 1989* (NSW).<sup>142</sup> Under s 20F(a) of the *State Owned Corporations Act*, a statutory state owned corporation 'is not and does not represent the State except by express agreement with the voting shareholders of the [corporation]'. The result is that those bodies referred to above that have been reconstituted as statutory state owned corporations are subject to the provisions of the *Duties Act 1997* (NSW) because they are no longer 'statutory corporations representing the Crown' and not because they, or their predecessors, are listed in the Order.

Notwithstanding the above, it may be that, at least in relation to legislation enacted following the *Wynyard Investments* decision, the effect of deeming a body to be 'a statutory body representing the Crown' should be held to be to confer upon that body rights, privileges and immunities equivalent to those enjoyed by the 'Crown'. That would appear to follow from an application of the principle that 'where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already "judicially attributed to [them]"'.<sup>143</sup>

## B Statutory Construction

The converse question may also arise, namely, when will a body be one which 'represents the Crown' for the purposes of a statutory definition of 'the Crown' or a particular statutory concession? That question involves giving content to the expression 'statutory corporation representing the Crown'.

Clearly, the task of giving content to that expression is one of statutory construction which will depend upon the purpose and terms of the relevant statute. Accordingly, it is useful to approach the issues involved in the context of a particular legislative scheme, rather than in the abstract. The example used for this discussion is the *Duties Act 1997* (NSW). That legislation gives concessionary stamp duty treatment in relation to transactions in units in 'wholesale unit trust schemes'. In order for a unit trust to be a 'wholesale unit trust scheme' it must, amongst other things, be a unit trust in which at least 80 per cent of its unit holders are 'qualifying investors'. A 'qualifying investor' is defined to include various categories of what might broadly be termed public unit holders, including, for example, complying superannuation funds, trustees of public unit trusts, life companies and the like.<sup>144</sup> In addition to those categories, the legislation now provides that 'qualifying investor' includes 'the Crown in

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142 Landcom is now constituted as a statutory state-owned corporation under s 5 of the *Landcom Corporation Act 2001* (NSW), RailCorp (the successor to the Railway Services Authority and [the State Transit Authority]) is constituted as a statutory state-owned corporation by item 8 of sch 1 of the *Transport Administration Amendment (Rail Agencies) Act 2003* (NSW), the Waste Recycling and Processing Corporation (the successor to the Service) is constituted as a statutory state-owned corporation by s4 of the *Waste Recycling and Processing Corporation Act 2001* (NSW).

143 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106.

144 *Duties Act 1997* (NSW) s 163ZU(2)(a).

right of the Commonwealth, a State or a Territory (including any statutory body representing the Crown in right of the Commonwealth, a State or a Territory)'.<sup>145</sup>

For the reasons discussed in Part II of this article, it is submitted that a statutory corporation is not 'the Crown in right of the Commonwealth, a State or a Territory'. The next question is whether such a corporation may be a 'statutory body representing the Crown' in any of those capacities. A statutory corporation that is deemed, by its constituting legislation, to be 'a statutory corporation representing the Crown' in any particular capacity should be a 'qualifying investor' as defined. Conversely, a statutory corporation which is expressly stated not to represent the Crown should not fall within that category of 'qualifying investor'.<sup>146</sup> Questions respecting the interrelationship of legislation from different polities may also arise here. For example, does a provision in a Queensland statute that a statutory body 'represents the Crown' of itself render that body a 'statutory body representing the Crown in right of' Queensland for the purposes of the *Duties Act 1997* (NSW)? Or is it merely a factor to be considered?

Another difficulty arises where the constituting statute is silent as to whether the statutory corporation 'represents the Crown' in the relevant capacity. In that context, two further issues must be addressed. The first is whether the 'stereotyped formula' has an 'ordinary meaning' or whether it refers only to a statutory corporation that is expressly deemed to 'represent the Crown'.<sup>147</sup> It is submitted that the expression 'statutory body representing the Crown', as it appears in the *Duties Act 1997* (NSW), should not be confined to those bodies expressly deemed to 'represent the Crown'. The apparent purpose of the extension to the categories of 'qualifying investor' is to accommodate investment in wholesale trusts by what may broadly be described as 'government' or 'public' bodies. In that context, it is difficult to see why the new category should be confined to those bodies expressly deemed by statute to 'represent the Crown'.<sup>148</sup>

The next issue is to identify the 'ordinary meaning' of the expression 'statutory corporation representing the Crown' which is to apply in the particular legislative context. There would appear to be at least three possible applicable meanings of the statutory expression, namely:

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145 *Duties Act 1997* (NSW) s 63ZU(2)(a)(ix). Section 89K(1)(ea) of the *Duties Act 2000* (Vic), which was inserted by the *State Taxation Acts (General Amendment) Act 2005* (Vic) with effect from 28 June 2005, is in materially the same terms.

146 For example, *State Owned Enterprises Act 1992* (Vic) s 70, which provides that a state owned company 'is not, and does not represent, the state' and 'is not exempt from any rate, tax, duty or other impost ... merely because it is a state owned company'. Section 20F(a) of the *State Owned Corporations Act 1989* (NSW) is to similar effect.

147 Cf *Wynyard Investments* (1955) 93 CLR 376, discussed earlier.

148 An argument could be constructed that the 'stereotyped formula' should bear the same meaning in the wholesale unit trust concessions as it does elsewhere in the *Duties Act 1997* (NSW), including s 308 (see the discussions above). However, there would appear to be a sufficient difference in the purpose and context of the two provisions to justify the conclusion that the same expression ought to bear a different meaning in each section.

- (1) a body which would be held entitled to the 'rights, privileges and immunities of the Crown' under the principles discussed in Part II above;
- (2) a body which is 'the State' or 'the Commonwealth' for constitutional purposes; or
- (3) a body which is an 'authority of the State'.

It is appropriate to examine each of these possible meanings.

### 1 *Body Entitled to the 'Rights, Privileges and Immunities of the Crown'*

This meaning has the support of a number of judicial statements, whether considered or otherwise, that treat the question of whether a body 'represents the Crown' as synonymous with the question of whether that body is entitled to 'the rights, privileges and immunities of the Crown' under the principles discussed in Part II above.<sup>149</sup> For example, in *Skinner*, Jordan CJ expressed the question as being 'whether a body represents the Crown for the purpose of being entitled to the benefit of the Crown's prerogative, privileges and immunities, including that of not being bound by a statute'.<sup>150</sup> Similarly, in *Townsville Hospitals Board*, Gibbs CJ thought that '[a]lthough the word 'represent' is not infrequently used in this context, it would be more precise to say that the question is whether the Board, in erecting the building, enjoys the privileges and immunities of the Crown'.<sup>151</sup>

In *Wynyard Investments*,<sup>152</sup> Williams, Webb and Taylor JJ stated that 'the only way a statutory body could represent the Crown would be to act as the agent or servant of the Crown and this must be the meaning of the word 'represent' in [the statutory deeming provision]'. This was probably intended as nothing more than a different way of saying that a statutory corporation will 'represent the Crown' if it is entitled to the 'rights, privileges and immunities of the Crown' and vice versa. This is supported by *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd*,<sup>153</sup> where the question of whether the Queensland Commissioner for Railways was entitled to the rights, privileges and immunities of the Crown was equated variously with 'the question whether the Commissioner is an agency of the Crown'<sup>154</sup> or whether the Commissioner was an 'instrumentality or agent or authority of the Crown'.<sup>155</sup>

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149 See, eg, *Skinner v Commissioner for Railways* (1937) 37 SR (NSW) 261, 269–70, 272; *Re Forestry Commission; Ex parte Graham* (1945) 45 SR (NSW) 379, 382; *Wynyard Investments* (1955) 93 CLR 376, 400–1; *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654, 661; *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330, 351; *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282, 288; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219, 230.

150 (1937) 37 SR (NSW) 261, 269–70. See also *Re Forestry Commission; Ex parte Graham* (1945) 45 SR (NSW) 379, 382.

151 (1982) 149 CLR 282, 288.

152 (1955) 93 CLR 376, 388.

153 (1979) 145 CLR 107.

154 *Ibid* 144 (Gibbs ACJ).

155 *Ibid* 132 (Mason and Jacobs JJ).

If this meaning of the expression ‘representing the Crown’ is adopted, a statutory body will fall within the scope of that expression if there is a sufficiently close relationship between the corporation and the relevant executive such that it would have been held to be entitled to the ‘rights, privileges and immunities of the Crown’ under the principles discussed in Part II above. In practice, that will tend to turn upon the degree of control over the activities of the corporation exercised by the executive and, of course, upon any applicable express statutory deeming provision.

It is submitted that this meaning is to be preferred for at least two reasons. First, it allows for recognition of the conclusion suggested in this article that statutory corporations should not be treated as forming part of ‘the Crown’ and therefore should not be entitled to the ‘rights, privileges and immunities of the Crown’. Secondly, by adopting the test of executive control, the courts may continue to be guided by the established lines of authority referred to in Part II above for the purpose of determining whether a body does or does not ‘represent the Crown’. Accordingly, on this view, a statutory corporation that is controlled by the executive will not be ‘the Crown’ but may nevertheless fall within the scope of the extended definition of that term in the *Duties Act 1997* (NSW) by being a ‘statutory body representing the Crown’.

## 2 ‘The Commonwealth’ and ‘The State’

It is now well established that the expressions ‘the State’ and ‘the Commonwealth’ in ss 75(iii), 75(iv) and 114 of the *Constitution* extend to agencies and instrumentalities of the relevant polity.<sup>156</sup> In determining whether a statutory body is such an agency or instrumentality, the critical question is the intention to be derived from the relevant statute:

is it, on the one hand, an intention that [the Commonwealth or the State] shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of [the Commonwealth or the State], that is to say otherwise than as a [Commonwealth or State] instrument, so that the concept of a [Commonwealth or State] activity cannot realistically be applied to that which the corporation does?<sup>157</sup>

The case law suggests that a number of factors or considerations are generally taken into account in answering this question, including amongst other things, the existence and identity of corporators (ie, shareholders), whether the body is subject to the direction of the relevant minister, whether the members of the board of directors are appointed by the minister or the Governor/Governor-General in Council, whether the corporation’s revenue is paid into the

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156 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334; *Crouch v Commissioner of Railways (Qld)* (1985) 159 CLR 22; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219, 230–1.

157 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334, 338.

consolidated revenue and whether the consolidated revenue is appropriated to meet the liabilities of the corporation.<sup>158</sup>

It is not necessary that all of those factors be present in order to conclude that the body is an instrumentality, agent or authority of the Commonwealth or the State. Rather, resolution of that question requires consideration of 'every feature of the entity which bears upon its relationship with the polity'.<sup>159</sup> Nevertheless, it may fairly be said that the most significant criterion is the extent to which the entity or body is controlled by the relevant polity.<sup>160</sup>

It will be seen, therefore, that the general considerations relevant to determining whether a body is an agency or instrumentality of 'the State' or 'the Commonwealth' for constitutional purposes overlap significantly with the considerations relevant to determining whether a body is entitled to the 'rights, privileges and immunities of the Crown' under the principles discussed in Part II above. However, the courts frequently have emphasised that the two questions are very different and, in particular, that the outcome of one does not control the other.<sup>161</sup>

As discussed above, a statutory corporation may be entitled to statutory rights, privileges or immunities that mirror some but not all of the rights, privileges and immunities of the executive or it may be entitled to those rights, privileges and immunities only in limited circumstances or for particular purposes.<sup>162</sup> Alternatively, statute may expressly confer certain rights, privileges or immunities on a private corporation, incorporated under the *Corporations Act 2001* (Cth), and carrying on a private business.<sup>163</sup> It is even conceivable, although perhaps unlikely, that legislation could deem a private corporation to be 'the Crown' or to 'represent the Crown'. However, as Dixon J observed, the question whether a body is 'the State' or 'the Commonwealth' for the purposes of the *Constitution* 'depends upon the meaning and operation of an unalterable constitutional provision which the intention of the legislature cannot affect'.<sup>164</sup> Accordingly, although such an express statutory statement may impact upon the rights, privileges and immunities to which the corporation is entitled, and upon the application of legislation to it, it cannot be determinative of the question whether that corporation answers the constitutional description of 'the Commonwealth' or 'the State'.

It may be that a closer relationship between the statutory corporation and the executive is required in order to conclude that the corporation is placed in relevantly the same position as the executive than would be required to conclude

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158 *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639, 644–5.

159 *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 69–70.

160 *Superannuation Fund Investment Trust v The Commissioner of Stamps (SA)* (1979) 145 CLR 330, 347–9, 354, 371; *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51.

161 *Maguire v Simpson* (1977) 139 CLR 362, 406; *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 230; *Residential Tenancies* (1997) 190 CLR 410, 458, 464–5; *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 67.

162 *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 230.

163 *Ibid* 230.

164 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 359; *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 230.

that the corporation is ‘the State’ or ‘the Commonwealth’. The reason for this lies in the different policy considerations underpinning the two issues. In considering whether a statutory corporation is placed in the same position as the executive, it is relevant that statutory corporations engaging in commercial activity should generally be treated no differently than private bodies engaging in that activity.<sup>165</sup> On the other hand, when asking whether, for example, a statutory corporation is ‘the Commonwealth’ for the purposes of s 75(iii) it is relevant that the purpose of that section was, in the words of Dixon J, ‘to ensure that the political organisation called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction in which it could be impleaded and which it could invoke’.<sup>166</sup>

The significance of the criterion of control in the constitutional sphere is usefully illustrated by the decision in *SGH Ltd v Federal Commissioner of Taxation*.<sup>167</sup> In that case, the presence of minority shareholders, whose rights were safeguarded by the general law, meant that the State of Queensland did not have sufficient control over SGH to bring it within the constitutional meaning of the term ‘the State’ in s 114. The presence of such shareholders also would deny to that corporation the character of a body entitled to the ‘rights, privileges and immunities of the Crown’ for the same reason. It is worth noting that one situation where the result would be different would arise if SGH were deemed by Queensland legislation to represent ‘the Crown’ or ‘the State’ or to be entitled to the ‘rights, privileges and immunities of the Crown’. Such a provision would, by force of that legislation, affect the status of SGH as a body to be equated with ‘the Crown’ for particular purposes, but would not affect its constitutional characterisation.

Another example in which a different outcome might be reached is provided by *State Bank of New South Wales v Commonwealth Savings Bank of Australia*.<sup>168</sup> In that case, the executive did not have direct control over the Bank, but six of the seven directors were appointed by the Governor (the remaining director was appointed by elected Bank employees), the directors held office for a fixed period of time and were removable only for incompetence or bad behaviour. In light of all the relevant considerations, the High Court concluded that ‘the State carries on banking through its statutory corporation, the Bank, and that it necessarily follows that the Bank is for this purpose the State of New South Wales’.<sup>169</sup> On the other hand, the Bank probably was not a body entitled to the ‘rights, privileges and immunities of the Crown’ because there was insufficient control by the executive over the activities of the Bank.<sup>170</sup> That is, it

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165 *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282, 291.

166 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363 (Dixon J).

167 (2002) 210 CLR 51.

168 (1986) 161 CLR 639.

169 *Ibid* 652.

170 It may be observed that the judgment of the Court is, in places, somewhat unclear and confused about the difference between asking whether a body is ‘the State’ and asking whether it is ‘the Crown’: see particularly (1986) 161 CLR 639, 650.

was the board of directors that controlled the affairs of the Bank not the relevant minister and the minister did not have sufficient control over the Board.<sup>171</sup>

It is tempting to equate the expression 'statutory corporation representing the Crown' with the constitutional expressions 'the Commonwealth' and 'the State' for the reason that, amongst other things, it would accord with the observations about the Australian federal structure referred to above. However, there is one difficulty with such a course. As mentioned above, the constitutional meaning of the expressions 'the Commonwealth' and 'the State' cannot be affected by a statutory deeming provision. That is, on this view, the question whether a statutory corporation 'represents the Crown' would turn solely on the constitutional tests outlined above and would not be affected by a provision deeming the statutory corporation to be a 'statutory corporation representing the Crown'.

### 3 *State or Commonwealth Authority*

The expression 'an authority of the Commonwealth' or 'an authority of the State' appears or has appeared in a variety of federal and state legislation, including, for example, the *Patents Act 1990* (Cth) and its predecessor the *Patents Act 1952* (Cth).<sup>172</sup> That expression has been given a different meaning to both 'agency and instrumentality' in the current constitutional sense and a body entitled to the 'rights, privileges and immunities of the Crown'.<sup>173</sup>

In determining whether a body is 'an authority of' the Commonwealth or a state, the courts have held that the 'primary focus is on government and the function of government'.<sup>174</sup> That is, attention is directed to the statutory powers exercisable by the putative authority and the question of whether that body is performing the 'work of government'. For example, the Committee of Direction of Fruit Marketing was 'an authority of a State' within the meaning of a postal by-law because the relevant legislation 'clearly creat[ed] [in] the [Committee] an instrument of government and equip[ed] it with the powers to achieve the organized marketing which is the purpose of the legislation'. Put simply, the term 'authority' is generally used to refer to those bodies exercising 'public' functions, rather than solely to those bodies which have a very close connection with the body politic.

In *Stack v Brisbane City Council*,<sup>175</sup> Cooper J held that the Brisbane City Council was an 'authority of the State' for the purposes of the concession in the *Patents Act 1990* (Cth) allowing exploitation of a patented invention by the

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171 (1986) 161 CLR 639, 646. See *Re Forestry Commission; Ex parte Graham* (1945) 45 SR (NSW) 379, 382 and *Re Australasian Performing Right Association Ltd* (1982) 65 FLR 437, 443 discussed above.

172 See *Patents Act 1990* (Cth) s 162; *Patents Act 1952* (Cth) s 132.

173 See *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577; *Stack v Brisbane City Council* (1995) 131 ALR 333.

174 *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577, 593 (Mason and Wilson JJ (Barwick CJ agreeing)); *Stack v Brisbane City Council* (1995) 131 ALR 333, 339.

175 (1995) 131 ALR 333.



Commonwealth, a State and an ‘authority’ of the Commonwealth or a State. His Honour noted that the inclusion of ‘authority of a State’ as a category of body entitled to the statutory concession recognised that government services ‘are managed or performed, not exclusively by departments of government, but as well by “authorities” of the Commonwealth or States’.<sup>176</sup> The Brisbane City Council was such an ‘authority’ because

the [Council] is a statutory body, established and ultimately controlled by State legislation. Its functions and powers are State governmental functions and powers, exercised in the interests of the community, which the State has delegated to it in legislation.<sup>177</sup>

At first glance, this would appear to be an appropriate meaning for the expression ‘statutory body representing the Crown’, particularly in the context of the definition of ‘qualifying investor’ in the *Duties Act 1997* (NSW). However, it is submitted that there is a clear distinction between the meaning of the expression ‘representing the Crown’ and the term ‘authority’, such that the former expression should not be equated with the latter. This is supported by *Committee of Direction of Fruit Marketing v Australian Postal Commission*,<sup>178</sup> where the High Court held that the Committee was an ‘authority of a State’ even though its constituting statute expressly stated that the Committee ‘shall not be deemed to represent the Crown for any purpose whatsoever’.

#### IV CONCLUSION

The polities created by the *Constitution* are not described in that document as ‘the Crown’ in any particular capacity. Nevertheless, legislatures at the federal, State and Territory levels continue to use that term to identify bodies that are to be entitled to statutory exemptions and concessions and, on occasion, the subject of statutory obligations. The inherent ambiguity or uncertainty in the scope of the expression ‘the Crown’ raises the important issue whether, and if so when, a statutory corporation will fall within the compass of that expression.

This paper has sought to demonstrate that, as a matter of principle, a statutory corporation should not be treated as forming part of the executive of a polity and therefore should not be equated with ‘the Crown’. Importantly, this does not mean that statutory corporations may not be entitled, either expressly or impliedly, to *statutory* rights, privileges and immunities that mirror those of ‘the Crown’. It also does not mean that in a particular legislative context the ordinary process of statutory construction will not lead to the conclusion that a statutory corporation does in fact fall within the scope of the expression ‘the Crown’ as used in a particular legislative scheme. However, it does suggest that the starting

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176 Ibid 344.

177 Ibid 344.

178 (1980) 144 CLR 577.

presumption ought to be that expression 'the Crown' refers to the executive of the relevant polity and does not encompass statutory corporations.

In Part II of this article, a tripartite approach was suggested in place of the analysis previously undertaken as to whether a statutory corporation was 'the Crown' or was entitled to the 'rights, privileges and immunities of the Crown'. In determining whether a statutory corporation is 'bound' by legislation,<sup>179</sup> that approach would involve asking the following questions:

- (1) does the legislation purport, by its terms, to impose the obligation upon the statutory corporation?
- (2) are there any applicable express or implied statutory rights, privileges or immunities of the statutory corporation?
- (3) does the imposition of the obligation directly and adversely affect some right, privilege, immunity of 'the Crown'?

The first question is one of statutory construction of the legislation imposing the relevant obligation and may involve determining whether the statutory corporation falls within the scope of a statutory expression such as 'the Crown' or 'statutory body representing the Crown'. The second question involves construing the legislation constituting the relevant statutory corporation and resolving any conflict between that legislation and the legislation which purports to impose the obligation. That conflict may or may not be one between legislation of different polities. It is only under the third question that any issue concerning the 'rights, privileges and immunities of the Crown' itself is encountered.

In Part III of this paper, the meaning and scope of the legislative expression 'statutory body representing the Crown' was examined, particularly in the context of the 'qualifying investor' definition in the *Duties Act 1997* (NSW). That expression has a long, and somewhat confused, legislative history. In particular, there appears to be doubt both as to the effect of a provision deeming a statutory corporation to be a body 'representing the Crown' and as to the content of the expression 'statutory corporation representing the Crown' when used to identify a category of body entitled to some concession or exemption.

There is a range of possible meanings that could be attributed to the statutory expression 'representing the Crown'. The precise meaning which that expression should bear in any particular context will turn upon the purpose and terms of the relevant legislative scheme. In the context of the 'qualifying investor' definition in the *Duties Act 1997* (NSW), the meaning which appears to the author to be the most appropriate is a body which either is, by statute, expressly deemed to represent the Crown in a particular capacity, or has a sufficiently close relationship with, and is subject to the control of, the executive of the relevant polity.

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179 For the sake of simplicity, the focus here is on the question of whether a statutory corporation is the subject of some statutory obligation. However, the same approach may be adopted in considering whether a statutory concession is available in favour of a statutory corporation or whether a statutory corporation's rights are affected in some other respect.

It is appropriate to conclude by emphasising that the expression ‘the Crown’ remains an awkward one in the Australian federal context. It is therefore to be hoped that the expression gradually falls out of favour and is replaced with more accurate and precise expressions such as ‘the Commonwealth’, ‘the State’ and ‘the Executive’.<sup>180</sup>

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180 A similar expectation was expressed by Sir W Harrison Moore more than 100 years ago and largely ignored by parliamentary draftspersons ever since: W Harrison Moore, ‘The Crown as Corporation’ (1904) 20 *Law Quarterly Review* 351, 362.