IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C7 of 2018

BETWEEN:

THE COMMONWEALTH OF AUSTRALIA
First Plaintiff

THE MURRAY-DARLING BASIN AUTHORITY
Second Plaintiff

and

COMMISSIONER BRET WALKER SC
First Defendant

THE STATE OF SOUTH AUSTRALIA
Second Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

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Part I Certification

1. These submissions are in a form suitable for publication on the Internet.

Part II Basis of intervention

2. The Attorney General for New South Wales ("**the NSW Attorney**") intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth).

Part III Argument

A Chapter III

3. The Special Case indicates that three of the persons to whom summonses have been issued are residents of States other than South Australia. Dr Dickson and Mr Bell are both residents of New South Wales: Special Case at [77] and [80] respectively (Special Case Book ("**SCB**") at 82 and 83). Mr Burns is a resident of Victoria: Special Case at [84] (SCB at 83).

4. By paragraph 26(d) of its Defence (and see also paragraphs 28(b) and (d)) (SCB at 48 and 49), South Australia appears to accept that, on its proper construction:

> section 11(1) of the RC Act does not apply to "*the Commonwealth*", "*a person suing or being sued on behalf of the Commonwealth*", or "*a resident of another State*" other than the State of South Australia as those terms are used in section 75 of the Constitution.

For the reasons explained at paragraphs 7 to 16 below, this concession is correct.

5. Despite conceding that s 11(1) does not apply to the Commonwealth, to persons being sued on behalf of the Commonwealth or to residents of States other than South Australia (collectively, "**Excluded Persons**"), South Australia nevertheless contends, in paragraphs 26(a) and 28(a) of its Defence (SCB at 48 and 49), that ss 10(b) and (c) of the Royal Commissions Act 1917 (SA) ("**the RC Act**") do apply to, and authorise the issue of summonses to, Excluded Persons.

6. The NSW Attorney's contention is that this issue is properly resolved as a question of statutory construction. It is not the case that s 11(1) of the RC Act, on its proper construction, purports to apply to Excluded Persons, but is invalid. Rather, having regard to the constitutional limits on the legislative power of the Parliament of South Australia and other relevant principles of statutory construction, the proper construction of s 11(1) is that it is not intended to, and does not, apply to Excluded Persons. As explained in paragraphs 17 to 40 below, s 10(b) and (c) of the RC Act are to be construed as having an identically confined operation.

The operation of Chapter III of the Constitution

7. Consistently with this Court's decision in Burns v Corbett (2018) 92 ALJR 423 ("**Burns v Corbett**"), it is beyond the legislative competence of the Parliament of a State to confer judicial power on a State body, other than a "court of a State", with respect to any of the "matters" listed in ss 75 and 76 of the Constitution, because Ch III of the Constitution contains a negative implication to the effect that (putting aside the position of Territory courts) only the bodies identified in Ch III (ie, the High Court, other federal courts and State courts) may exercise judicial power in respect of such matters.

10 8. *First*, a royal commission established by the Governor of South Australia is, plainly, *not* a "court of a State" within the meaning of Ch III of the Constitution.

9. *Secondly*, the exercise of the powers conferred by s 11(1) of the RC Act involves the exercise of judicial power. The "adjudgment and punishment of criminal guilt" has long been recognised as an exclusively judicial function: see, eg, Magaming v The Queen (2013) 252 CLR 381 at 396 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). The exercise of a power to punish for contempt of a court or tribunal has itself also been specifically recognised as involving "punishment", and as being criminal in nature: see, eg,
20 Witham v Holloway (1995) 183 CLR 525 at 533-4 (Brennan, Deane, Toohey and Gaudron JJ); Al-Kateb v Godwin (2004) 219 CLR 562 at 613 [138] (Gummow J, dissenting).

10. That the power conferred by s 11(1) is properly characterised as a power to impose "punishment" can scarcely be doubted, but is confirmed by the language of the RC Act itself: see, in particular, s 11(4), identifying contravention of s 11(1) as "an offence" that is "punishable", and s 12(2), referring to a person who has neglected to attend in answer to a summons as "punishable".

11. *Thirdly*, it is well established that an accusatorial criminal proceeding involves the adjudication of a "matter" between the State and the accused for the purposes of
30 s 75(iv): see, eg, Rizeq v Western Australia (2017) 91 ALJR 707 ("**Rizeq v Western Australia**"). A "matter", as that expression is used in Ch III, means "the subject matter for determination in a legal proceeding": In re Judiciary and Navigation Acts (1921) 29 CLR 257 at 265. The matter in the case of a criminal proceeding is "the controversy as to [the defendant's] criminal liability": Rizeq v Western Australia at 716 [37] (Bell, Gageler, Keane, Nettle and Gordon JJ). Precisely the same kind of "matter" exists where a person is accused of failing to comply with a summons issued

under s 10 of the RC Act and a chairman is considering the imposition of a punishment under s 11(1): there exists a "controversy" as to the person's "liability" to the punishment prescribed by s 11(1).

12. Although, in an inquisitorial body like a royal commission, the functions of the prosecution and the decision-maker tend to merge, a controversy as to a person's liability for contempt is properly characterised as a matter between the State — the chairman of a royal commission, acting as an instrumentality of or on behalf of the State — and the person whose liability is in question.

13. The chairman of a royal commission established to inquire for and on behalf of a government of a State, when considering and imposing a punishment pursuant to s 11(1) of the RC Act, is properly to be regarded as a "State" within the meaning of s 75(iv) of the Constitution: see, eg, Crouch v Commissioner for Railways (Qld) (1985) 159 CLR 22; Deputy Commissioner of Taxation v State Bank (NSW) (1992) 174 CLR 219. So much is necessarily implicit in South Australia's concession that s 11(1) does not apply to interstate residents: paragraphs 26(d) and (e) of its Defence (SCB at 48 and 49).

14. *Fourthly*, if the negative implication recognised in Burns v Corbett did not prevent the exercise of an exclusively judicial power by an inquisitorial body, simply because of the absence of a "party" other than the inquisitorial body itself, the purpose of the constitutional limitation would be circumvented. That is particularly apparent when it is appreciated that counsel assisting a royal commission would ordinarily be expected effectively to assume the role of the prosecutor in any proceeding relating to punishment under s 11(1). The appellate jurisdiction of this Court (subject only to exclusion by the Commonwealth Parliament) under s 73 of the Constitution in relation to the exercise of judicial power in ss 75 and 76 matters would be avoided, and the scheme of Ch III partially frustrated, if the State could confer such a power on a non-judicial body. This was an important structural consideration in the reasoning of the majority in Burns v Corbett: see at 432 [20], 437 [49], 438 [53] (Kiefel CJ, Bell and Keane JJ), 441 [68], 444 [81], 447 [97]-[98] (Gageler J).

15. For these reasons, the legislative power of the Parliament of South Australia does not extend to conferring a power on the chairman of a royal commission to punish Excluded Persons for contempt of the royal commission or failure to comply with its summonses.

16. It may be noted in passing that this conclusion would not altogether prevent a State enacting laws providing for the punishment of non-compliance with summonses to give evidence or produce documents before commissions of inquiry, by residents of other States. There is no constitutional impediment to a State law conferring a power

to punish for such non-compliance on a *State court* — as is provided for by, eg, ss 18A-18D of the Royal Commissions Act 1923 (NSW).

Construing the RC Act in light of the constitutional limitations

17. The next question that arises concerns the construction of ss 10 and 11 of the RC Act, in light of the conclusion that the legislative power of the Parliament of South Australia does not extend to conferring a power on the chairman of a royal commission to punish Excluded Persons.

18. Section 22A of the Acts Interpretation Act 1915 (SA) ("the **SAI Act**") provides:

> **22A—Construction of Act so as not to exceed power of State**
>
> (1) Every Act and every provision of an Act will be construed so as not to exceed the legislative power of the State.
>
> (2) Any Act or provision of an Act which, but for this section, would exceed the power of the State, is nevertheless a valid enactment to the extent to which it does not exceed that power.

19. Section 22A(1) enacts a rule of *construction,* in the sense of "interpretation". It requires a court, where constructional choices are open, to choose a construction of an Act which would ensure that it does not exceed the legislative power of the State: see Public Service Association of South Australia v Industrial Relations Commission (SA) (2012) 249 CLR 398 ("**PSA**") at 408 [16] (French CJ) and cases there cited. It reflects the common law rule that "so far as different constructions of [a provision] are available, a construction is to be selected which, so far as the language of [the provision] permits, would avoid, rather than result in, a conclusion that the section is invalid": New South Wales v The Commonwealth (Work Choices Case) (2006) 229 CLR 1 at 161 [355] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). This principle is to be taken into account, in conjunction with all other relevant principles of statutory construction (common law and statutory), in ascertaining the true construction of an Act and the provisions thereof.

20. Section 22A(2) serves to identify the Parliament's general intention as to how a law should operate in the event that an Act or provision, if given its full and natural meaning (ie, if not read down as required by s 22A(1)), would exceed the power of the State. Section 22A(2) indicates that, generally speaking, the Parliament intends that the Act or provision in question should not be invalid in its totality, but should instead be understood as still intended to operate if and to the extent that it is capable of having a valid operation: PSA at 414-15 [35] (French CJ).

21. Section 22A enacts "a rule of construction and not a rule of law" and so is to be taken into account together with other relevant principles of statutory interpretation: Pidoto

v Victoria (1943) 68 CLR 87 ("**Pidoto**") at 110 (Latham CJ); . When a question arises as to the construction and operation of a provision, or group of related provisions, "[t]he whole question is one of the intention of Parliament": Pidoto at 108 (Latham CJ). Section 22A informs that intention, as do other relevant principles of statutory interpretation.

22. South Australia appears to accept that s 11(1) of the RC Act must be construed so as not to apply in respect of Excluded Persons: paragraphs 26(d) and (e) of its Defence (SCB at 48 and 49). This is consistent with interpreting the RC Act in accordance with s 22A(1) of the SAI Act.

23. The issue that arises is whether pars (b) and (c) of s 10 of the RC Act should likewise be construed so that they, too, are construed as not extending to Excluded Persons. The NSW Attorney contends that they should. That submission rests upon the principle that the RC Act must be construed as a whole, and follows from a careful analysis of the interrelationship between ss 10 and 11 of the RC Act.

24. Section 11(1) of the RC Act provides for the punishment of "any person" who (among other things) fails to comply with a summons issued under s 10. Section 11(1) empowers the chairman of a royal commission to:

> ... commit such person to gaol for any term not exceeding three months or may impose on him a penalty not exceeding $1 000, and in default of immediate payment of such penalty the chairman may commit the offender to gaol for any term not exceeding three months unless the penalty is sooner paid.

25. Section 10 of the RC Act confers various powers on royal commissions to obtain evidence by compulsion. In particular, so far as is presently relevant, s 10(b) confers a power to issue summonses to compel the attendance of "persons" before a royal commission, and s 10(c) confers a power to compel the production of documents. Although the word "person" is not used in s 10(c), it is implicit that the power conferred by s 10(c) is a power to compel persons to produce documents. So much is clear both because only persons can produce documents and because s 11(1) provides for the punishment of persons who have failed to comply with, *inter alia*, s 10(c).

26. The general word "person" as it appears in each of ss 10(b) and 11(1) is capable, as a matter of construction, of being "read down" and so construed as extending only to persons to whom it can constitutionally apply; that is to persons who are not Excluded Persons: cf Pidoto at 110-11 (Latham CJ); Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1 at 10 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J). As to the technique of reading down general words more generally, see Taylor v The Owners of Strata Plan No 11564 (2014) 253 CLR 531 at 547-9 [35]-[40] (French CJ, Crennan and Bell JJ).

27. South Australia's concession as to the proper construction of s 11(1) of the RC Act entails that the word "person", as it appears throughout s 11(1), is properly to be construed as extending only to persons who are not Excluded Persons.

28. The NSW Attorney contends that the references to "persons" in s 10 of the RC Act should receive a like construction. If s 10(b) is construed in that way, it is apparent that it authorises the issue of summonses only to persons who are not Excluded Persons. Likewise, although the reading down is less immediately textual in relation to s 10(c), because that paragraph is expressed in the passive voice and the word "person" does not appear in it, the same limitation can obviously be read into s 10(c) as a matter of construction.

29. The scheme created by ss 10 and 11 of the RC Act support this approach for the following reasons.

30. *First*, ss 10 and 11 are evidently intended to work together to create a coherent scheme. Section 10 enables a Commissioner to take particular action (issuing a summons) which has the effect of creating certain obligations on the "person" in respect of whom that action is taken.

31. Section 11(1) serves the dual function of (a) prescribing the consequences of non-compliance with the obligations thus created and (b) conferring a jurisdiction on the chairman of a royal commission to enforce those obligations by imposing fines or committing persons to gaol: cf R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett (1945) 70 CLR 141 at 165-6 (Dixon J).

32. The fact that the very purpose of s 11(1) is to prescribe the consequences for non-compliance with s 10(b) and (c) (via s 11(1)(a) and (f)) provides a strong indication that ss 10(b) and (c) and 11(1) were intended to have a harmonious, and coterminous, operation — in other words, that the powers conferred by s 10 were intended to apply in respect of the same classes of persons as those to whom s 11(1) applies. Thus, if the "persons" to whom s 11(1) applies are limited in that they do not extend to Excluded Persons, coherence of statutory operation suggests that s 10(b) and (c) are likewise limited in their operation to persons other than Excluded Persons.

33. The general presumption that the same terms have been used with the same meaning in all places in which they appear in the one statute (see, eg, Firebird Global Master Fund II Ltd v Republic of Nauru (2015) 258 CLR 31 at 86-7 [190] (Nettle and Gordon JJ); Registrar of Titles (WA) v Franzon (1975) 132 CLR 611 at 618 (Mason J)) has particular force when construing provisions which are, plainly, intended to intersect in their operation and to form part of a single scheme, as are ss 10 and 11 of the RC Act: contrast SZTAL v Minister for Immigration and Border Protection (2016) 91 ALJR 936 at 942 [24] (Kiefel CJ, Nettle and Gordon JJ).

34. *Secondly*, the use of the words "*any* person" in the chapeau to s 11(1) indicate that a chairman's power under s 11(1) is to be available in respect of *all* persons to whom a summons to attend before the Commission may be issued under s 10(b) or (c).

35. Section 11(1)(a) applies to "any person who … has been personally served with a summons". Likewise, s 11(1)(f) applies to "any person who … refuses or neglects to produce any books, papers, documents or records as required by a summons personally served upon him". It is difficult to see those words in s 11(1), in each case commencing with the phrase "any person", can sensibly denote a narrower class of persons that the whole class of "persons" to whom the obligations in s 10 attach. The use of the words "*any* person" in s 11(1) is, therefore, a strong textual confirmation that it was Parliament's intention that the remedies and jurisdiction provided for in s 11(1) should be applicable in *all* cases where the powers in s 10 were exercised. It follows that, if s 11(1) is to be construed as not extending to Excluded Persons, the application of s 10 must be similarly confined.

36. *Thirdly*, there is no indication in the RC Act that the Parliament intended to create an unenforceable legal duty, or to empower a royal commission to do so. The very nature of a witness summons or summons to produce documents is to compel compliance with its command on pain of penalty; and it is apparent from a consideration of ss 10 and 11 together that that is precisely the scheme that those provisions contemplate. In those circumstances, it is hardly to be supposed that the Parliament of South Australia, in enacting a scheme for the issue of summonses to witnesses and their enforcement, intended to create (or empower a royal commission to create) duties of imperfect obligation.

37. *Fourthly*, to read down the words "any person" in s 11(1), while not similarly reading down the words "all such persons as they think fit" in s 10(b), and the class of persons to whom s 10(c) applies, would have the effect that the very same words used in s 10 would simultaneously serve the function of creating *enforceable obligations* in relation to persons other than Excluded Persons and also the quite distinct function of creating *unenforceable obligations* in relation to Excluded Persons. There is to be found in the RC Act no indication at all that such a dual effect, facilitating the creation of two fundamentally different kinds of obligations, was intended for s 10.

38. As has long been recognised, it is necessary to consider whether a proposed reading down of general words "would alter the policy or operation of the statute with respect to the cases which, after the reading down, would still remain within its terms": Pidoto at 111 (Latham CJ). To read down s 11(1) but not also s 10(b) and (c) would give s 10(b) and (c) a quite different operation with respect to Excluded Persons. To read down s 10(b) and (c) consonantly with s 11(1) avoids that difficulty, while

allowing both ss 10 and 11(1) to have their intended operation with respect to persons other than Excluded Persons.

39. *Fifthly*, if (as South Australia concedes) s 11(1) is to be construed as not applying to Excluded Persons, then s 11(3) must be construed as similarly limited. Were this not so, s 11(3) would have the bizarre operation of authorising the issue of a warrant to bring (say) an interstate resident before the Commission, even though nothing could then be done to compel that person to give evidence or to answer any question. That would mean that s 11(3) would authorise the arrest and detention of a person, quite possibly to no achievable end. Again, the Parliament of South Australia cannot be taken to have intended such a result. South Australia's apparent suggestion (see Defence at paragraph 9(b)) that s 11(3) somehow assists in enabling the obligations created by s 10 to be enforced therefore should not be accepted.

40. For all these reasons, the better construction of the RC Act is one which reads each of ss 10(b) and (c) and 11(1) of the Act as applying only to persons who are not Excluded Persons.

41. It is only if the process of statutory *interpretation*, in light of the limits of State power and s 22A of the SAI Act, fails to yield a construction of the RC Act such that it does not exceed the legislative power of South Australia that it would become necessary to resort to "reading down" in the sense of "severance" of invalid operations of s 11(1), as opposed to "interpretation". That approach would be contrary to the apparent position of South Australia that s 11(1) of the RC Act, on its proper construction, does not apply to Excluded Persons.

42. Should it nevertheless be necessary to consider that issue then, for essentially the reasons already advanced above and for the reasons advanced by the Plaintiffs at paragraphs 20 to 25 of their Submissions, s 10(b) and (c) can have no operation independently from s 11(1). Accordingly, if s 11(1) purports to operate with respect to Excluded Persons, but is invalid in that operation, s 10(b) and (c) are invalid insofar as they purport to operate with respect to Excluded Persons.

B Section 10 and 11 of the RC Act do not bind the executive government of the Commonwealth

The presumption that the executive government is not bound by legislation

43. In relation to South Australian legislation, the presumption that the executive government is not to be taken to be bound by legislation is addressed in careful detail in s 20 of the SAI Act. Section 20(5) makes it plain that the definition of "the Crown" found in s 4 of that Act is displaced for the purposes of s 20, and the expression "the

Crown" is used in s 20 in the sense of the executive government of the State. Moreover, s 20(5)(a) makes it clear that the term "the Crown" extends to and includes the executive government of other polities, at least in relation to executive governments identified with "the Crown". (It is not necessary in this case to decide whether s 20 is to be understood as extending to the executive government of the Australian Capital Territory which is not, at least expressly, identified with "the Crown".)

44. In The Commonwealth v Western Australia (1999) 196 CLR 392 ("**Mining Act Case**") at 410 [33] (Gleeson and Gaudron JJ) said:

> It would be preferable, in our view, and more consonant with our constitutional arrangements, if the presumption that a statute "does not bind the Crown" were expressed as a presumption that a statute which regulates the conduct or rights of individuals does not apply to members of the executive government of any of the polities in the federation, government instrumentalities and authorities intended to have the same legal status as the executive government, their servants or agents. For ease of reference, we shall refer to that presumption as the presumption that legislation does not apply to members of the executive government.

See also at 429 [105] (Gummow J); Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334 ("**Bass**") at 346-7 [17]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

45. Even though the language of "the Crown" in s 20 has not kept pace with developments in this Court, s 20 is to be understood as addressed to the same issue as the common law presumption.

46. Section 20(1) of the SAI Act applies only to Acts passed after 20 June 1990, being the date of this Court's decision in Bropho v Western Australia (1990) 171 CLR 1 ("**Bropho**"). In Bropho, at 23-4, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ confirmed that there remains a presumption of statutory interpretation that legislation does not bind the Crown. Their Honours adopted a "flexible" approach to the rebuttal of that presumption, observing that the strength of the presumption in the case of particular legislation would depend upon all the circumstances: see also State Government Insurance Corp v Government Insurance Office (NSW) (1991) 28 FCR 511 at 557 (French J).

47. Because the RC Act was enacted in 1917, s 20(1) of the SAI Act does not apply in respect of it. It is implicit in s 20(2) that, in the case of legislation enacted prior to 20 June 1990, "the question whether the amendment binds the Crown will be determined in accordance with principles applicable to the interpretation of Acts passed before 20 June 1990"; that is, the common law principles.

48. In Bass, the question of construction was framed by the Court as whether the reference to a "person" in ss 6(3) and 75B(1) of the Trade Practices Act 1974 (Cth) extended to the State of New South Wales: see at 345 [13] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). At least as far as ss 10(b) and 11(1) are concerned, the question of construction presented here might be posed in a similar fashion: does the word "person", as used in those provisions, include the executive government, or an agent or instrumentality of the executive government, of another polity of the Federation (in particular, as relevant to the present case, the Commonwealth)? And, in relation to s 10(c), although the word "person" does not appear, the provision plainly contemplates the issue of summonses to persons or entities, and the same question can obviously be asked.

The application of the presumption to the executive governments of other polities

49. Bropho directly concerned the question of whether the executive government of the Western Australia was bound by legislation enacted by its own legislature. In contrast, the issue that arises immediately in the present case concerns the application of South Australian legislation not to the executive government of the enacting polity, South Australia, but to the executive government of another polity, the Commonwealth.

50. In Jacobsen v Rogers (1995) 182 CLR 572 ("**Jacobsen**") at 585, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said:

> It must, we think, now be regarded as settled that the application of the presumption that a statute is not intended to bind the Crown extends beyond the Crown in right of the enacting legislature to the Crown in right of the other polities forming the federation.

51. There is, then, a need for South Australia to point to some positive indication, sufficient to overcome the presumption that the RC Act (and ss 10 and 11(1) in particular) were not intended to apply to the Crown in right of other polities of the Federation (that is, the executive governments of other polities of the Federation).

52. The fact that the interpretative presumption against "binding the Crown" applies to both the enacting polity and other polities does not, of course, deny that the task in each case is to construe the particular legislative provisions in question. It follows that the question of whether the presumption is rebutted or overcome may, in some cases, receive a different answer in relation to the Crown in right of the enacting polity and the Crown in right of other polities.

53. Applying the "flexible" approach identified in Bropho, it may well be found that a particular statute binds the executive of the enacting State (or its servants or agents) but nevertheless does not evince an intention to bind the executive governments of other polities, or their servants or agents. On the other hand, consideration of all the

circumstances, and in particular the nature and purpose of the legislation, may lead ultimately to a conclusion either that the executive governments of all polities were to be bound by a particular legislative provision or that none were: cf Jacobsen at 590-1 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

54. It has been observed that "in a federal system one does not expect to find one government legislating for another": Sweedman v Transport Accident Commission (2006) 226 CLR 362 at 400 [22] (Gleeson CJ, Gummow, Kirby and Hayne JJ), referring to In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation (1947) 74 CLR 508 at 529 (Dixon J). This pithy expression amounts to a recognition of the basic value of the intrinsic responsibility of each polity of a federation, as a polity (comprising legislative, executive and judicial branches) over its own executive government. This consideration suggests that, if anything, the presumption that legislation is not intended to bind the Crown will tend to be less readily rebutted in relation to the executive governments of polities other than the enacting legislature.

55. Consistently with this view, in the Mining Act Case at 472-3 [231]-[232], in construing the Western Australian legislation in issue in that case, Hayne J distinguished between the presumption that legislation was not intended to bind the Crown in right of the enacting polity and the presumption that legislation should not bind the executive governments of other polities. His Honour said:

> The presumption now in question [ie, the presumption that State legislation was not intended to bind the executive of another polity in the federation] owes its origin to the fact of federation and is a presumption that is not encrusted with the extensive history of particular statements of the applicable rules of statutory construction that is mentioned in *Bropho*. That being so, it may be doubted that the strength of the presumption should be seen as varying over time.

See also Jacobsen at 601-2 (McHugh J, dissenting).

The application of these principles to ss 10 and 11 of the RC Act

56. Sections 10 and 11(1) of the RC Act do not bind the executive governments of the Commonwealth and States other than South Australia

57. There is no express statement to the effect that ss 10 and 11(1) of the RC Act were to bind the executive government, either generally or specifically in relation to the executive governments of other polities.

58. Nor are there any apparent textual or contextual considerations that indicate that the RC Act was intended to bind the executive governments of the Commonwealth and other States and Territories, their officers, servants, agents or instrumentalities, and there is nothing to suggest that ss 10 and 11(1) of the RC Act in particular were

intended to confer (on every royal commission) a coercive authority to compel the executive governments of other polities, and their officers, servants, agents or instrumentalities, to attend before the royal commission or produce documents.

59. It is to be noted that there is in South Australia no equivalent to s 2C(1) of the Acts Interpretation Act 1901 (Cth) which provides that "expressions used to denote persons generally ... include a body politic or corporate as well as an individual". Nor does South Australia have a definition of "person" like that found in s 21(1) of the Interpretation Act 1987 (NSW), extending the meaning of that word to include a body politic. Rather, s 4(1) of the SAI Act provides that "'person' or 'party' includes a body corporate", but *not* a body politic.

60. It may not be unexpected for commissions of inquiry for the executive government of South Australia to relate to matters touching upon aspects of the government of the State of South Australia. That might possibly be one reason in favour of construing ss 10 and 11(1) of the RC Act as applying to the executive government *of South Australia*. There is, however, an obvious reason to conclude otherwise: generally speaking, compulsive powers to obtain information and documents *from the executive government of South Australia* are hardly likely to be necessary where it is the executive government of South Australia itself that has commissioned the inquiry.

61. In any case, even if ss 10 and 11(1) do, on their proper construction, apply to the executive government of South Australia (and it is not necessary in this case to decide), very different considerations apply to a power to compel the attendance as witnesses of officers of the executive government of another polity, and to compel production of documents from the executive government of another polity. Any considerations that might weigh in favour of a conclusion that ss 10 and 11(1) were intended to apply to the executive government of South Australia provide no support for the conclusion that those provisions were intended to apply to the executive governments of other polities.

62. The nature of the coercive powers conferred on a commission by s 10 of the RC Act, backed by the sanctions provided for in s 11(1) of that Act, are such that the observation that "one does not expect to find one government legislating for another" applies here with special force: it is not lightly to be supposed that the Parliament of South Australia intended to confer upon commissions of inquiry a power coercively to compel the executive governments of other polities to appear as witnesses or to produce documents.

63. The issue of a summons requiring the production of documents, or the attendance of a witness to reveal information, including confidential information, relating to the governmental functions of other executive governments of the Federation, whether

from those governments or from their officers, employees or agents, would involve a substantial and surprising interference with the hegemony of those governments. It is notable that the Parliaments of each State (including South Australia) and Territory and the Parliament of the Commonwealth have enacted freedom of information legislation which makes careful provision for the production of documents and the provision of information held by those governments, as well as restrictions on access to such information and documents: see, eg, Government Information (Public Access) Act 2009 (NSW). Considerations of this kind provide a *positive* reason why the general words of ss 10 and 11(1) of the RC Act should not be construed as authorising the issue of a summons that would require the production of documents, or the calling of witnesses to provide information, relating to the affairs of other executive governments of the Federation.

The relevance of the fact that s 11 provides for the imposition of punishment

64. A further positive reason for concluding that ss 10 and 11(1) do not bind the executive government generally, and the executive government of the Commonwealth in particular, is that those provisions together create a scheme that enables a royal commission to compel the attendance of a person before the commission or to produce documents, on pain of criminal penalty.

65. There is, as Dixon J (Rich J agreeing) explained in Cain v Doyle (1946) 72 CLR 409 at 424:

> … the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature. It is opposed to all our conceptions, constitutional, legal and historical. Conceptions of this nature are, of course, not immutable and we should beware of giving effect to the strong presumption in their favour in the face of some clear expression of a valid intention to infringe upon them. But we should at least look for quite certain indications that the legislature had adverted to the matter and had advisedly resolved upon so important and serious a course.

See also Bropho at 26 (Brennan J); State Authorities Superannuation Board v Commissioner of State Taxation (WA) (1996) 189 CLR 253 at 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ), 294 (McHugh and Gummow JJ); Telstra Corporation Ltd v Worthing (1999) 197 CLR 61 ("**Telstra v Worthing**") at 75 [22].

66. The common law rule referred to in Cain v Doyle has sometimes been understood as having a relatively narrow operation: legislation is construed so that *the Crown*, in the sense of the polity or the executive government of the polity, is not *itself* made liable to criminal liability, but that *officers* or *agents* of the government might still be criminally liable: see, eg, Wurridjal v The Commonwealth (2009) 237 CLR 309 at 380-1 [163]-[165] (Gummow and Hayne JJ), holding that the presumption applied so

that s 69 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (a "penal provision") did not apply to "the Commonwealth as a body politic", but that *officers* of the Commonwealth were nevertheless personally bound by the provision creating the offence.

67. However, in South Australia, s 20(3) of the SAI Act makes plain that, where on its proper construction a particular provision does not impose criminal liability *on the Crown*, that immunity is extended so that the provision *also* does not impose criminal liability on servants and agents of the Crown (unless the contrary intention "is expressed"). Plainly there is, in s 11(1) of the RC Act, no "expressed" intention to bind the officers, servants or agents of the executive government. The operation of s 20(3) is addressed further in paragraphs 69 to 71 below.

68. As is demonstrated by the analysis in paragraphs 30 to 40 above, and adapting what was said by this Court in Telstra v Worthing at 75 [22], the penal provisions created by s 11(1) "are central to the structure upon which the … scheme established by the State legislation [for compelling persons to appear as witnesses and to produce documents to a royal commission] rests". As in that case, it would "require the clearest indication of a legislative purpose to demonstrate that these penal provisions attach to the Commonwealth" (or to other polities in the Federation), and "[n]o such indication is to be seen in" the RC Act. And, by analogy with the conclusion reached in Telstra v Worthing, it follows that the obligations to which the penal provisions attach are not obligations to which the Commonwealth or other polities of the Federation are subjected.

69. Finally, it is necessary to address the assertion of South Australia (in its Defence at paragraph 28(h) (SCB 50)) that:

> with respect to any servant or agent of the Commonwealth, to refuse to comply with a summons issued under section 10 of the RC Act is not, for the purposes of section 20(3) of the *Acts Interpretation Act 1915* (SA), an act within the scope of the obligations of that servant or agent;

70. This argument is, with respect, specious. Section 20(3) cannot sensibly be construed as requiring a focus upon the narrow question of whether a servant or agent is under an obligation *to contravene* a particular statutory provision. Rather, the better view of s 20(3) is that, if the statutory provision in question is found not to bind the executive government, then it is also not to bind servants and agents of the executive government insofar as they are acting in their capacity as such — that is, insofar as they are performing the "obligations" of their employment, or office or agency.

71. A summons under s 10(c) is directed at the production of documents. Where documents are in the possession or control of a servant or agent of the Commonwealth (or another polity) by reason of their authority, obligations or capacity as such, it is

the servant or agent's obligations, as an aspect of their employment or office, to access, maintain control over or otherwise deal with those documents that is the "obligation" relevant to the operation of s 20(3). Likewise, where a servant or agent of the Commonwealth (or another polity), in the course of or by reason of the performance of their obligations as such a servant or agent becomes aware of matters upon which they might be required to give evidence under s 10(b), it is *those* obligations which are relevant for the purposes of s 20(3).

C Does the RC Act bind the Authority?

72. In relation to the issue of whether the Murray Darling Basin Authority ("**the Authority**") is an agency or instrumentality to which the presumption against binding the executive government applies, the NSW Attorney makes no submission.

D The RC Act does not bind current or former officers and employees of the executive government of the Commonwealth

73. In relation to the application of the RC Act to officers and employees, and former officers and employees, of instrumentalities of the Commonwealth, the NSW Attorney adopts paragraphs 44 to 48 of the Plaintiffs' Submissions.

E Intergovernmental immunity

74. The following submissions are advanced on the assumption that s 10 of the RC Act on its proper construction does apply to the executive government of the Commonwealth and the Authority.

75. Section 10 of the RC Act is a law of general application. It applies equally to all persons within its purview, permitting a commission to issue summonses to any persons who may be expected to be capable of providing relevant oral or documentary evidence to its inquiry. In Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority (1997) 190 CLR 410 ("**Henderson**") at 443-4, Dawson, Toohey and Gaudron JJ (Brennan CJ agreeing) said:

> There is nothing in the principles recognised in *Melbourne Corporation v The Commonwealth* or in any extrapolation of those principles to be found in the judgment of Dixon J in *Uther* or in the reasons of the majority in *Cigamatic* which would suggest that the Crown or its agents enjoy any special immunity from the operation of laws of general application, State or federal. Indeed, the contrary is affirmed. The rule of law requires such a result.

76. The Plaintiffs' submissions identify two alleged "capacities" of the Commonwealth which they submit are "modif[ied] or restrict[ed]" by the issue of a summons under the RC Act to officers of the Commonwealth or staff or members of the Authority.

77. The first "capacity" identified by the Plaintiffs is the "capacity to execute and maintain Commonwealth laws". A State law which, in its legal or practical effect, detracts from, alters or impairs the operation of a Commonwealth law is inconsistent with that law and, by reason of s 109 of the Constitution, invalid to the extent of the inconsistency. If and to the extent that officers or employees of the Commonwealth executive, or of any other authority charged with the execution of Commonwealth legislation, were impaired or prevented from executing a law of the Commonwealth by reason of the operation of State law, including s 10 of the RC Act, that State law would be inconsistent with the law of the Commonwealth to that extent, and inoperative.

78. It follows that there is no necessity for any intergovernmental immunity, separate and distinct from the accepted effect of s 109 of the Constitution, in respect of the "capacity to execute the laws of the Commonwealth". Any suggested inconsistency between a law of a State and the execution of a law of the Commonwealth is properly to be dealt with as a question arising under s 109 of the Constitution: see Henderson at 427 (Brennan CJ), 453 (McHugh J), 469-70; Commonwealth v Cigamatic Pty Ltd (in liq) (1962) 108 CLR 372 at 378 (Dixon CJ).

79. Notably, the Plaintiffs do not advance any contention that s 10 of the RC Act is invalid by reason of any inconsistency between s 10 of the RC Act and any law of the Commonwealth, such as the provisions of the Water Act 2007 (Cth) that confer powers, functions and capacities on the Authority. No doubt that is because, like the Defence Housing Authority considered in Henderson, the Authority is a creature of statute. It is endowed, by legislation, with capacities that are "predicated on the existence of a legal system", of which State legislation, including the RC Act, forms a part: see Henderson at 447 (Dawson, Toohey and Gaudron JJ; Brennan CJ agreeing).

80. The second "capacity" identified by the Plaintiffs is the "prerogative against discovery".

81. In his seminal work on the Royal Prerogative, Dr Evatt observed that "the Crown enjoys a Prerogative immunity from the obligation to discover documents *in actions in which it is a party*": H V Evatt, The Royal Prerogative (1987, Law Book Co Ltd) at p 123. However, as is apparent from that description, this "prerogative" related to discovery in actions in which "the Crown" was *a party*. A summons before an executive inquiry is not of that nature: the Commonwealth is not a "party" to a royal commission in the sense that it may be a party to a legal (or arbitral) proceeding.

82. In suits to which the Commonwealth is a party, the Crown's general immunity from discovery has been abolished by s 64 of the Judiciary Act 1901 (Cth): Commonwealth v Northern Land Council (1991) 30 FCR 1 at 22 (Black CJ, Gummow and French JJ). In Heimann v Commonwealth (1935) 54 CLR 126 at 132, Evatt J said:

> although the Crown, whether represented by the Commonwealth or a State, originally enjoyed the prerogative right of refusing discovery of documents, the passage of such Acts as the *Judiciary Act* in respect of the Commonwealth, and the *Claims Against the Government and the Crown Suits Act 1912* in respect of the State of New South Wales, has resulted in the disappearance of the old prerogative right by reason of the clearly expressed grant of inconsistent rights to litigants against the Crown.

As the reference to "disappearance" of the prerogative right makes clear, his Honour plainly was not suggesting that "the old prerogative right" had a broader operation, beyond legal proceedings, which survived.

83. Assuming that it is correct to characterise the Crown's immunity from discovery as a "prerogative" of the Crown, none of the authorities referred to in footnote 95 of the Plaintiff's Submissions suggests that the immunity ever had an operation beyond discovery (strictly so called) of documents in *inter partes* proceedings to which the Crown is a party. Indeed, in Duncan v Cammell [1942] AC 624 ("**Duncan v Cammell**"), a case involving what we would now recognise as a claim of public interest immunity, Viscount Simon LC expressly confirmed that the withholding of documents in answer to "a subpoena issued to a minister or department to produce a document (usually, but not necessarily in a suit in which the Crown is not a party)" was "not properly to be regarded as a branch of the law of privilege connected with discovery": Duncan v Cammell at 633, 641.

F Answers to questions in the Special Case

84. The questions in the Special Case should be answered as follows:

Question 1 should be answered "No", at least insofar as it relates to:

a. the Commonwealth;

b. employees or officers of the Commonwealth in respect of their activities and duties as such;

c. former employees of the Commonwealth in respect of their activities and duties as such; and

d. residents of a State other than South Australia;

(The NSW Attorney advances no submission as to whether s 10 empowers the First Defendant to require current and former employees of the Authority to attend to answer questions or to produce documents.)

If question 1 is answered as submitted above, it is unnecessary to answer 2.

The NSW Attorney makes no submission in relation to questions 3 and 4.

Part IV Estimate of time

85. The NSW Attorney estimates that 20 minutes will be required for the making of oral submissions on his behalf.

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