Crown immunity on trial - the desirability and practicability of enforcing statute law against the Crown

Steven Price*

Under section 5(k) of the Acts Interpretation Act 1924, the Crown is immune from all of the statute law of New Zealand which does not expressly apply to it. In light of the current political philosophy of level playing fields and governmental accountability, this state of affairs seems incongruous. Steven Price examines the history and rationale of section 5(k) and concludes that a blanket Crown immunity from statute law is unjustified in principle, uncertain in application, and has the potential to work great injustice. He goes on to look at some of the existing statutory regimes for monitoring the Crown's activities and bringing it to account when it infringes the law and suggests that these could serve as models if section 5(k) were to be reversed.

I INTRODUCTION

Is the Crown subject to statute law? It may seem surprising that an issue of such fundamental constitutional significance has not long since been resolved. Certainly, the sovereignty of Parliament gives it the freedom and power to make laws applicable to the Crown. Yet, as a matter of construction, it is often unclear whether the monarchs themselves, and the various ministries, departments and agencies of the Crown, are obliged to conform to the dictates of statutes which do not expressly include them.

In 1561, Brown J said of the Statute of Westminster *De Donis Conditionalibus*:[1]

> the King ... perceived the mischief and saw that it was necessary and profitable to provide a remedy, and therefore he ordained a remedy; and when he ordained a remedy for the mischief it is not to be presumed that he intended to be at liberty to do the mischief.[2]

His statement reflects the original form of the common law rule concerning the application of statutes to the Crown. In 1561 a statute applied to the Crown if it

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1 13 Ed 1, stat 1.

2 *Willion* v *Berkley* (1561) 1 Plowden 223, 248.

was *intended* to apply to the Crown, whether or not it contained express words to that effect. Moreover, the courts readily inferred such an intention,[3] but their willingness to subject the King to statute law stopped at the door of his prerogative. There was a strong presumption that a general statute was not intended to bind the King if it interfered with his prerogative rights.[4]

In more recent times, however, the King has generally been completely at liberty to do the mischief "for which he has ordained a remedy". In New Zealand, it has been held that the Crown is immune from the indefeasibility provisions of the Land Transfer Act 1915,[5] the fraudulent preference sections of the Bankruptcy Act 1908,[6] the provisions of the Wages Protection and Contractors' Liens Act 1908,[7] the Drainage and Plumbing Regulations 1959/19,[8] and from prosecution for breach of the conditions of a water right granted under the Water and Soil Conservation Act 1967.[9] Indeed in 1842 Baron Alderson was able to say that "it is inferred that the law made by the Crown, with the assent of Lords and Commons, is made for subject and not for the Crown."[10] His words were echoed a century later by Lord Diplock in *BBC* v *Johns*,[11] who said "laws are made by rulers for subjects".[12]

A leading decision of the Privy Council in *Province of Bombay* v *Municipal Corporation of the City of Bombay*[13] cemented in place the modern version of the rule: a statute will not be construed to apply to the Crown unless it expressly includes the Crown within its purview or does so by necessary implication. That presumption has been encapsulated in statutory form in New Zealand since 1888.

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3 In *Willion's* case (above n 2) the King was held to be bound by the Statute of Westminster *De Donis Conditionalibus*, a statute of general application which did not expressly name him.

4 See H Street "The Effect of Statutes upon the Rights and Liabilities of the Crown" (1948) 7 UTLJ 357, 359-61.

5 *Raven* v *Keane* [1920] GLR 168.

6 *Official Assignee* v*R* [1922] NZLR 265.

7 *Andrew* v *Rockell* [1934] NZLR 1056.

8 *Lower Hutt City* v *Attorney-General* [1965] 1 NZLR 65.

9 *Southland Acclimatisation Society* v *Anderson* [1978] NZLR 838.

10 *Attorney-General* v *Donaldson* (1842) 10 M & W 117, 124; 152 ER 406, 409.

11 [1965] Ch 32, 78.

12 It is apparent that the original rule was markedly transformed at the hands of the judges between 1561 and 1842. Professor Street details this transformation (above n 4), attributing it to the failure of judges to analyse carefully the early authorities; a prominent text-writer's error in citing only half the rule; and to the increasing judicial preoccupation with the literal interpretation of statutes. It was considered dangerous and mischievous for the courts to consider the policy behind the statute as a method of interpreting it.

13 [1947] AC 58.

The presumption is currently contained in section 5(k) of the Acts Interpretation Act 1924, which reads in part:[14]

> No provision or enactment in any Act shall in any manner affect the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

Section 5(k) raises a host of interpretative and substantive issues, the most important being:

- to what extent does section 5(k) succeed in exempting the Crown from general statutory obligations?
- to what extent *should* the Crown be immune from such obligations?
- how can the Crown's statutory obligations best be enforced against it?

This paper aims to provide:

(a) a discussion of the wording and application of section 5(k) of the Acts Interpretation Act 1924 (Part I);

(b) an outline of some of the interpretative difficulties it poses (Part II);

(c) a summary of the arguments in favour of the reversal of the presumption of Crown immunity from statute law (Part III); and

(d) an analysis of one area in which special provision is often made for the Crown, that of enforcement (including enforcement through the criminal law), an area which will assume greater significance if the reversal of section 5(k) is effected (Part IV).

II THE WORDING AND APPLICATION OF SECTION 5(K)

In New Zealand as in Canada and two Australian states[15] the Crown's position with respect to statute law is regulated by an Interpretation Act. As we have seen, section 5(k) of New Zealand's Acts Interpretation Act says that no enactment can

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14 The Acts Interpretation Act does not itself bind the Crown (although it applies its provisions to itself: s 28). The Crown Proceedings Act 1950 (which does not contain a binding section either) purports to apply the Acts Interpretation Act to the Crown (s 5(2)), but is technically incapable of doing so as s 5(k) insists that the binding section be contained *in the Act in question.*

15 Queensland (Acts Interpretation Act 1931 s 6(6)), Tasmania (Acts Interpretation Act 1954 s 13). For a discussion of the Canadian provisions, see P Hogg *Liability of the Crown* (2 ed, Carswell, Toronto, 1989).

affect the rights of the Crown "unless it is expressly stated therein that Her Majesty shall be bound thereby".

Section 5(k) is subject to introductory words of section 5: "[t]he following provision shall have effect in relation to every Act ... except in cases where it is otherwise specially provided", and to section 2 of the Acts Interpretation Act, which states that its provisions apply to every Act:

> except in so far as any provision hereof is inconsistent with the intent and object of any such Act, or the interpretation that any provision hereof would give to any word, expression or section in any such Act is inconsistent with the context; ...

Section 5(k) was first enacted in New Zealand, in very similar terms, in 1888. It amounted to a codification of the like common law presumption, which survives as the law in other commonwealth jurisdictions.[16]

A striking feature of section 5(k) is the way it provides a formula for applying statutes to the Crown. If an Act is to *affect the rights* of Her Majesty, that Act must say that it *binds* Her Majesty. Section 5(k), then, provides an explanation for the statutory provisions commonly appearing in section 3 stating that "this Act binds the Crown" or "this Act shall bind the Crown". These formulations simply mean that the Crown's rights are affected by the Act. Yet the double-sided nature of section 5(k) is potentially misleading as it is easy to conclude that in the absence of a binding section - a provision which expressly states that the Act is to bind the Crown to a greater or lesser extent - and Act cannot have any effect on the Crown at all. That cannot be right. The Crown is plainly "bound" (that is, its rights are affected) by statutes which confer powers on it, whether or not they contain binding sections.

For example, Part VIII of the Customs Act 1966, which confers powers on customs officers, is not expressed to bind the Crown. Accordingly, applying section 5(k) literally, the powers of customs officers to search persons, vehicles or boats, enter and search premises under customs warrants, and impound documents and take samples, do not "affect the rights" of the Crown. This nonsense may perhaps be explained by reference to the introductory words of section 5: it might be said that Parliament has "otherwise specially provided" that these provisions are to apply to the Crown. A similar argument might be made on the basis of section 2 - a finding that the Crown's rights were not augmented by these provisions would clearly be inconsistent with the context of the Customs Act.

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16 There is no practical difference between the common law and statutory forms of presumption. In his discussion of s 5(k) in *Southland Acclimatisation Society* v *Anderson* (above n 9), Quilliam J referred to cases from two jurisdictions, one of which had enacted its presumption in statutory form and one of which had not, but apparently did not feel that this difference was significant.

Alternatively, reference may be made to a number of cases in which it has been held that when Parliament must make something "express" then a clear implication from the context will suffice.[17] The New Zealand courts have held that section 5(k) cannot be construed literally as "the legislature cannot bind itself as to how it shall and how it shall not express itself in the future".[18] How clear must this implication be for a statute to be held to apply implicitly to the Crown? The answer would appear to lie in the "necessary implication" exception to the common law presumption of Crown immunity from statutes, an exception which the New Zealand courts have imported into their interpretation of section 5(k).[19]

In *Bombay*,[20] Lord du Parcq discussed the scope of the necessary implication exception. He rejected the contention that it is sufficient that the Act in question could not operate with reasonable efficiency unless the Crown were bound. The inference must be more persuasive than that:[21]

> If it can be affirmed at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may safely be inferred that the Crown has agreed to be bound.

Thus it can be argued that there is a necessary implication that the Crown is affected by these provisions because the beneficent purpose of the Customs Act would be completely frustrated if it were not.

A better explanation, however, is that parts of statutes which confer powers on the Crown do not require binding sections at all, precisely because they do not "affect" the rights of the Crown. It seems that in section 5(k) the ostensibly neutral word "affect" is used in the sense of "restrict" or "restrain" - or "bind", with which it is used synonymously.[22] The result is that these provisions do not need to bind the Crown expressly because they do not "affect" - that is, prejudice - its rights. This result is also in keeping with section 29(1) of the Crown Proceedings Act which allows the Crown to take advantage of the provisions of an Act even if it is not named therein.

What of the limits placed on these rights? Can it be argued that the Crown can take advantage of Part VIII of the Customs Act, yet because it contains no binding

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17 See, eg, *Chorlton* v *Lings* (1868) LR 4 CP 374.

18 Chapman J, *In re Buckingham* [1922] NZLR 771, 773 (with reference to the comparable s 6(j) Acts Interpretation Act 1908).

19 North P summed up the New Zealand position in *Lower Hutt* v *Attorney-General*, saying "it is clear beyond words that the Crown is not bound unless it is expressly so stated in the statute (s 5(k) Acts Interpretation Act 1924) or possibly follows as a necessary implication from the provisions of the statute". (Above n 8, 65).

20 Above n 13.

21 Above n 13, 62-3.

22 This point is made by P Hogg in *Liability of the Crown* (Law Book Company, Melbourne, 1971) 184-5.

section, ignore the restrictions placed on its powers? What if a customs official were to exercise a power of search and entry under section 217 without the requisite warrant? The answer is that these restrictions - even where they are contained in different sections of the statute or different statutes altogether - are part and parcel of the definition of the power. The officer would be violating the property rights of the owner of the premises, and without statutory authorisation would be subject to civil and criminal liability.

Thus the section 5(k) presumption of Crown immunity from statute has a more limited scope than might at first be apparent. The absence of the formulaic code-words "this Act binds the Crown" does not mean that the Crown is in no sense "bound" by the Act in question. To the extent that new powers are conferred on the Crown, its rights are augmented (hence "affected" in that sense only) and it is "bound" to operate within those powers. But this has nothing to do with section 5(k). The absence of a binding section merely means that the Act will not be construed to prejudice the rights of the Crown, unless an exception to the doctrine of immunity, such as a necessary implication, can be found.

Clearly this is not limited to encroachments on prerogative rights. In *Lower Hutt City* v *Attorney-General*[23] it was held that "rights" include all rights known to law. In that case, the Plumbing and Drainage Regulations 1959/19, which called for permits to be obtained, fees to be paid and plans to be submitted for inspection and approval, were held to infringe the Crown's property rights. Neither the regulations themselves, nor the parent Health Act 1956, contained a general binding section:[24] accordingly the Crown was not obliged to comply with the requirements.

On the other hand, even if a particular Act is empowered to affect the Crown's rights by virtue of a binding section or a necessary implication, that does not necessarily mean that the Crown's rights will be restrained by the Act in exactly the same manner as those of ordinary citizens. There is a strong presumption that the Crown is not intended to be a subject to criminal liability, a presumption which is not necessarily rebutted by a binding section alone.[25] Part IV of this paper will look at whether there is any justification for such a presumption. It may well be that the courts will be similarly reluctant to hold that an Act is apt to derogate from the royal prerogative unless it does so in very explicit terms. Perhaps a presumption against interference with the Crown's prerogative can be more easily justified than a blanket presumption of Crown immunity given that the Crown's prerogative powers relate closely to its function as governor.[26]

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23 Above n 8.

24 Nor, presumably, was there a necessary implication that the rights of the Crown were to be affected by the Act. There was no explicit finding to this effect, although North P did mention it as a possible general exception to s 5(k).

25 Above n 9.

26 Note that where legislation has no application except to the prerogative, this argument cannot be made. It is clear that where Parliament regulates the royal prerogative by

A The two roles of the Crown

Here an important distinction must be drawn between the Crown in its capacity as regulator, administering and enforcing the law, and the Crown in its dealings as a legal "person", selling life insurance for example.

Many statutes deal with the Crown's special position as governor, conferring powers - and concomitant duties and functions, to enter and inspect, to license various activities, to investigate accidents, and so forth. It is, as we have seen, inaccurate and inadequate to say that the powers and duties conferred in, for example, the Noise Control Act 1982, the Corporations (Investigation and Management) Act 1989 or the Apple and Pear Marketing Act 1971 apply to the Crown by virtue of a binding section or by necessary implication. That such provisions bind has more to do with Parliamentary sovereignty than any rule of interpretation: their whole purpose is to confer functions on the Crown and regulate their exercise.

Although the doctrine of Crown immunity is not really relevant to the *bestowal* of regulatory powers upon the Crown and the enforcement of the limits on them, it is easy to see that it is the Crown's unique position as governor that provides something of the rationale for the doctrine. Ambulances and fire engines ought not to be hindered by speed limits in emergency situations. The Armed Forces should not be subject to statutory firearms control. Agencies of the Crown should not have to pay tax to each other. In this context it is more appropriate to talk of statutes and regulations "binding" or "not binding" the Crown (that is, affecting or not affecting its rights) - although it is an entirely different question whether the Crown's special position as governor justifies the extent of its immunity from statute law.

This role must be distinguished from the actions of the Crown in its capacity as an ordinary legal individual. Modern governments characteristically engage in a wide variety of activities and perform a variety of roles far removed from that of regulator. The law has however been slow to acknowledge that the Crown in this second capacity is subject to the general law. Even now the Crown's liability in tort under the Crown Proceedings regime is not exhaustive.[27]

When the Crown is acting as an employer, a neighbour, a contractor, a business-person, for example, there is no good reason why it should not generally be obliged to adhere to the law applicable to private employers, neighbours, contractors and business-people. Yet the umbrella of Crown immunity from statute law covers these activities as well: absent express inclusion or a necessary implication the

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statute, the legislation displaces the operation of the prerogative to that extent: *Attorney-General* v *De Keyser's Royal Hotel* [1920] AC 508.

27 See Crown Proceedings Act s 6. Tortious liability is imposed on the Crown in four separate categories, although it had been imposed more broadly in the Crown Suits Act 1881. See generally, Hogg *Liability of the Crown*, above n 22, 69-70.

Crown is legally free from general statutory regulation. That the Crown in this capacity is protected is largely because of its alter ego as regulator.

It is true that this distinction becomes awkward or impossible to draw in the case of activities such as the building of schools in which these roles coincide, but this overlap should not lead us to conclude that these functions are always and everywhere inseparable, or that the breadth of the Crown's immunity is necessary in order for it to govern effectively.[28] The rule is particularly anachronistic in light of the expansion of state activities, especially in the commercial sphere.

III INTERPRETATIVE DIFFICULTIES POSED BY SECTION 5(K)

In practice Parliament often expressly provides that particular statutes are to apply to the Crown, usually in section 3. More often, however, it does not. In any case, the necessary implication doctrine suggests that the question is more complex than it might seem from a cursory reading of section 5(k). In fact a number of difficulties make it unclear in many cases just how far the Crown is legally obliged to conform to statute law:

1 Who is the Crown?

The definition of "the Crown" is somewhat blurry, giving rise to problems for those seeking to apply the doctrine of Crown immunity. The issues surrounding the make up of the Crown have arisen frequently in the past, often in the context of a claim for the Crown's exemption from taxation.[29]

It seems that the status of a particular body depends in large part on the amount of legal control exercisable by the Crown over that body.[30] The law is far from certain, however, and quasi-governmental bodies have sometimes been forced to litigate to clarify their positions.[31]

Occasionally Parliament makes express its intentions regarding the status of particular statutory bodies. Section 7 of the New Zealand Government Property Corporation Act 1953, for example, says:

> (1) The Corporation is hereby declared to be an instrument of the Executive Government of New Zealand, and a Government Department within the meaning of the Crown Proceedings Act 1950.

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28 See Part III.

29 Eg, *BBC* v *Johns* [1965] Ch 32, *Bank voor Handel en Scheepvart* v *Administrator of Hungarian Property* [1954] AC 584.

30 This rule was established by the Privy Council's decision in *Fox* v *Government of Newfoundland* [1897] AC 667. See also *Smith & Smith Ltd* v *Smith* [1939] NZLR 588, 590.

31 *Southland Boys and Girls High School Board* v *Invercargill City Corporation* [1931] NZLR 881. Education Boards do not receive Crown immunity.

> (2) The Corporation shall not be bound by any Act that is not binding on Her Majesty in right of New Zealand, and shall be entitled to all rights, privileges, exemptions and immunities of Her Majesty in right of New Zealand (including exemptions from taxation and rates).

This is to be encouraged; but there remains a significant area of uncertainty in respect of the bodies upon whose status Parliament has not seen fit to pronounce.

This difficulty is compounded in relation to the Crown's general immunity from statute law. The immunity extends to all whom it would prejudice the Crown *not* to include.[32] So in the *Lower Hutt* case,[33] the plumbers, who were no more than independent contractors employed by the Crown, were given the benefit of the Crown's immunity because to have held otherwise would have been to prejudice the rights of the Crown. Thus many individuals and bodies may be entitled to immunity in some circumstances but not in others. Crown immunity, then, is not only a fuzzy concept, it is also elastic, neither of which is conducive of legal certainty.

2 *Which Acts bind?*

The wording of section 5(k) is apparently tight and clear. "No provision or enactment in any Act shall in any manner affect the rights of Her Majesty ... unless it is expressly stated therein that Her Majesty shall be bound thereby". We have seen that this apparent certainty is deceptive. The Crown may take advantage of general statutory provisions which do not name it. Similarly, no binding section is required for provisions which confer powers on the Crown, or manifestly regulate its behaviour. Moreover, some statutes may apply to the Crown by necessary implication.

On my count, over two-thirds of the public statutes presently in force in New Zealand contain no binding section.[34] It might be easy to say, for one or more of the reasons given above, that many of these Acts do, in fact, apply to the Crown. In *Fitzgerald* v *Muldoon*,[35] for example, Wild CJ had no hesitation in holding that the Superannuation Act 1974 bound the Crown as employer, although it did not do so expressly. Nevertheless, a large question mark hovers over the operation of the presumption of Crown immunity with respect to legislation which is not so intimately and obviously connected with the Crown. The Crown has occasionally

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32 *Wellington City Council* v *Victoria University of Wellington* [1975] 2 NZLR 301.

33 Above n 8.

34 417 out of 610.

35 [1976] 2 NZLR 615, 623. Wild CJ noted that the Superannuation Act did not declare that it bound the Crown, but was in no doubt, "having regard to the definitions of 'employer' and 'person' in s 2 and the terms of s 43 that the Crown is liable for employer's contributions in respect of the contributory earnings of an employee of a government department".

been chastised for its overzealous assertions of its alleged immunities:[36] what if it were to claim immunity from the Equal Pay Act 1972, the Trespass Act 1980, the Securities Transfer Act 1977 or the Fencing of Swimming Pools Act 1987?[37] None of these Acts expressly bind the Crown, but it seems that each would be workable without the Crown being bound, precluding the finding of a necessary implication.

Certainly the courts would do their utmost to include the Crown in most situations, but despite the vagaries of the necessary implication doctrine, and the existence of other possible exceptions to Crown immunity[38] it is not always possible to do so. Thus it is, in some cases, impossible to tell without litigation whether a particular statute legally applies to the Crown.

3 *What happens when the Crown is expressly only partially bound?*

The situation is further complicated in the cases of statutes which are only partially expressed to bind the Crown. If only one Part or one section is expressed to bind the Crown then the courts will apply the maxim *expressio unius est exclusio alterius* and hold that the rest of the Act does not bind the Crown. Partial exemptions of the Crown, the courts have held, are simply enacted *ex majori cautela* (out of an abundance of caution) and do not give rise to the contextual argument that the rest of the statute binds the Crown.[39]

The same is true where particular branches of the Crown are exempted: other parts of the Crown (or Crown agents for the time being) may claim immunity if the rights of the Crown are threatened. So in *Smithett* v *Blythe*[40] - a claim against the Crown for lighthouse dues - a statute which specifically exempted Crown warships from such dues was held to say nothing about the general right to charge other Crown ships, and the ordinary presumption against inclusion of the Crown was applied.

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36 For example, *Dyson* v *Attorney-General* [1911] KB 410, 423. See Street, above n 4 at 358.

37 Clearly these bind to the extent they they confer powers on the Crown, but we are here concerned with the Crown in its role as a legal subject.

38 In *Liability of the Crown*, Professor Peter Hogg details the exceptions to the rule, including the inclusion of the Crown by logical inference or by incorporation, by reference, of an Act which does not bind into a contract or Act which does. In fact, Professor Hogg goes as far as to suggest the given the number of exceptions to the presumption, its reversal would not result in as big a change to the law as might at first be thought.

39 *Andrew* v *Rockell* [1934] NZLR 1056, 1058.

40 (1830) 1 B & Ad 509; 109 ER 876.

4 How far is the Crown bound?

Even where it is ascertained that a particular Act or part of an Act binds the Crown, an additional problem arises. To what *extent* are the rights of the Crown affected by the Act's provisions? In *Southland Acclimatisation Society* v *Anderson*[41] Quilliam J discussed the meaning of a typical binding section contained in section 3 of the Water and Soil Conservation Act 1967.[42] He said that:[43]

> it binds the Crown to comply with the particular provisions of the Act. It defines the respective rights under the Act of the Crown and of individuals. It establishes the limits of what the Crown may and may not do and it enables the subject to know at what point remedies against the Crown may arise. There are, of course, some remedies which could apply, such as an application for review or a declaration in lieu of an injunction.

So the Crown was bound by the substantive provisions of the Water and Soil Conservation Act, and by some associated civil procedures, but not by the sections which provided for the prosecution of offenders, because Quilliam J could find no clear intention that the Crown was intended to be criminally liable. Thus, a determination that a particular Act substantively applied to the Crown (often no easy question in itself as we have seen) is not necessarily conclusive of the question of the extent to which the Crown is covered by the Act's enforcement provisions.

The Noise Control Act 1982, for example, is expressed to bind the Crown.[44] The Crown is therefore bound "to comply with the particular provisions of the Act", such as the section 5 obligation to keep the noise on its premises down to a reasonable level. It is unlikely, following *Southland* that the Act's prosecution provisions extend to the Crown in the event of it failing to keep the noise down, although individual Crown servants who infringe the Act may be subject to criminal prosecution. But what of the Act's other enforcement provisions? Would the Department of Scientific and Industrial Research, for example, be obliged to comply with abatement notices issued by the Noise Control Officer under section 6? Or a direction to abate under section 9(3)? Could an officer seize and impound the source of the noise - and recover the enforcement expenses as a debt due to the local authority under section 7?

Other Acts throw up similar sets of questions. The Construction Act 1959, for instance, is also expressed to bind the Crown.[45] Applying the reasoning of Quilliam J, then, this enables the subject to know at what point remedies may arise against the Crown, such as judicial review or declaration in lieu of an injunction. Here again, the Crown is undoubtedly bound to comply with the Act's health, welfare and safety provisions such as the duties it imposes to appoint safety

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41 Above n 9.

42 Section 3 reads "This Act shall bind the Crown".

43 Above n 9, 843.

44 Section 3. An exception is provided for the Armed Forces.

45 Section 3. Again, the Armed Forces are exempted.

supervisors (section 9), fence dangerous excavations (section 12A) provide safe scaffolding (section 13) and have first aid and drinking water on hand for construction workers (section 17).

Once again, it is unclear whether or not the Crown can be criminally prosecuted, even though section 24 makes any breach of the Act's provisions an offence. Section 22 imposes vicarious liability on employers[46] for any contravention by their employees of any requirement, obligation, rule or provision of the Act unless the offence was committed without the employer's knowledge, consent or connivance and the employer had taken reasonable steps to prevent the offence. Offenders are liable to fines on summary conviction.

The Act also makes extensive provision for the inspection of construction sites (sections 5-7). Inspectors may enter such sites, require the production of documents, take samples, conduct examinations, and issue directions to prevent accidents. Would the Crown be bound to comply with these in respect of, say, state housing construction or public works? And what of the power of a District Court Judge to order defendants to do specified work to prevent the continued non-observance of the Act or of regulations made under it (section 28)?

It is all very well for Parliament to say, or for the courts to hold, that an Act binds the Crown. Yet the *Southland* case demonstrates that this does not necessarily mean that the statute applies to the Crown in the same manner as it applies to private citizens. Parliament uses a variety of methods to ensure compliance with its statutory edicts. Certainly it has the power to extend its enforcement provisions to the Crown. But as a matter of interpretation it may be unclear in many cases precisely how far Parliament intends its statutes to bind the Crown. To what extent do provisions relating to the keeping of records, licensing,[47] inspection, and the reporting and investigation of accidents affect the rights of the Crown? To what extent are the statutory powers of officers to issue compliance directives, make confiscations, seek mandatory court orders and recover costs exercisable in relation to the Crown?

5 *Is there jurisdiction to try the Crown?*

A separate difficulty with the operation of section 5(k), also concerning enforcement, was discussed in the *Southland* case. Even if Quilliam J had found clear indications in the Water and Soil Conservation Act that Parliament intended the Crown to be liable to criminal prosecution. Can Her Majesty be prosecuted in her own courts?

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46 Defined in s 2 as "Any person who is liable for the payment of wages of persons employed on any construction work ...".

47 If one of the terms of a licence was the payment of a tax, for example, would the Courts be prepared to hold that Parliament intended the Crown to be bound to the extent that a regulatory body is empowered to derogate from a prerogative immunity?

Quilliam J noted that such prosecutions would have to be made under the Summary Proceedings Act 1957, which does not expressly provide that it binds the Crown, and concluded that "as the law stands I can see no jurisdiction for a magistrate to entertain an information against the Crown".[48] He dismissed the plaintiff's argument that it would be intolerable that such liability could not be the subject of proceedings in the appropriate court, saying that "if such a lacuna exists then it is not for this court to fill it. That is a task for the legislature if it thinks proper to do so".[49]

In practice, no doubt, all of these theoretical difficulties are papered over by the Crown's frequent voluntary compliance with statutory requirements. But the practical situation rests uneasily with the Crown's ability to assert that it is entitled to immunity. Ought we to allow the Crown the opportunity to dig in its toes?

IV THE PROPOSED REVERSAL OF SECTION 5(K)

It is submitted that the presumption of Crown immunity is uncertain in its scope of unpredictable in this application. It may be that many of the problems are potential rather than actual - section 5(k) has given rise to little recent litigation - but this fact does not detract from the desirability of clarification and reform. It would be unfortunate if such change had to wait for a constitutional crisis to justify it.

It was this potential for abuse that prompted the Law Commission of British Columbia[50] to recommend the reversal of the Crown immunity presumption in their Interpretation Act, which was cast in similar terms to section 5(k). The

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48 Above n 9, 843.

49 Above n 9, 843, Quaere, whether the cases concerning incorporation by reference could not be used in this context. In *Brophy* v *NS* (1985) 68 NSR (2d) 158 it was held that the Crown was liable to pay pre-judgment interest under Nova Scotia's Crown Proceedings Act 1967. The Crown Proceedings Act itself only made the Crown liable for post-judgment interest, but in s 6 provided that proceedings be instituted in accordance with the Judicature Act 1972. Section 38(a) of that Act provided that pre-judgment interest was payable in all proceedings but did not mention the Crown. Those provisons were held to have been incorporated into the Crown Proceedings Act. Professor Hogg points out (above n 38) that the incorporating statute need not expressly refer to the adopted one. For example, many Canadian crown proceedings statutes contain provisions stating that the rights of the parties in suits involving the Crown are to be as nearly as possible the same as in a suit between subject and subject. This has been held to apply to the Crown those statutes that would be applicable to a private litigant even though they are not expressed to bind the Crown: *Canadian & Industrial Gas & Oil* v *Government of Saskatchewan* [1979] 1 SCR 37. Could it not be argued that where Parliament has clearly sought to impose criminal liability on the Crown, it has implicitly picked up and applied the Summary Proceedings Act to the Crown for that purpose?

50 *Report on the Legal Position of the Crown* (1972), ch 7.

reform was implemented in 1974. Section 14(1) of the British Columbian Interpretation Act now reads:[51]

> Unless it specifically provides otherwise, an enactment is binding on Her Majesty.

In 1981 Prince Edward Island also reversed its presumption, albeit without retroactive effect.[52] A similar change was propounded by the New Zealand Law Commission in 1987,[53] a mere 80 years after Sir John Salmond attempted, in vain, to include the reform in the 1908 Acts Interpretation Act Amendment Bill.[54]

Current academic opinion seems to be unanimous in its support for the reversal of the rule.[55] With regard to ease of statutory interpretation alone, a change is desirable: indeed, in one sense, the reversal of section 5(k) would only demand a semantic change in drafting practice. If the law were reversed, and immunity from a particular statute was desired, the draftsperson need only insert an express immunity section. At the moment, if the Crown is not to be bound then the draftsperson simply says nothing at all on the matter. It has already been mentioned that this is the case with about two-thirds of New Zealand's present statutes.[56] That statistic triggers nagging doubts. Can it really be said that the omission of a binding section is in all cases the product of a conscious decision to exempt the Crown?

Consider the New Zealand legislature's response to section 5(k). There are some surprising omissions from the list of 193 Acts which contain binding sections. Examples include the Electoral Act 1956, the Defence Act 1971, the Mining Act 1971, the Indecent Publications Act 1963, the Commissions of Inquiry Act 1908, the Passports Act 1980 and the Public Contracts Act 1908. No doubt many of these bind in accordance with some of the exceptions to section 5(k) discussed above. But that would also be true of many of the Acts which are expressed to bind the Crown, such as the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1947, the District Courts Act 1987 and the Acts Interpretation Act itself.

A close examination of the statute law reveals a wide variation in the proportions of groups of statutes administered by different Government

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51 RSBC 1979 c 206.

52 RSPEI 1981 c 18 s 14.

53 *Legislation and its Interpretation: The Acts Interpretation Act and related legislation* (1987) NZLC PP1.

54 The clause was unceremoniously expunged at the behest of the then Prime Minister Sir Joseph Ward: R Cooke (ed) *Portrait of a Profession* (Reed, Wellington, 1965).

55 See, for example, Hogg *Liability of the Crown* (Law Book Co, Melbourne, 1971) 199-203; Glanville Williams *Crown Proceedings* (Stevens, London, 1948) 53; de Smith *Constitutional and Administrative Law* (eds H Street and R Brazier, Pelican, Harmondsworth, Middlesex, 5 ed, 1985) 146.

56 Above n 34.

departments and agencies which are expressed to bind the Crown. For example, none of the Acts administered in the Ministry of Defence contain binding sections; this compares with 50 percent of those administered by the Justice Department, and 44 percent of the Labour Department's statutes.

Nor is there always consistency with Parliament's approach to statutes of similar subject matter. Of the Department of Scientific and Industrial Research's three research levy Acts, the Building Research Levy Act 1969, the Heavy Engineering Research Levy Act 1978 and the Wheat Research Levy Act 1974, only two (the former two) bind the Crown.[57] The Fishing Industry Board Act 1973,[58] the Pork Industry Board Act 1982[59] and the Poultry Board Act 1981[60] all contain binding sections: the Wool Industry Act 1987, the Apple and Pear Marketing Act 1981 and the Dairy Board Act 1971 do not. Of the statutes concerned with the family, three contain binding sections (the Family Courts Act 1980, the Family Proceedings Act 1980 and the Domestic Protection Act 1982)[61] and four do not (the Family Protection Act 1955, the Guardianship Act 1968, the Status of Children Act 1969 and the Adoption Act 1955).

There does not seem to be any rational and consistent legislative policy behind the apparently scattershot application of statute law to the Crown. Yet it is understandable that our draftspeople often fail to consider the extent to which the Crown should be bound, given the complexity of the issues involved, the pressure for their time and the fact that the Crown's interests are not prejudiced when the issues are set aside or forgotten. Far better, then, that a failure to address the issue result in the Crown being bound: such a presumption tips the scales away from the possibility of injustice and gives those responsible for promoting legislation a powerful incentive to consider the issue as a matter of course in the framing of their Bills. The reversal would have the additional advantage of making each Act complete on its face. A full understanding of an Act would not require resort to the Acts Interpretation Act. The law would be much simpler and clearer: the thorny necessary implication and Crown agency problems would largely be dissolved.

More importantly, as a matter of policy it is preferable that the Crown be generally bound by the substance of statute law. As it stands section 5(k) conflicts with the basic constitutional assumption that the Crown is under the law. "[E]very man, whatever his rank or condition", says Dicey in his *Introduction to the Study of the Law of the Constitution*, "is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".[62]

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57 Each in s 3.

58 Section 2A.

59 Section 3.

60 Section 3.

61 Each in s 3.

62 (Macmillan, London, 10 ed, 1960) 193. This is Dicey's second meaning of the "rule of law".

Certainly it is true that the government is not verily a legal citizen. It requires special powers and privileges in order to be able to govern effectively. The Crown's "brain", the Cabinet, is however in an excellent position to secure the immunities required by the Crown: blanket immunity is superfluous. Recall the distinction between the two functions of the Crown: as regulator and as regulated; governor and legal person. It was suggested that the Crown's regulatory role provided something of a rationale for the doctrine of Crown immunity; and that the immunity is nevertheless cast too widely in view of the Crown's ability to secure exceptions for itself where necessary. In fact, many Acts make special provisions for the Crown *as law enforcer*. Section 53 of the Transport Act, for example, exempts the Police, Traffic Officers and drivers of ambulances and fire engines from compliance with speed limits in emergency situations.

Similarly, under the Dog Control and Hydatids Act 1982, customs, defence and police dogs being used in an official capacity are exempted from the sections which permit any person to seize or destroy dogs which are attacking persons or stock, or rushing at vehicles (section 56(7)) and owners liable for damage caused by their dogs (section 57(3)). Special provision is also frequently made for Crown servants acting in good faith and pursuant to particular Acts, protecting them from civil and criminal liability for their actions.[63]

Not only do the actions of regulators sometimes receive special treatment; so do their decisions. Section 334(10) of the Local Government Act 1974 states that:

> Neither the Crown nor the Minister of Transport nor the council shall be liable for damages in respect of any accident arising out of the existence of a gate or cattlestop across any road erected under a permit granted pursuant to this section.

On the other hand, sometimes Parliament sees fit to *impose* liability on the Crown. For example, the Land Transfer Act 1952 contains no binding section but section 172 provides that an action lies against the Crown for damage due to the mistake or misfeasance of the Registrar.

These provisions demonstrate that the Crown does not need a blanket immunity from statute law in order to govern effectively. Moreover, in light of the size, activities and breadth of legislative regulation of the modern welfare state, it is checks, and not blank cheques, that are desirable. As Professor Hogg points out in his book *Constitutional Law of Canada*,[64] "when powers and immunities are specifically granted by statute, a powerful tradition exists that their scope be carefully defined". This is especially true in the New Zealand context where there is no supreme law, Parliament is unicameral, political parties are highly

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63 These are included in Acts that contain binding sections, such as the Dangerous Goods Act 1974 (s 25) and the Misuse of Drugs Act 1975 (s 34) as well as offering an additional layer of protection in Acts which do not, such as the Mental Health Act 1969 (s 124).

64 (Carswell Co Ltd, Toronto, 1985) 235.

disciplined, and successive governments have been strongly cabinet-oriented and prodigious in their legislative efforts. If the reform were effected, the Crown would not only have to define any exemptions it considers necessary, it would also have to justify them. In the words of the Law Commission of British Columbia, "[i]t places the onus on the claim for immunity".[65]

There is no reason in principle why the Crown should not generally be subject to its own enactments. It is difficult to fault the three hundred year old reasoning of Brown J in *Willion's* case: "it is a difficult argument to prove that a statute, which restrains men generally form doing wrong, leaves the King at liberty to do the wrong".[66] It is in keeping with current attitudes on open government and accountability for the Crown to be subject to statutory controls where it engages in an activity that is refuted by statute. Do the reasons behind the passage of measures dealing with safety standards, working conditions, hygiene, noise and pollution control, rent-setting, and the like, have any less force or application where the Crown is carrying out the same activities? If not, then should the statute itself have any less force or application? The Crown should practice, and not be given licence to breach, what it preaches.

V THE ENFORCEMENT OF THE LAW AGAINST THE CROWN

It must be realised that the reversal of section 5(k), whilst it would make the law clearer and fairer, would not solve all the problems relating to Crown immunity. The reversal is but the first step. The *Southland*[67] case demonstrates that even if the Crown is expressly bound by an Act there may be limits on the extent to which its rights are affected. Moreover, as the Law Reform Commission of New South Wales has pointed out, a reversal would not eliminate all of the bugbears:[68]

> It suffers from the same defect [as the original presumption]. It does not give sufficient weight to the pressures of competing demands upon the time of draftsmen and legislators. No doubt it is practicable for draftsmen and legislators to give specific attention to the problem in respect of provisions as to which it is manifest that a major issue of policy is involved, that the rights of subject will be seriously affected, or that a difficult question of interpretation will arise if express provision is not made. But it is all too easy under the pressure of a heavy workload, to fail to anticipate these considerations where they do not manifestly arise from the nature of the provisions in question. Oversights are inevitable.

In fact, by concentrating on the "all or nothing" proposal to reverse section 5(k) this discussion has to that extent obscured the real issues, namely, how far *ought* the Crown to be bound by statute law? What immunities does it really need in

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65 Above n 50, 67.

66 Above n 2, 248.

67 Above n 9.

68 *Report on Proceedings By and Against the Crown* LRC 24 (1975).

order to govern? These are questions which must sooner or later be addressed, whether or not the reform goes ahead. A standard practice of using section 3 to set out the extent of the Act's applicability to the Crown would, if adopted, allay some of the concerns expressed by the New South Wales Law Reform Commission. It could be uniformly used to resolve matters such as:

(i) Whether the Act is to apply to the Armed Forces

Perhaps it would be better to ask how far the Armed Forces should be bound? Do the members of the Armed Forces and Defence Ministry employees really need the complete immunities they are frequently given - even from Acts which are otherwise expressed to bind the Crown? See, for example, the Carriage of Goods Act 1979 section 4, the Shipping and Seamen Act 1952 section 3, the Clean Air Act 1972 section 22, and the Town and Country Planning Act 1977 section 176.

(ii) The extent to which local bylaws can affect the rights of the Crown

Parliament often exempts the Crown from compliance with local body bylaws. Examples include road traffic bylaws made under section 72 of the Local Government Act 1974 and Harbour Board bylaws concerning the carriage and storage of dangerous goods.[69]

(iii) Whether the Crown is to pay tax

The Crown has a common law immunity from taxation, but some Acts make express provision for particular taxes to be paid by the Crown, such as petroleum tax under the Local Government Act and excise duty under the Customs Act. In both cases, however, Parliament has recognised and provided for the Crown's special position by permitting the Governor-General in Council to exempt the Crown from all or some of its tax liabilities.

(iv) Whether special provision need be made with respect to land belonging to the Crown

For example, the Fencing Act 1978 does not apply to National Parks, roads, railways land or Crown land reserved for sale;[70] and the Soil and Conservation and Rivers Control Act 1941 provides that it shall not in any way affect Her Majesty's interest in any property of any kind belonging to or vested in Her Majesty.[71]

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69 See Dangerous Goods Act 1974 s 4.

70 Section 3.

71 Section 170.

(v) Whether the Crown is to be subject to the Act in question's enforcement provisions or some alternative enforcement process

The rest of this paper will consider some of the present statutory methods of controlling the behaviour of the Crown.

The position of the Crown as governor has already been dealt with: the conferment of statutory powers has nothing to do with section 5(k) and the Crown has little difficulty in securing the immunities it needs. It is to be hoped that this question will be systematically addressed when legislation is being framed. But what of the other side of the Crown's activities - those it performs in common with, and often in competition with, citizens and companies of the public? We have seen that, even whilst wearing this hat, the Crown benefits from its general immunity from statute. The Crown must, however, obey the substantive provisions - at least, those that are expressed in terms of duties - contained in Acts which do not bind it expressly or by necessary implication.[72]

Two crucial questions fall to be considered: firstly, by what structures are these obligations to be overseen? Secondly, how are contraventions to be remedied? Quilliam J held that statutory provisions act as signposts for the civil remedies which may arise against the Crown. In practice, however, Parliament employs statute law. These range from the apparent inclusion of the Crown within the operation of an Act's general enforcement procedures, through to the enactment of special procedures designed to remedy Crown breaches.

A General and Limited Binding Sections

We have seen that Acts which contain a binding section or which bind by necessary implication raise questions concerning the extent to which the enforcement procedures they establish can be used to monitor and regulate the performance of the Crown's statutory obligations. These questions would attain new significance if the section 5(k) presumption were to be reversed. The Crown would then - at least arguably - come under the jurisdiction of a greatly increased number of inspectors, investigators and other officials. Some of the most common enforcement provisions relate to:

(i) the keeping of records;
(ii) licensing and registration;
(iii) permit requirements;
(iv) inspectors' powers of entry, investigation, confiscation, examination, searches, taking of samples, and so forth;
(v) inspectors' powers to make requisitions and issue directives;
(vi) the investigation of accidents;

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72 Perhaps a necessary implication will be harder to find in this context as it will be difficult to argue that an Act's purpose would be completely frustrated if the Crown, which here is merely another regulated actor, were not included.

(vii) powers to obtain information, documents and evidence;
(viii) civil remedies against infringers to compel compliance or recover enforcement expenses or compensation; and
(ix) prosecution and pecuniary penalties.

The awkwardness of the interface between the Crown and the general law seems to have been implicitly recognised by Parliament in its occasional practice of limiting the scope of binding sections so that while the Act binds the Crown, its enforcement provisions do not. For example, the sections of the Holidays Act 1981 which deal with holiday periods and wages bind the Crown,[73] but those concerning inspections, the keeping of records, directives, offences, penalties and the power of inspectors to recover earnings payable by employees, do not.

In fact, New Zealand legislation seems to have covered most of the permutations of binding and not binding the Crown with respect to inspections, licensing, penalties and offences, requisitions and the like:

* The Dangerous Goods Act 1974, which contains a binding section, expressly exempts the Crown from its licensing provisions as well as those that involve fees or forfeitures.[74] Amongst the provisions which apparently apply to the Crown, however, are those relating to summary offences,[75] and powers of inspectors to make tests, seize and detain goods and make requisitions.

* The Factories and Commercial Premises Act 1981 also binds the Crown, but exception is made for Crown offices and commercial depots in relation to Part I (Inspectors) and IV (Requisitions).[76] These exceptions do not include the registration requirements,[77] nor those relating to offences, penalties,[78] the keeping of records,[79] and restrictions on employment.[80]

* The Commerce Act 1986 expressly binds the Crown in so far as it engages in trade, but provides that the Crown is exempt from the prosecution and pecuniary penalty provisions.[81] The Crown is not exempt, then, from the requirement that merger or takeover proposals be cleared by the Commerce Commission,[82] the obligation to

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73 Sections 24-30 (by virtue of s 7).
74 Section 4.
75 Section 39.
76 Section 3.
77 Sections 9-11.
78 Part VI.
79 Section 15.
80 Section 12.
81 Section 5.
82 Section 66.

keep records,[83] or from the Commisson's powers to obtain information, documents and evidence.[84]

* The Crown is not expressly bound by most of the substantive law (and the parallel enforcement provisions) in the Property Law Act 1952, including provisions relating to general rules affecting property, covenants and powers, and mortgages.[85] Part VIII (Leases and Tenancies) binds the Crown "in relation to leases of dwelling houses".[86] Some enforcement provisions would seem to bind, such as sections 116E and 116F, which give lessors and lessees remedies against each other for breaches of implied covenants. The remedies include court orders that the breach be rectified, compensation be paid and costs be recovered.

These examples show that the selective application of particular parts of the Acts to the Crown is one method used by Parliament to cope with the difficulties of enforcement. Often the policy behind the exemptions like those cited above is clear.[87] Yet difficulties remain over the interpretation of the unexcepted parts of the Acts. It is still likely, for instance, that the offence and penalties provisions of the Factories and Commercial Premises Act will not be held to apply to the Crown. The same is true of the Dangerous Goods Act. And although the Crown is expressly immune from requisitions under the Factories and Commercial Premises Act, would it be bound to comply with those of the Dangerous Goods Act? Even requisitions directed at the Armed Forces, which receive no special immunity under that Act? And what of mandatory District Court orders under the Property Law Act? How is this to be reconciled with section 17 of the Crown Proceedings Act which forbids the award of an injunction against the Crown?

A consideration of the terms of the Property Law Act throws up another problem. It would seem that where only some parts of an Act are expressed to bind the Crown, there is a strong contextual implication that the rest of the Act is not intended to bind the Crown. Moreover, this implication would survive a reversal of section 5(k). It must not be assumed that the reversal of section 5(k) will automatically place the Crown within the ambit of all of our statutes: Acts such as this must be looked at particularly carefully.

It is to be hoped that the simple exclusion of the Crown from the scope of the enforcement measures will not become a standard answer to the difficulties raised. It is, rather, a non-answer to the problems, and is hardly in keeping with the constitutional tradition of equality under the law. Nor does it recognise the

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83 Section 56.

84 Section 98.

85 Parts II, V and VII respectively.

86 Section 104B.

87 But note the inconsistencies in this practice. Why is the Crown exempted from prosecution in the Commerce Act but not the Dangerous Goods Act or the Factories and Commerical Premises Act? Why is it subject to inspections in the Dangerous Goods Act but not in the Factories and Commercial Premises Act?

importance of remedies for breaches of statute law. Where doubt remains over the extent to which the Crown is subject to statutory enforcement mechanisms, it is submitted that the position is also unsatisfactory and that it should be resolved in the Acts themselves. Parliament should not shrink from applying general enforcement provisions to the Crown where there is no good reason to do otherwise.

There are, however, a variety of other approaches which have been used to bring the Crown to account.

B The Commerce and Fair Trading Acts

One approach is that adopted in the Commerce and Fair Trading Acts, both passed in 1986. Section 5 of the Commerce Act[88] states:

> (1) Subject to this section, this Act shall bind the Crown in so far as the Crown engages in trade.[89]
>
> (2) The Crown shall not be liable to pay a pecuniary penalty under section 80 of this Act.
>
> (3) The Crown shall not be liable to be prosecuted for an offence against this Act.
>
> (4) Where it is alleged that the Crown has contravened any provision of this Act and that contravention constitutes an offence, the Commission or the person directly affected by the contravention may apply to the [High] Court for a declaration that the Crown has contravened that provision; and, if the Court is satisfied beyond a reasonable doubt that the Crown has contravened that provision, it may made a declaration accordingly.[90]

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88 Section 4 Fair Trading Act is in similar terms, although there is no equivalent to subs(2) because, unlike the Commerce Act, it contains no separate pecuniary penalty regime as an alternative to prosecution for certain infringements.

89 Of course, in its capacity as regulator and prosecutor, the Crown's rights are certainly affected by the Act, although it is not there "engaging in trade".

90 The precursor to this provision, s 12 of the Commerce Amendment Act 1979, was enacted in 1979. In introducing the Amendment Bill to Parliament the Minister of Trade and Industry, the Hon Lance Adams-Schneider, mentioned the sort of circumstances that the provision was intended to deal with. He cited an instance when coal was not available from the government depot for three days because of some change in arrangements and prices (NZ Parliamentary debates Vol 406, 1979: 3264). In other contexts, the reasons given by our Parliamentary representatives for the inclusion of binding sections in legislation have varied. The Private Schools Conditional Intergration Act 1975 was amended to include a binding section to "... remove any possibility of legal doubt and underline the good faith of the Crown". (NZ Parliamentary debates Vol 410, 1977: 125, Hon LW Gandar) A similar amendment to the Fishing Industry Board Act 1963 was said to be "... in line with the Government's policy of binding the Crown". (NZ Parliamentary debates Vol 400, 1977: 3852, Hon Colin Moyle) The Hon Colin Moyle also discussed the Government's

This section makes it clear that the Crown is not to be held criminally liable for infringing the Act but where the Crown oversteps the criminal mark, a declaratory judgment is available instead. It enables the Commerce Commission to play a watchdog role over the Crown's activities: the policing of the Crown's compliance is not dependent on the exercise of aggrieved individuals who have the resources, inclination and standing to seek the civil remedies mentioned by Quilliam J in *Southland*.[91]

The section is given a rather unusual flavour by the express importation of a criminal standard of proof. It thus has civil and criminal elements; there is effectively a criminal prosecution with a civil remedy. The Commission or plaintiff must prove that the elements of an "offence" have occurred (presumably it is left open for the Crown to raise defences such as those in section 44 of the Fair Trading Act) but there is no possibility of a criminal conviction or fine for the Crown to pay "to itself". With respect to the Crown a declaration alone should suffice to prevent repetition of the breach.

C The Clean Air Act

It will be noted, however, that the award of a declaration is nevertheless at the discretion of the High Court Judge and enforcement still requires litigation. A less adversarial (and less expensive) method of keeping the Crown in line with the law is used in the Clean Air Act 1972. Section 22(4) of that Act provides that the Crown is bound by the Act except in relation to the prosecution and licence-cancellation sections.[92] The measures dealing with licensing and inspection are binding.

Section 22 makes it a function of the Director-General of Health, the Clean Air Council and local authorities, in "proper" cases, to report breaches of the Act by the Crown to the permanent head of the government department responsible. The permanent head is then required to enquire into the circumstances of the alleged contravention. If the allegation is confirmed, he or she "shall employ the best practical means to terminate that contravention or avoid recurrence". Thus, existing enforcement structures are utilised but at the same time the special position of the Crown is recognised. Parliament seems to be saying that although the Crown is under the law, there are better ways of bringing it to account than criminal prosecution.

The informal procedure adopted in the Clean Air Act could be supplemented by a formal appeal structure if this was thought necessary. Disputes could perhaps be resolved in a similar manner employed by the Commerce and Fair Trading Acts,

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policy of binding the Crown in relation to the Fisheries Amendment Bill 1986, saying that "... it is fair and reasonable that the Crown should be bound by the same rules as other fisheries, ..." (NZ Parliamentary debates Vol 432, 1986: 2884).

91 Above n 9, 843.

92 Sections 50 and 52.

that is, by High Court declaration. The appropriate arbiter might vary with the Act in question. Disputes over the Crown's payment of special rates under section 131 of the Local Authorities Loans Act 1956, for example, are referred to the Audit Office. If the proposed Building Code were to bind the Crown, it has been suggested that disputes could be handled by the Ombudsmen or Planning Tribunal.[93]

D The Transport Act

Another example of a parallel enforcement structure can be found in the Transport Act 1967. With the exception of road traffic bylaws made under section 72, that Act binds the Crown.[94] The Act makes its an offence, inter alia, to exceed prescribed speed limits, infringe parking restrictions and overload vehicles.[95] Traffic Officers are given powers to enforce these measures by imposing fines for infringement. Disputes concerning facts of the alleged offence, or over the non-payment of fines, are heard in the District Court.[96]

Section 69C, however, substitutes a different procedure in respect of the overloading of Crown vehicles. Notices of infringement setting out the fine payable are served on the permanent head of the department of state responsible for the vehicle. the department then has two weeks in which to object to the Secretary for Transport on the grounds that the fine was incorrectly calculated. This provision, and the section 53 speed limit exemption for emergency services, are good illustrations of Parliament's ability to subject the Crown to the general law, and keep a check on its behaviour, without subjecting it to the full measure of its enforcement powers.

It is interesting to note that Parliament is apparently comfortable with the concept of the Crown paying a fine "to itself". It is sometimes suggested[97] that this is folly, but Professor Hogg[98] has argued that fines are not simply returned to the infringing government body and in fact make public accounts more accurate in that they better reflect the costs incurred by the different branches of the government. Moreover, the imposition of a fine may provide extra incentives for agencies, having limited budgets, to prevent the recurrence of the infringement. It is submitted that the mere fact that a particular body happens to be a government agency does not automatically render fines an inappropriate form of enforcement.

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93 K Palmer *Memorandum Re Building Industry Commission: Proposal for New Zealand Building Code to bind the Crown*, 6.

94 Section 200.

95 Sections 42A and 69B.

96 Section 47A.

97 See, eg, Latham CJ in *Cain* v *Doyle* (1946) 72 CLR 409, 418.

98 *Liability of the Crown* 2 ed, above n 15.

E Licensing Requirements

Parliament uses a variety of other statutory mechanisms to regulate the activities of the populace. A frequent example is the creation of statutory licensing authorities. Some of these statutes "bind" the Crown,[99] others do not.[100] But the presence or absence of a binding section does settle the questions concerning their application to the Crown. In what circumstances will the Crown be obliged to obtain a licence? Furthermore, to what extent is it bound to comply with its terms and conditions?

Section 225 of the Public Works Act states:

> It shall be lawful and shall be deemed to have always been lawful for the Crown to be granted or to acquire in any way and to hold, on the same terms and conditions as any of the Crown's subjects any licence, permit, right, privilege or authority which can be granted by the Crown or by any Court or any public or local authority under any Act which can be acquired or held by any of the Crown's subjects.

This provision was originally enacted as section 34 of the Public Works Amendment Act 1948, which allowed the Crown to obtain licences under specific Acts but exempted it from the expiry provisions associated with those licences. In its present form, by contrast, this section does not seem to add anything to the Crown's general power to apply for licences as a legal "person".[101] It may be that this is an attempt by Parliament to bring the Crown under the general law in so far as it engages in licensed activities. There is, however, no authority on whether the acquisition of a licence is a precondition for the Crown's performance of a licensed activity or whether compliance with licensing provisions would have any effect on the Crown's legal obligations in the event of a subsequent decision not to comply with licensing conditions.

If the Crown was obliged to apply for licences then, depending on the powers it is given under the particular statute in question, the licensing body would seem to have the discretion to deny the application - or make the licence subject to such terms and conditions as it has the discretion to impose. Section 36(6) of the Petroleum Act 1937 side-steps this difficulty by providing that, although the Crown must obtain a licence in order to be able to prospect or mine for petroleum, and although the licence confers the same *rights, benefits and privileges* on the Crown as any other licensee:

> Nothing in this section shall be construed to impose any obligation on the Crown or on any person or persons holding a licence solely on behalf of the Crown or to render

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99 Eg, Transport (Vehicle and Driver Regulation and Licensing) Act 1986, Toxic Substances Act 1979.

100 Eg, Mining Act 1971, Explosives Act 1957, Gaming and Lotteries Act 1977.

101 The definition of "person" in the Acts Interpretation Act s 4 includes a corporation sole.

> binding on the Crown any provisions of this Act that are not expressed to bind the Crown.

The Dangerous Goods Act 1974 takes a slightly different approach. Under section 4, as has been mentioned, the Crown need not take out a licence in order to store dangerous goods. Instead, section 4(6) provides that:

> In any case where the Crown stores or uses or intends to store or use dangerous goods on premises which, except for subsection (2) of this section, would require to be licensed under Part II of this Act, the Crown shall advise the licensing authority for the district in which those premises are situated of the address of the premises and the nature and quantity of dangerous goods which are, or are intended to be, so stored or used.

In each case the regulatory body concerned at least has knowledge of the Crown's activities so that it can oversee such parts of the legislation as do bind the Crown. In neither case does the regulatory body have the power to place restrictions on the Crown's activities. It is submitted that this arrangement is somewhat less than satisfactory.[102] When the Crown engages in regulated activities it is in general unlikely to have any good reason for special treatment: in fact, immunity would give it an unfair advantage over licensed private competitors. A better solution might be to bring the Crown within the purview of licensing regulations but to give it the power to disallow conditions if the circumstances require. Section 3 of the Misuse of Drugs Act 1975 provides something of a precedent for this sort of measure, allowing the Governor-General by Order in Council to exempt any instrument of the executive from any of its provisions.[103] The presumption would be in favour of inclusion rather than exclusion, and once again the onus would be on the Crown to justify any exemptions it considers necessary.

F Criminal Prosecution

The final matter to be addressed concerns the law's ultimate enforcement mechanism. Is it desirable (or indeed possible) to impose criminal liability on the Crown? Ordinarily criminal sanctions will not present a problem as crimes are seldom committed by the Crown and where they are, they will normally be attributable to wrongdoing individual Crown servants who will be liable to criminal prosecution. But that does not answer the question of whether the Crown itself can, or should, be made criminally liable.

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102 Although the reversal of s 5(k) would have no effect on those Acts which expressly exempt the Crown from their licensing provisions, it would nevertheless highlight the significance of these issues as it would subject the Crown to a variety of licensing regimes whch previously could not affect its rights.

103 The same approach can be applied to the Crown's obligations with respect to permit requirements, inspectors' requisitions, conditions of water rights, registration requirements, building code provisions and the like.

It has been suggested[104] that where the Crown acts as an owner, a manufacturer, a builder, or a landlord it should as a general proposition be bound by the welfare statutes which regulate these activities. Yet many of these statutes make breaches of their rules a criminal offence of strict liability, often imposing vicarious liability on employers for the acts of their employees.[105] It is at least clear that where an Act does not bind the Crown expressly or by necessary implication, the Crown cannot be prosecuted for an offence arising under that Act. Nor is there any difficulty with Acts such as the Clean Air Act and the Commerce Act which specifically exempt the Crown from their prosecution and penalty provisions and introduce a different remedy procedure.

What is the position where an Act creating offences does bind the Crown? One judge has doubted that it is ever possible for the Crown to be made criminally liable.[106] The Crown would have to be prosecuted in its own court, he said, and criminal penalties are inappropriate as the Crown cannot be imprisoned and fines would simply be paid to itself. Moreover, the maxim "the King can do no wrong" implies that the Crown is inherently incapable of committing an offence; or, at least, that there is no tribunal with jurisdiction to try the sovereign.

It has already been argued that there is nothing fundamentally wrong with fining the Crown. Nor should the impossibility of imprisoning with Crown dissuade us from making it criminally liable: as Professor Hogg points out, corporations cannot be imprisoned either, but this is no bar to their answerability in the criminal courts. Besides, the Crown has been made subject to tort law since the Crown Suits Act 1881 - why cannot the criminal law also apply to it? Admittedly, there is not the same private interest in the criminal prosecution of the Crown as there is in making it civilly liable. Yet an important role of the criminal law is public denunciation: its educative and general deterrent functions are no less in significant or useful in the case of infringements by the Crown.

In the few cases in which this issue has been considered, it has been held that it is possible for criminal liability to be imposed on the Crown.[107] The contemporary position is that the Crown may indeed be made liable and subjected to those penalties which can suitably be imposed against it.[108]

It will be recalled that in *Southland* Quilliam J suggested that the courts have no jurisdiction to entertain an information against the Crown.[109] This is because

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104 Part III above.

105 For example, Construction Act 1959 s 22, Bushworkers Act 1945 s 15B.

106 Latham C J in *Cain* v *Doyle* above n 97, 416.

107 *Cain* v *Doyle* above n 97; *Canadian Broadcasting Corporation* v *Attorney-General for Ontario* (1959) 16 DLR (2d) 609; *Southland Acclimatisation Society* v *Anderson* above n 9.

108 CHH McNairn *Governmental and Intergovernmental Immunity in Australia and Canada* (Univeristy of Toronto Press, Toronto, 1977), 87.

109 Above n 9, 843.

the only machinery for bringing summary offences before the court is that contained in the Summary Proceedings Act 1957, which does not bind the Crown. The proposed reform of section 5(k) would, if effected, appear to dissolve this objection. Would this mean that liability to criminal prosecution will follow as a matter of course? Professor Hogg has suggested that if a statue binds the Crown by express words then it is safe to conclude that the Crown is also subject to penal sanctions (in the form of fines) in the statute.

The *Southland* case, however, indicates that, in New Zealand at least, the position is less clear. That case concerned the Water and Soil Conservation Act 1967, which contains a general binding section.[110] It would seem, then, that the Crown is prima facie liable to prosecution under section 34, which provides for the imposition of fines on summary conviction. Yet the primary ground of Quilliam J's decision was that there is no clear indication in the Act that the Crown was intended to be criminally liable under it. His conclusion rested on an interpretation of the words "every person" in section 34, which he found were not apt to include the Crown. It is also significant that in the other cases which he discussed, *Cain* v *Doyle* and *Canadian Broadcasting Corporation* v *Attorney-General for Ontario*, the definition of the word "person" in the criminal statute concerned did include the Crown, but this fact alone was held to be insufficient to displace the presumption that the Crown cannot be criminally liable for a supposed wrong.

Two things follow from this reasoning. Firstly, it will be harder for courts to find a necessary implication that the Crown is bound where the Act in question creates criminal offences; and secondly, even where an Act binds the Crown in a general way criminal liability does not automatically follow. The intention to apply criminal provisions to the Crown must be unequivocal before it will be upheld. It is likely that this presumption would survive a reversal of section 5(k).

McNairn has argued that there is no warrant for such an extreme presumption.[111] Where it engages in regulated activities the Crown should have no call for special treatment. He adds that "it does seem odd that a single provision should apply in its directive aspect but not in its penal aspect to the Crown",[112] and concludes:[113]

> A legislature may seek to secure the realisation of the objectives of a regulatory scheme with the aid of the devices of civil sanctions, administrative controls, criminal sanctions, or some mixture thereof. If criminal sanctions should be the chosen control technique there seems no reason why the Crown should be entitled to a greater immunity than would otherwise be the case.

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110 S 3.

111 Above n 108, 87-91.

112 Above n 108, 89.

113 Above n 108, 90.

It may be that there are better ways of bringing the Crown to account; ways that are less litigious (such as the Clean Air Act procedure) or do not involve the prospect of the criminal conviction of the Crown (such as the Commerce Act solution), but the option of criminal liability ought not to be discarded out of hand. It has the advantage of convenience, in that it utilises existing enforcement mechanisms, and is in keeping with modern notions of fairness and equality under the law.[114]

VI CONCLUSION

In the midst of a series of rules of construction contained in a one hundred year old statute lies an invidious provision which has had a substantive effect on the limits of the behaviour of the Crown and its liability for acts which to other citizens and corporations are tightly regulated or illegal. Section 5(k) of the Acts Interpretation Act greatly reduces the Crown's obligations under New Zealand's statutes by removing their ability to affect the rights of the Crown unless they do so expressly or by necessary implication. That presumption is difficult to justify, is uncertain in its application, and has the potential to create injustice. Indeed the complexity of the doctrine and the interpretative difficulties it poses are themselves a recommendation for reform. That reform is under consideration in a number of jurisdictions,[115] and has been implemented in two.[116]

If the presumption of Crown immunity were to be reversed, so that New Zealand statutes which do not expressly include the Crown can nevertheless affect the Crown's rights if their language is apt to include the Crown, then the law would have virtually come full circle. What began as a rule which sought to *apply* the intention of Parliament, has gradually congealed into a rule which *presumes* the intention of Parliament, a rule which operates in all circumstances where it is not expressly displaced in the Act concerned. The proposed reform would return the law to the position in which the Crown is, in the normal course of events, under the general law. Any immunities would have to be defined and justified.

If the Crown is to be brought more fully under the substantive law then it becomes important to ask what monitoring mechanisms are in place to ensure that it complies with the law, and how breaches are to be remedied if it does not. This paper has outlined some of the measures already adopted by Parliament to control the activities of the Crown. It is submitted that these can be used as models for future statutes, and perhaps the reform of existing ones which would acquire new teeth with regard to the Crown if the presumption were to be reversed.

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114 The Crown Proceedings Act's method of making the Crown a party to proceedings could also be employed with respect to criminal prosecution. Accordingly, the defendant would be the relevant government department or an officer of the Crown sued on behalf of the Crown, or, where there is no appropriate department or officer, the Attorney-General (Crown Proceedings Act s 14).

115 For example in New South Wales, Ontario and New Zealand.

116 Prince Edward Island and British Columbia.

But perhaps it should be asked whether, in many instances, there is a need for such separate structures at all. The criminal law is an adequate enforcement mechanism which could be extended to encompass the Crown, particularly in the context of regulatory offences. Certainly the courts would require an abundantly clear intention to accept such a result. But perhaps if the presumption of Crown immunity were reversed the courts' unwillingness to impose criminal liability on the Crown would be watered down a little.

In summary, then, there are two sets of issues which need to be considered by those promoting legislation. The first relates to the substantive obligations created by the legislation. Is the nature of the Act such that special provision needs to be made for the Crown in respect of:

(i) particular obligations, such as measurements relating to Crown land, taxation or local authority bylaws?

(ii) a particular branch of the Crown, such as the Armed Forces or the Police Department? If an immunity for the Crown is desirable, need it be a complete immunity? Could it instead be restricted to particular sectors of the Crown only so that the Act still apples to the Crown "in so far as it engages in trade" for example?

The second set of issues relates to the enforcement of statutory obligations against the Crown. In part, they are merely a repetition of the first questions. In this context, it should be asked:

(i) Is there any good reason why the Act's general enforcement provisions concerning the keeping of records, inspections, registration and the like, should not encompass the Crown?

(ii) How are the Crown's statutory obligations to be overseen? If immunity from enforcement structures is required must the whole of the Crown be given immunity? And can some parts of the general enforcement structure still be employed? Instead of exempting the Crown from a licensing regime, for example, the Crown could be exempted from measures relating to the payment of application and licence fees, and to the expiry and forfeiture of licences - or it could be given the power to disallow particular conditions.

(iii) Is it appropriate that the Crown be subject to provisions relating to fines and inspectors' powers to enter and search, issue directives, and so forth?

(iv) How are contraventions by the Crown to be remedied? Is an alternative complaints or disputes procedure such as those used in the Clean Air and Transport Acts desirable? Or should breaches be remedied through declaratory proceedings brought by affected individuals or enforcement bodies? How are such civil remedies as are available under the Act to be reconciled with the Crown Proceedings Act?

(v) Is there any good reason why the Act's criminal provisions (if any) should not apply to the Crown? If there is not, criminal liability should be imposed on the Crown in very clear terms.

Whether or not the proposed reform of section 5(k) is effected, the increasing tendency of Parliament to address the questions of how far statutes are to apply to the Crown and how they are to be enforced against the Crown is to be welcomed.[117] In the rush of Parliamentary business it is all to easy for these issues to get swept under the carpet.

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117 As evidenced by the Commerce and Fair Trading Acts' provisions, and the fact that over the years an increasing proportion of statutes have been expressed to bind the Crown. For example, only 20 percent of the statutes passed in the 1950s and still in force contain binding sections. That figure compares with 22 percent of the statutes passed in the 1960s, 33 percent of those in the 1970s and 51 percent of those passed since 1980 and still in force. Note that the creation of state-owned enterprises which are subject to market forces and general legislation also serves to bypass the operation of s 5(k) by removing these corporations from the umbrella of Crown immunity.

WESTERN SAMOA LEGISLATION LISTS AS AT 1 JUNE 1989

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Patrick Fepulea'i, Barrister and Solicitor,
Western Samoa, formerly Senior State Solicitor, Western Samoa
and
Rosemary Gordon, Barrister and Solicitor of the High Court of New Zealand

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