App of p. 425. (1976) 2 NSWLR 570.
Ref to 31 ALR 317.
Ref to (1982) 2 NSWLR 182.

Ref to (1983) 1 NSWLR 110.

[HIGH COURT OF AUSTRALIA.]

CAIN . . . . . APPELLANT;
INFORMANT,

AND

DOYLE . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1946.

SYDNEY, *July* 23.

MELBOURNE, *Oct.* 16.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

Crown—Ex-members of the Forces—Reinstatement in employment—Termination of that employment—Prohibition by statute—Breach—"Employer"—Inclusion of the Crown—Liability of Crown to penalties imposed by the statute—Charge of aiding and abetting breach—Principal offence—Proof—Re-establishment and Employment Act 1945 (*No.* 11 *of* 1945), *ss.* 10, 18 (1), (2)—*Crimes Act* 1914-1941 (*No.* 12 *of* 1914—*No.* 6 *of* 1941), *s.* 5.

The *Re-establishment and Employment Act* 1945, by s. 10, defines "employer," unless the contrary intention appears, as including the Crown (whether in right of the Commonwealth or of a State): and provides, by s. 18, (1) that when an employer has reinstated a former employee in accordance with the Division of the Act containing the section, he shall not without reasonable cause terminate the employment of that employee: Penalty £100; and (2) that, in proceedings for a contravention of the section, the onus of proof of reasonable cause shall be upon the employer. Section 5 of the *Crimes Act* 1914-1941 provides that any person who aids, abets, counsels or procures, or by any act or omission is in any way directly or indirectly concerned in, or party to, the commission of any offence against any law of the Commonwealth, shall be deemed to have committed that offence and shall be punishable accordingly.

D., the manager of a munition factory conducted by the Commonwealth Government was charged before a magistrate that he without reasonable cause did terminate the employment of W. contrary to the provisions of s. 18 of the *Re-establishment and Employment Act* 1945 and s. 5 of the *Crimes Act* 1914-1941. W. was a former employee at the factory and, upon his return from war-service, had been reinstated in accordance with the Act. By a notice issued in accordance with instructions from the Department of Munitions and signed by the Industrial Officer on behalf of D. and with his authority, W.'s employment was terminated, the reason stated being the cessation of

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hostilities and the consequent reduction of the need of the factory products. The magistrate dismissed the information on the ground that, since the Commonwealth could not be convicted of the principal offence under s. 18, no offence of aiding and abetting under the *Crimes Act*, s. 5, could be proved to have been committed by D. On appeal,

Held, by *Latham* C.J., *Rich*, *Starke* and *Dixon* JJ. (*Williams* J. dissenting), that the appeal should be dismissed, on the grounds :—

(1), by *Latham* C.J., *Rich* and *Dixon* JJ. (*Starke* and *Williams* JJ. dissenting), that s. 18 (1) of the *Re-establishment and Employment Act* 1945 does not create an offence of which the Commonwealth may be guilty, therefore D. could not be convicted of aiding and abetting the Commonwealth in the commission of such an offence.

(2), by *Rich*, *Starke* and *Dixon* JJ., that the evidence did not show that D. procured the termination of W.'s employment or was knowingly concerned therein or party thereto.

Per Rich and *Dixon* JJ., that sub-s. 2 of s. 18 of the *Re-establishment and Employment Act* 1945 cannot be invoked upon a prosecution under s. 5 of the *Crimes Act* 1914-1941.

ORDER NISI for review.

Upon an information laid by James Cain, honorary secretary of the Munitions Sub-Branch of the Returned Servicemen's League of Victoria, R. H. Doyle, manager of the Commonwealth Government's Munition Factory at Footscray, Victoria, administered by the Department of Munitions, was charged in the Court of Petty Sessions at Footscray, before a magistrate, that on 10th May 1946, without reasonable cause, he did terminate the employment of Charles Leslie Weston Wright contrary to the provisions of s. 18 of the *Re-establishment and Employment Act* 1945 and s. 5 of the *Crimes Act* 1914-1941.

Evidence given by and on behalf of the informant showed that Wright, a married man, was employed as a carpenter at the Commonwealth Government's Munition Factory at Footscray from 30th March 1942 until he enlisted in the Royal Australian Air Force on 1st September 1943. Wright was discharged from the Royal Australian Air Force on 9th November 1945 and on 10th January 1946 he recommenced work at the factory as a carpenter. On 2nd May 1946, the industrial officer, acting with the authority of Doyle who at all material times was the manager of the factory and as such was himself an employee of the Commonwealth, gave to Wright a notice, signed by Doyle or signed under an authority from him, in the following terms :—" I regret to inform you that, because of the cessation of hostilities and the consequent reduction of the need of factory products, it is necessary to terminate your services from close of business

on Friday 10th May 1946." A certificate of service issued by Doyle, on a form headed "Department of Munitions," stated that Wright left the service at the factory on 10th May 1946 the cause being "surplus to requirements." A witness said that the industrial officer informed him that Wright's dismissal was in accordance with a ministerial direction and showed to him a "Munitions' Staff Circular," bearing date 2nd August 1945 and issued by the Ministry of Munitions, which, so far as material, was as follows :—"Wage personnel : Order of Discharge . . . the following decision approved by the Prime Minister is to be implemented :—1. The following is to be the general order for observance where circumstances render necessary a reduction in the number of employees in any activity—(*a*) women or single men ; (*b*) married men without family ; (*c*) married men with family ; (*d*) members of the Forces (which included members of the Royal Australian Air Force) and persons judged to be entitled to preference under the *Re-establishment and Employment Act* 1945 in accordance with the length, locality and nature of their service. 2. The foregoing order of discharge does not apply to employees who commenced work with the Department prior to 3rd September 1939, and who formed the nucleus around which the Government factory organization developed . . . 4. . . . the rule of 'last to come, first to go' should apply." Wright ceased to be employed at the factory on 10th May 1946. Another witness stated that Doyle had informed him that he, Doyle, had the power of hiring and discharging employees at the factory and that he had delegated the exercise of that power to the industrial officer ; further, that he, Doyle, knew of Wright's impending dismissal and that he agreed with the decision of the industrial officer in this respect.

Evidence was not given by or on behalf of Doyle.

The magistrate held that the Commonwealth could not be guilty of the principal offence under s. 18, and that therefore no offence could be proved to have been committed by Doyle. He dismissed the information.

From that decision the informant appealed, by way of order nisi to review, to the High Court.

Further facts and the relevant statutory provisions sufficiently appear in the judgments hereunder.

Ashkanasy K.C. (with him *Rapke*), for the appellant. The evidence does not show the basis upon which the employee was dismissed. The actual decision to dismiss the employee was made by the respondent ; admittedly, within the departmental policy approved by the Minister acting on behalf of the Commonwealth. If the contention

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be right that where the employer is the Crown no one could aid or abet or be directly or indirectly concerned in something within the meaning of s. 5 of the *Crimes Act* 1914-1941 because the Crown could not commit an offence, there would be no way by which an employee of the Crown could obtain compensation under the *Re-establishment and Employment Act* 1945 because it would not be possible to obtain a conviction. Under s. 5 an aider and abettor is deemed to have committed the offence and it follows that he must also be deemed to be the employer. Upon conviction of such a person the actual employer would thereupon become liable under s. 19 of the *Re-establishment and Employment Act* to pay compensation to the employee. Throughout the Act there is a manifest intent to bind the Crown. The penalty would be ineffective in all its provisions, but if the Act did not provide a penalty it would be possible to contend that the Act conferred a right and that right would be enforceable by civil action (*O'Connor* v. *S. P. Bray Ltd.* (1)). The *Commonwealth of Australia Constitution Act* effected a radical change in the position of the Crown and as to the enforcement of the law. It is within the power of the sovereign body of the Commonwealth to enact that the Crown can commit an offence. The Crown in right of the Commonwealth can commit an offence and, therefore, in this particular case, aiders and abettors can be prosecuted. Although it is suggested in *Stone* on *The Province and Function of Law* (1946), p. 86, that he who is all powerful cannot bind himself; that the sovereign is all powerful; and that the sovereign cannot bind himself nor anything that concerns his liberty, it is submitted that in the case of the Commonwealth the Crown is an integral part of the Commonwealth, but the Crown as representing the executive Government is not in fact the whole Commonwealth. Applying s. 78 of the Constitution and *In re Judiciary and Navigation Acts* (2) it is recognized that the conception of punishment for an act inhibited is provided for by the use of the word "matters" in s. 78. Certain conceptions are implicit in the Constitution. The Constitution creates the Commonwealth and the States as separate juristic persons. The Crown remains one and indivisible under the Constitution and a corporation sole. The Crown, under the Constitution is: (i) a person external to the Commonwealth and the States to whom loyalty is owed; and (ii) a corporation sole—it is an integral part of the Commonwealth and of the States. Within the Commonwealth the King, or Crown, is: (*a*) a component part of the legislative power—s. 1 of the Constitution; and (*b*) the sole repository of the executive power —s. 61 of the Constitution. The Constitution destroys the doctrine

(1) (1937) 56 C.L.R. 464.

(2) (1921) 29 C.L.R. 257, at p. 266.

that all power is theoretically vested in the Crown, as is demonstrated, for example, by the whole basis of the division of legislative power. The existence of separate juristic entities shows that it is possible that there could be a prosecution on behalf of the Crown directed against the Crown, that is, a prosecution by the Crown not against itself but against the Executive. It may be that under s. 18 (1) of the *Re-establishment and Employment Act* the Crown could commit an offence and not be liable to a penalty but that upon the conviction the compensation provisions of s. 19 (1) (*b*) would apply.

Barwick K.C. (with him *Curlewis*), for the respondent. Section 5 of the *Crimes Act* 1914-1941 does not create a substantive offence ; it is merely an " aiding and abetting " provision, therefore the onus is upon the prosecutor to establish the principal offence. There is no evidence proper to be entertained by the Court of the principal offence, nor is there any evidence that the respondent aided, abetted, counselled or procured, either directly or indirectly, or was knowingly concerned in, the commission of that offence within the meaning of s. 5. As this is a prosecution under s. 5 of the *Crimes Act* and not under s. 16 (5) or s. 18 of the *Re-establishment and Employment Act* the onus of proving the exceptions is on the prosecutor : see *Crimes Act*, s. 14. On general principles when the aider and abettor is charged the whole of the principal offence must be proved by the prosecutor. It was essential that the appellant should establish the circumstances from which the inference could be drawn that the dismissal of Wright was without reasonable cause, or was outside the exceptions of s. 16 of the *Re-establishment and Employment Act*. In the circumstances that Wright's original appointment was due to expansion attributable to the war ; that the expansion still existed when he returned from war service ; and that his dismissal was an act of retrenchment due to the cessation of hostilities and, as a consequence he was " surplus to requirements," the dismissal of Wright was reasonable. The onus was upon the prosecutor to show that, if the respondent was not guilty of aiding or abetting or was not knowingly concerned in the commission of the offence, at least he must have known of the facts which constituted the offence and, to establish his guilt, that such knowledge on his part was beyond doubt, that is, knowledge of the elements of the offence and not dismissal *simpliciter* but dismissal without reasonable cause. It is clear from the evidence that the respondent had no such knowledge. Upon its true construction the *Re-establishment and Employment Act* does not enable the Commonwealth to be prosecuted for a penalty

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under s. 18. It may be it has power to do so if the Commonwealth so desires. No submission is made with reference to that on behalf of the respondent, nor is it argued to the contrary. It is conceded that the Act binds the Crown, whatever that expression may mean. The circumstances that a particular Act binds the Crown does not mean of necessity that the Crown is liable to be sued in respect of breaches of the Act, or the duty that is imposed by the Act. The two steps that need to be taken in order to render the Crown liable to be dealt with by the courts, particularly criminally, are : (i) that the Act shall impose or purport to impose some obligation or duty upon the Crown ; and (ii) that provision must be made for the enforcement in the courts of that obligation or duty. The fact that the Crown has not been liable hitherto for tort does not mean that in some sense the Crown had no duty towards the subject out of which tortious liability might otherwise have come. The fact that the Crown has been unable, except in the case of the Commonwealth, to be sued for tort has flowed rather from something in the nature of a presumption that even though there be the duty no person in the courts can impute to the Crown a breach of the duty. Although the *Re-establishment and Employment Act* binds the Crown, it has not provided and does not intend to provide that the Crown can be liable to prosecution. It binds the Crown to the extent of the obligation or duty, but it does not provide that the Crown in respect of any breach of that obligation or duty can be punished. The Act does not make the Crown—the Commonwealth—amenable to the criminal jurisdiction of the courts of the Commonwealth. Section 18 does not disclose any intention to render the Crown liable to a penalty ; indeed, there is a sufficient contrary intention otherwise, especially when considered in conjunction with the background that, apart even from the Constitution and s. 56 of the *Judiciary Act*, wrong cannot be imputed to the Crown (*Mackenzie-Kennedy* v. *Air Council* (1)). Also no provision is made in the Act for any special jurisdiction in any court to deal with the Commonwealth. The penalties are recoverable summarily through State courts invested with Federal jurisdiction and no special provision is made for giving those courts jurisdiction over the Crown. It must be remembered that the only method by which the penalty could be collected would be by imprisonment in default of payment. In the Act the Crown accepted the obligation or duty but did not provide a remedy against itself. The doctrine that wrong cannot be imputed to the Crown was established by two distinct lines of thought, namely : (i) that it is part of the King's dignity and his sovereignty to be immune from process in his courts and, because he is not liable to

(1) (1927) 2 K.B. 517, at p. 523.

process, there cannot be a wrong without a remedy, therefore there can be no wrong by the King ; and (ii) there cannot be an imputation of wrong to the King. There is an infallibility with respect to the Crown and because wrong cannot be imputed to him he cannot be proceeded against in his courts. Thus it needs the strongest and clearest indication in legislation to evidence a departure from these principles, and in this particular case, even where the Crown accepts an obligation, the principle that a wrong cannot be imputed to the King still applies (*Blackstone's Commentaries*, 15th ed. (1809), vol. 1, pp. 241, 242 ; 14th ed. (1803), vol. 1, p. 242 ; 9th ed. (1783), vol. 1, p. 241 ; *Chitty's Prerogatives of the Crown* (1820), pp. 339 et seq., 374 ; *Broom's Legal Maxims*, 9th ed. (1924), pp. 34, 35 ; *Halsbury's Laws of England*, 2nd ed. vol. 6, pp. 445-447, 486, 487). A State magistrate has no jurisdiction over the Crown, whether in right of the Commonwealth or in right of the State, unless it is conferred upon him expressly. This s. 18 of the *Re-establishment and Employment Act* fails to do. The jurisdiction is not increased by s. 39 of the *Judiciary Act* or ss. 41-44 of the *Acts Interpretation Act*. Section 18 of the *Re-establishment and Employment Act* does no more, so far as the Crown is concerned, than accept the obligation. It creates no remedy for the failure on the part of the Crown to observe the obligation (*Craies* on *Statute Law*, 4th ed. (1936), p. 378). There is no Federal court of summary jurisdiction. There are only State courts of summary jurisdiction and their jurisdiction can only be within their limits of jurisdiction. The criminal courts cannot deal with the Crown as a defendant. It is a limited jurisdiction and the creation of an offence by the Crown in right of the Commonwealth does not operate to extend jurisdiction.

Ashkanasy K.C., in reply. As the Crown refrained from arguing the question of validity, the Court can determine the issues on the basis desired, leaving the question of validity undetermined and the subject of further proceedings if it be raised. The evidence shows that the respondent had the power to reinstate, retain or dismiss employees and that he knew and approved beforehand of the then proposed dismissal of Wright. Generally speaking it is not competent for an employee of the Crown who does wrong to plead the instructions of a superior, and the superior cannot be made responsible.

[DIXON J. referred to *Performing Right Society Ltd.* v. *Ciryl Theatrical Syndicate Ltd.* (1).]

By the joint operation of s. 18 of the *Re-establishment and Employment Act* and s. 5 of the *Crimes Act* the conviction of an aider and

(1) (1924) 1 K.B. 2.

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abettor becomes a conviction for the principal offence. Under these circumstances the onus of proof must be identical. The purported reasons stated in the letter of dismissal were not proved in evidence. The words in s. 18 are absolutely explicit that an employer who wrongfully dismisses an employee is to be subject to a penalty of £100. Under the Act an " employer " includes the Crown in right of the Commonwealth and under s. 18 the Commonwealth may be prosecuted, convicted and fined even though s. 19 may not apply. In determining the amount of compensation, if any, the Court, under s. 19 (2) could give consideration to the position of the Commonwealth as a " relevant factor." The Act does not show an intention contrary to the application of the penalty provision to the Commonwealth upon conviction. In fact, this prosecution was not brought against the Crown in right of the Commonwealth, therefore argument relating to s. 39 of the *Judiciary Act* has no application to these specific proceedings. In order to secure a conviction under s. 5 of the *Crimes Act* it is not necessary that a principal offender should have been convicted (*R.* v. *Goldie*; *Ex parte Picklum* (1)). The Act modified or impliedly amended s. 39 of the *Judiciary Act*. The magistrate had jurisdiction.

Cur. adv. vult.

Oct. 16.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by way of order to review from an order of a police magistrate dismissing a summons for an offence against the *Re-establishment and Employment Act* 1945, s. 18 (1), and the *Crimes Act* 1914-1941, s. 5. The informant was the honorary secretary of a returned soldiers' organization, and the defendant was the manager of a munition factory conducted by the Commonwealth Government.

Section 18 (1) of the *Re-establishment and Employment Act* provides as follows :—" Where an employer has reinstated a former employee in accordance with this Division, or in accordance with the National Security (Reinstatement in Civil Employment) Regulations, he shall not, except as required by sub-section (5) of section sixteen of this Act or without reasonable cause, terminate the employment of that employee or vary it by employing the employee in an occupation, or under conditions, less favourable to him than the employment in which he was so reinstated. Penalty : One hundred pounds."

Sub-section (2) provides that, in proceedings for a contravention of the section, the onus of proof of reasonable cause shall be upon the

(1) (1937) 59 C.L.R. 254.

employer. This prosecution, however, was not a prosecution of an employer, and sub-s. (2) therefore has no relevance.

The *Crimes Act*, s. 5, provides that : " Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth . . . shall be deemed to have committed that offence and shall be punishable accordingly."

Section 10 of the *Re-establishment and Employment Act* provides as follows :—" In this Division, unless the contrary intention appears—'employer' includes the Crown (whether in right of the Commonwealth or of a State) and any authority constituted by or under the law of the Commonwealth or of a State or Territory of the Commonwealth."

It was contended for the appellant that this section showed that it was the intention of Parliament that the Commonwealth could, as an employer, be convicted of an offence against the Act.

One C. L. W. Wright was a former employee at the factory and had been reinstated in accordance with the Act. By a notice signed by another person on behalf of Doyle with Doyle's authority, Wright's employment was terminated, the reason stated being the cessation of hostilities and consequent reduction of the need of factory products. Doyle was not the employer and could not actually himself commit an offence under s. 18. The case for the prosecution was that the Commonwealth had, without reasonable cause, terminated the employment of Wright, and that Doyle had aided or abetted, or was concerned in the commission of that offence, and therefore was deemed to have committed that offence. A person cannot be convicted of aiding and abetting an offence unless that offence has been committed (*Walsh* v. *Sainsbury* (1) ; *R.* v. *Goldie* ; *Ex parte Picklum* (2)).

The police magistrate decided that the Commonwealth could not be guilty of an offence under s. 18, and that therefore the defendant Doyle could not be convicted of aiding and abetting the Commonwealth in the commission of such an offence.

It has long been an established principle that the Crown is not liable for a civil wrong : *Tobin* v. *The Queen* (3) ; *Feather* v. *The Queen* (4), unless made liable by statute : see e.g. *Judiciary Act* 1903-1940, s. 56 ; *Farnell* v. *Bowman* (5). In the case of the criminal law, the application of the rule that the King can do no wrong is

(1) (1925) 36 C.L.R. 464.
(2) (1937) 59 C.L.R. 254.
(3) (1864) 16 C.B. (N.S.) 310 [143 E.R. 1148].
(4) (1865) 6 B. & S. 257 [122 E.R. 1191].
(5) (1887) 12 App. Cas. 643.

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a fortiori. It has never been suggested that the criminal law binds the Crown. In the case of serious offences the Crown is the prosecutor, and it would appear to be obvious that it is impossible for the Crown in right of the Commonwealth to prosecute the Commonwealth. It is true that the proceeding before the magistrate in this case was a summary proceeding by a private prosecutor, but under the *Crimes Act*, s. 12 (2) it is provided that " Where proceedings for an offence against the Act are brought in a Court of Summary Jurisdiction the Court may either determine the proceedings, or commit the defendant for trial." In the present case, if proceedings against the Commonwealth could properly be entertained by the magistrate, he might have committed the Commonwealth for trial, in which case if the proceedings had continued the Commonwealth would have prosecuted the Commonwealth.

Ministers and officers of the Crown can be guilty of breaches of Commonwealth law and Parliament could, if it thought proper, subject them to the penalties to which private employers are liable under the Act. But the fundamental idea of the criminal law is that breaches of the law are offences against the King's peace, and it is inconsistent with this principle to hold that the Crown can itself be guilty of a criminal offence.

But it was naturally argued that some effect must be given to the provisions of s. 10 (1). This is an express provision that " employer " includes the Crown in right of the Commonwealth, and accordingly it is said that there was a deliberate intention to place some sort of obligation upon the Crown. It should be observed, however, that, while much weight must be attached to this argument, s. 10 (1) includes the words " unless the contrary intention appears." The question is whether the provision in s. 18 that an offender can be convicted and fined indicates a contrary intention. Any fine inflicted in proceedings for a breach of the section would become a debt of record to the Commonwealth : see *R.* v. *Woolf* (1). There is no reason in a provision that the Commonwealth shall pay a fine to itself. Further, the Crown has the power of remitting any penalty imposed for a breach of Federal law. In my opinion it should be held that Parliament did not intend to subject the Crown to conviction and fine, and that therefore the Commonwealth cannot be guilty of an offence under s. 18.

Where the only penalty for an offence is imprisonment, a corporation cannot be convicted of the offence, because a corporation cannot be imprisoned : see *Pharmaceutical Society* v. *London & Provincial Supply Association Ltd.* (2), per Lord *Blackburn* ; *Hawke*

(1) (1819) 2 B. & Ald. 609 [106 E.R. 488]. (2) (1880) 5 App. Cas. 857, at p. 869.

v. *E. Hulton & Co. Ltd.* (1). In my opinion the principle applied in these cases produces the result that the Commonwealth cannot be convicted of offences under the Act for which the penalty is either fine or imprisonment, because the Commonwealth cannot be either fined or imprisoned for a breach of Federal law.

It is a mistake to say that this view of the Act deprives it of all effect in relation to the Commonwealth. Sections 27 and 28, e.g., provide for preference in employment to members of the forces. Section 28 empowers a court to make an order directing an employer to employ a particular person. I see no reason why an order under these provisions should not be made against the Commonwealth.

The statute may be read as showing that Parliament intends the Crown to act in the same way as other employers, but the only remedy provided by s. 18 is one which is not applicable in the case of the Crown. The Crown, therefore, cannot be convicted or fined under that section. There has been no principal offence. Therefore the defendant cannot be found to be guilty of aiding and abetting such an offence. This conclusion makes it unnecessary for me to deal with other contentions relied upon by the respondent. In my opinion the appeal should be dismissed.

Rich J. I concur in the conclusion arrived at by *Dixon* J., and speaking generally, with the reasons given by him in arriving at that conclusion.

Starke J. The defendant was charged on information before the Court of Petty Sessions at Footscray in the State of Victoria that he without reasonable cause did terminate the employment of one, Wright, contrary to the provisions of s. 18 of the *Re-establishment and Employment Act* 1945 and s. 5 of the *Crimes Act* 1914-1941.

The *Re-establishment and Employment Act* prohibits an employer who has reinstated a former employee from terminating or varying his employment except as provided by the Act, without reasonable cause, under a penalty of £100. By s. 10 of the Act, unless the contrary intention appears, an "'employer' includes the Crown (whether in right of the Commonwealth or of a State) and any authority constituted by or under the law of the Commonwealth or of a State or Territory of the Commonwealth."

And the *Crimes Act* 1914-1941, s. 5, provides that "any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth,

(1) (1909) 2 K.B. 93.

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whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly."

The *Acts Interpretation Act* 1901-1937, s. 41, provides that the penalty set out at the foot of any section of any Act indicates that any contravention of the section is an offence against the Act punishable upon conviction by a penalty not exceeding the penalty mentioned. And s. 44 provides that " all pecuniary penalties for any offence against any Act may, unless the contrary intention appears, be recovered in any court of summary jurisdiction."

The *Judiciary Act* 1903-1940, s. 39 (2), invests the several courts of the States, which includes courts of summary jurisdiction, with Federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it (see *The Commonwealth of Australia Constitution Act*, ss. 75, 76).

The constitutional validity of s. 18 of the *Re-establishment and Employment Act* so far as it purports to bind the Commonwealth and the States was not argued and the question must be regarded as open so far as I am concerned.

The argument on the part of the Commonwealth was that the provisions of s. 18 bound both it and the States, but that so far as the Commonwealth was concerned the provisions created an obligation of imperfect obligation which did not enable the penalty indicated at the foot of the section to be enforced against it. The same argument would apply, I apprehend, to the provisions of s. 16 and other sections such as s. 41 and possibly ss. 30 and 33 of the Act. Constitutional usage it was said rendered this construction of the section inevitable. There was no way of enforcing any duty cast upon the Commonwealth. It could remit the penalty and in any case the amount of the penalty would merely return to the consolidated revenue.

But the States are also bound, according to the argument, by the provisions of s. 18 and the argument loses force in its application to them. It would be a strange construction of s. 18 that rendered the States liable to a penalty and yet denied the liability in the case of the Commonwealth.

Sovereign bodies may create rights and obligations against themselves and submit the determination of those rights and obligations to the jurisdiction of the Courts and provide means for enforcing them. Indeed the Commonwealth has given the subject the same rights of action against it in contract and in tort as he would have against another subject (*Baume* v. *The Commonwealth* (1) ; *Farnell* v.

(1) (1906) 4 C.L.R. 97.

Bowman (1)) and in the *Judiciary Act*, Part IX., may be found means of enforcing those rights. A penal sanction does not seem an impossibility especially when, as in this case, the judicial authority may order that portion of the penalty be paid to the employee (See *Re-establishment and Employment Act*, s. 19). If the Act is explicit the Act is conclusive alike in what it directs and in what it prohibits (*Attorney-General for Ontario* v. *Attorney-General for Canada* (2)).

The object of the *Re-establishment and Employment Act* is to provide for the reinstatement and preference in employment by the Commonwealth, the States and other employers, of persons who rendered war services. The obligations in respect of reinstatement and preference in employment are imposed upon Governments and private employers alike by the same sections and in the same words. And the penalty is attached to breach of the obligations thus expressed.

Section 18 should be given its plain and ordinary meaning in the English language unless some gross or manifest absurdity is thereby produced. And in my judgment, as at present advised, there is no convincing reason for limiting the penalty prescribed by s. 18 to subjects.

The right to reinstatement and preference is hedged with many vague conditions, and if the duties imposed upon Governments cannot be enforced against them the right of reinstatement and preference contemplated by the Act is seriously affected. Well may servicemen and women declare that the provisions of s. 18 and other sections

"keep the word of promise to our ear,
And break it to our hope."

Further, it was contended that no jurisdiction was conferred upon a Court of Petty Sessions to hear and determine an information against the Commonwealth : that it had not submitted itself to its jurisdiction. In this case it is unnecessary to determine whether the provisions of s. 39 (2) of the *Judiciary Act* 1903-1940 are sufficient in themselves for that purpose. But, I think, the *Re-establishment and Employment Act* coupled with the *Judiciary Act* and the *Acts Interpretation Act* 1901-1937, ss. 41, 43 and 44, are sufficient for the purpose. Assuming as I do that the penalty imposed by s. 18 is enforceable against the Commonwealth then it may be recovered in any court of summary jurisdiction (s. 44) which the *Judiciary Act* describes and invests with Federal jurisdiction.

But the information was rightly dismissed.

(1) (1887) 12 App. Cas. 643.

(2) (1912) A.C. 571, at p. 583.

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There is no evidence, I think, that the defendant Doyle participated in any breach of s. 18 or aided, counselled or procured or was in any way directly or indirectly concerned in, or party to, any breach of the provisions of that section. All he did, as I follow the evidence, was to inform the employee in accordance with his duty as the manager of the Commonwealth Government Ammunition Factory that his services had been terminated. But he did not terminate the employment, nor did he procure or assist in its termination. These services were terminated in accordance with instructions from the Department of Munitions by the industrial officer of the ammunition factory whose duties included the engagement and dismissal of employees. The defendant, who was the manager of the factory, was informed of the dismissal, but did not interfere with that decision and in the course of his duty as manager conveyed the decision to the employee.

In my judgment that evidence does not establish any breach of s. 18 of the *Re-establishment and Employment Act* on the part of the defendant Doyle.

The order nisi to review should be discharged.

DIXON J. The appeal is from an order of a Court of Petty Sessions exercising Federal jurisdiction whereby an information for an offence under Federal law was dismissed. The Federal law upon which the informant relied is a combination of s. 5 of the *Crimes Act* 1914-1941 and s. 18 of the *Re-establishment and Employment Act* 1945.

The defendant to the information, who is the respondent in the appeal, is described as the factory manager of the Commonwealth Government Ammunition Factory at Footscray, in the State of Victoria.

The informant, who is the appellant, is the honorary secretary of the Munitions Sub-Branch of the Returned Servicemen's League of Victoria and, of course, in preferring the information does not act in any governmental or official capacity.

The material part of s. 18 of the *Re-establishment and Employment Act* provides that, when an employer has reinstated a former employee in accordance with the Division of the Act containing the section, he shall not without reasonable cause terminate the employment of that employee. Penalty: One hundred pounds. The Division contains a definition clause: s. 10 (1). According to the clause in that Division, unless the contrary appears, "employer" includes the Crown (whether in right of the Commonwealth or of a State).

The material part of s. 5 of the *Crimes Act* provides that any person, who procures, or by any act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth, shall be deemed to have committed that offence and shall be punishable accordingly.

The prosecution is founded upon the allegation that the Crown in right of the Commonwealth violated s. 18 by terminating the employment in the munition factory of a reinstated employee, named Wright, and that the defendant was the responsible officer who sanctioned the violation. In other words, it is alleged that the defendant, as factory manager, procured or was knowingly concerned in the commission by the Crown in right of the Commonwealth of an offence against s. 18.

To this the defendant makes three answers. He contends, first, that upon its proper construction s. 18 does not impose penalties upon the Crown but binds the Crown by a legislative direction depending upon the constitutional and legal remedies appropriate to the Crown and stops short of including the Crown in the liability to the punishment appointed for a violation of its provisions. In the second place, the defendant maintains that, even if an offence could be, and was, committed by the Crown in terminating Wright's employment, he incurred no guilt under s. 5 as the responsible head of the factory. In the third place, the defendant says that no proof was offered on the part of the informant that the termination of Wright's employment was without reasonable cause, and that sub-s. (2) of s. 18, which places the burden of proof on the employer if the termination is within the first six months of re-employment, applies only to a principal offender and has no application to a defendant charged as an accessory under s. 5 of the *Crimes Act*.

I shall deal with the questions raised by these contentions in order. (1) The first involves a question of interpretation only. The argument did not impugn the validity of the provision, assuming that upon its true interpretation it affects to impose penalties upon the Crown. I imagine that an argument could be advanced that to impose penal sanctions upon the Crown, whose executive power is expressed by s. 61 of the Constitution to extend to the execution and maintenance of the laws of the Commonwealth, ought not to be considered incidental to any of the enumerated legislative powers, that is, in this case, to the defence power. The legislative power is to make the laws which the Crown is to execute and maintain. It is, I suppose, open to question whether the punishment of the Crown itself for a failure to obey the law, the execution of which is the

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responsibility of the Crown, can logically be regarded as ancillary or incidental to any substantive legislative power. Nor is it by any means certain that the Crown in right of the State can be made liable to punishment under Federal legislation; if not, that might raise a question of severability.

However, it was not to be expected that counsel for the respondent representing, as he did, an official of the Commonwealth should attack the validity of the legislation, whatever might be its meaning. But counsel did depend for his argument on some of the considerations which would be material to such a question of validity. For, in denying that the provision meant to do such a thing, he relied upon the unprecedented character of legislation attempting to penalize the Crown, upon the constitutional solecism that it would involve and upon the absurdity of supposing that the Executive Government of the country, for that is the practical meaning of the expression Crown in such a connection, is to be brought before magistrates to receive punishment, a punishment which the Executive Government may enforce or remit.

There is, I think, 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.

The presumption against general words bearing such a meaning is reinforced by considerations which have a daily application. Here are some of them:—(*a*) There is no Court of summary jurisdiction with jurisdiction over the Crown and no summary procedure to which the Crown is amenable, that is apart from the consent of the Crown. Certainly s. 39 of the *Judiciary Act* does not confer such a jurisdiction. The words in sub-s. (2) "within the limits of their several jurisdictions" secure that consequence. The conferring of Federal jurisdiction over the Crown on State magistrates cannot, I think, be spelled out of ss. 26 (*b*), 41, 42, 43, and 44 of the *Acts Interpretation Act* 1901-1941 or out of s. 13 of the Commonwealth *Crimes Act* 1914-1941.

(*b*) Apart from the effect of s. 19 (*a*) of the *Re-establishment and Employment Act* 1945, the whole of a forfeiture, fine or penalty would presumably go to the Federal treasury; and yet a fine imposed is payable by the treasury.

(*c*) It is for the Crown to remit fines.

(*d*) Except in great matters of State the Crown acts only by its Ministers and servants. If two or more of them knowing the facts agree upon a course of action which constitutes or involves the offence on the part of the Crown, they would then be guilty of conspiracy and punishable under s. 86 of the *Crimes Act*, and it would not matter that they were ignorant of the legal consequences of their decision and were actuated solely by a desire to serve the interests of the Commonwealth. In the same way, if the act or order were that of one Commonwealth officer only, he might be punishable under s. 5 of the *Crimes Act*. In either case, besides incurring the liability to punishment prescribed by those provisions he would be liable to dismissal from the public service, if he were subject to the Commonwealth *Public Service Act* : See s. 62 (2).

These are only minor considerations, but they show the place occupied in our system by the fundamental constitutional principle and the many and various consequences which flow from a departure from it. That principle is that the Crown is not liable to be sued criminally for a wrong, and only civilly by modern statute ; and that the King is not under the coercive power of the law, but that in many cases the commands of the Crown are under the directive power of the law which makes an unlawful act invalid and leaves the persons executing the commands, if they need a justification, obnoxious to its provisions. Compare *Tobin* v. *The Queen* (1) per *Erle* C.J. and *Hale's Pleas of the Crown* (1778), vol. 1, p. 43.

Directive provisions binding upon the Crown are not uncommon, and it is the duty of the Ministers and other officers of the Crown to carry them out. Neglect of such a duty may sometimes be remedied by injunction or by mandamus and sometimes, when it means that the servants of the Crown have acted without lawful authority, ordinary civil remedies may be available. That depends on the nature of the case. But I am not aware that under any statute there has ever been a criminal remedy against the Crown itself. The principle that the Crown cannot be criminally liable for a supposed wrong, therefore, provides a rule of interpretation which must prevail over anything but the clearest expression of intention.

In the present case no one doubts that the prohibition contained in s. 18 (1) against terminating the employment of a reinstated employee applies to the Crown in right of the Commonwealth. The whole question is whether the words at the foot of the sub-section—"Penalty : One hundred pounds," apply to the Crown.

(1) (1864) 16 C.B. (N.S.), at p. 355 [143 E.R., at p. 1165].

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In my opinion it is not necessary to interpret them as intending to affect the Crown and it would not be proper so to understand them. There is no sufficient evidence on the face of Division 1 or of Division 2 that the question of imposing penal sanctions on the Crown was ever adverted to. Division 1, in which s. 18 occurs, was modelled upon the *National Security* (*Reinstatement in Civil Employment*) *Regulations* and it is not unreasonable to suppose that in affixing penalties to provisions like s. 18 the purpose was to effect no more than, in the case of the Regulations, had been effected by s. 10 (3) of the *National Security Act*. It may well be that the consequences now said to result from a combining of the penalty provision with the inclusion of the Crown in the definition of employer were neither intended nor foreseen.

In Division 2 there is a set of parallel provisions in which it seems quite clear that the penalty clause could not have been intended to apply to the Crown, at all events, not to apply in its entirety. By s. 26 that Division, which deals with preference in employment is to "extend in relation to employment by the Crown in right of the Commonwealth or a State." By s. 30 an employer is forbidden to terminate without reasonable cause the employment of any person whom he has engaged in employment in pursuance of the Division. Section 33 (1) then provides that a person who contravenes or fails to comply with any provision of the Division shall be guilty of an offence punishable on conviction by a fine not exceeding One hundred pounds, or imprisonment not exceeding six months or both. Now it is perfectly clear that the penalty of imprisonment was not meant to apply to the Crown and I should think that the plain inference is that no part of s. 33 (1) applies.

It appears to me that in the same way the more reasonable conclusion is that the penalty provided at the foot of s. 18 (1) was meant to apply to the subject and not to the Crown. At all events, where it is uncertain whether the legislature adverted to the special position of the Crown, it is the very case in which the presumptive rule of interpretation should prevail and the application of the penalty clause should be restricted to the subject to the exclusion of the Crown. There is no excess of realism in adopting the view that the general words "Penalty: One hundred pounds" were never used with the intention that the Crown should be exposed to criminal prosecution.

On the foregoing grounds I am of opinion that s. 18 (1) does not create an offence of which the Crown may be guilty. This means that the defendant could not be informed against under s. 5 of the *Crimes Act* as an accessory offender.

(2) The question whether the defendant in fact did procure or by act or omission was in any way directly or indirectly knowingly concerned in or party to the termination without reasonable cause by the Crown of Wright's employment does not arise in the view I have expressed upon the first question. But it is, perhaps, desirable that I should state my opinion upon that and also upon the third question.

All that appears from the evidence is that the defendant, as factory manager, delegated his power of hiring and discharging employees to the industrial officer who decided on the application of a departmental order that Wright's employment must be terminated and then that Wright communicated that fact to the defendant. In answer to a question whether he had agreed with the dismissal of Wright, the defendant said: "Yes, whatever my industrial officer does I would agree with." It appeared, too, that a certificate of service was given to Wright bearing the name of the defendant as manager signed per some other officer.

On these materials I do not think that it was shown that the defendant procured the termination of the employment or was knowingly concerned therein or party thereto.

(3) The third question raised by the defendant's counsel is whether s. 18 (2) operates to place the burden of proving reasonable cause upon the defendant when he is not the employer and is prosecuted as an accessory under s. 5 of the *Crimes Act*. In terms s. 18 (2) applies only to a proceeding for a contravention of sub-s. (1). But s. 5 of the *Crimes Act* provides that the person who aids, abets, counsels, or procures or is knowingly concerned in or party to the commission of a Federal offence shall be deemed to have committed that offence and shall be punishable accordingly.

It is a question of construction whether a consequence of deeming the person bringing himself within s. 5 to have committed the principal offence is that upon the hearing of a charge against him he should be subject to the same burdens of proof as apply to the principal offender upon a prosecution for the principal offence. It is to be noticed that the language of s. 5 is not the same as that of the English *Accessories and Abettors Act* 1861, s. 1. It appears to me that, until all the elements described by s. 5 are established, the person charged is not brought within its scope, and, therefore, is not, until the proof is complete, deemed to have committed the principal offence. But to complete the proof it is necessary to show that there was no reasonable cause and perhaps that the defendant knew there was none. On the whole, I do not think that sub-s. (2) of s. 18 can be invoked upon a prosecution under s. 5 of the *Crimes Act*.

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Section 14 of the *Crimes Act* does not, in my opinion, affect the matter.

On all three grounds I think that the dismissal of the information was justified.

In my opinion the appeal should be dismissed and the order *nisi* to review discharged.

WILLIAMS J. The respondent was prosecuted in the Court of Petty Sessions of Footscray in Victoria upon an information that he did at Footscray without reasonable cause terminate the employment of C. L. W. Wright contrary to the provisions of s. 18 of the *Re-establishment and Employment Act* 1945 and s. 5 of the *Crimes Act* 1914-1941. The magistrate dismissed the information on the ground that Wright's employer was the Commonwealth and that, applying the maxim " the King can do no wrong," s. 18 should not be construed so as to make the Crown liable to a penalty. Section 5 of the *Crimes Act* provides that any person who aids, abets, counsels, or procures the commission of any offence against any law of the Commonwealth shall be deemed to have committed that offence and shall be punishable accordingly. It is not disputed that if the Commonwealth could not be prosecuted as the principal offender there would be no offence which the respondent could aid or abet and he could not therefore be prosecuted under this section : *Thornton* v. *Mitchell* (1).

The material provisions of the *Re-establishment and Employment Act* are contained in Part II., Divisions 1, 2 and 3. Part II. is headed " Provisions relating to Employment " ; Division 1, " Reinstatement in Civil Employment " ; Division 2, " Preference in Employment " and Division 3, " Apprenticeship." Each of these divisions contains its own section defining employer, unless the contrary intention appears, as including the Crown (whether in right of the Commonwealth or of a State) and any authority constituted by or under the law of the Commonwealth or of a State or Territory of the Commonwealth. It is clear that the Crown must be expressly named or a necessary implication to that effect must appear in a statute before it can be bound in respect of its prerogatives, rights, immunities or property (*Minister for Works (W.A.)* v. *Gulson* (2) ; *Attorney-General* v. *Randall* (3)). It is equally clear from the reiteration in the definitions of " employer " that the draughtsman of the *Re-establishment and Employment Act*, whatever its other shortcomings may be, fully appreciated the significance of this principle of construction and intended to involve the Crown up to the hilt.

(1) (1940) 162 L.T. 296.
(2) (1944) 69 C.L.R. 338.
(3) (1944) 1 K.B. 709, at p. 712.

Division 1 creates three important duties binding on employers. Section 11 provides that an employer shall not terminate the employment of any person employed by him for the reason that that person is, or may become, liable to perform any war service : Penalty £100. Sections 12 to 16 impose a duty upon an employer to reinstate any person who has completed a period of war service in his former employment : Penalty £100. Section 18 provides that where an employer has reinstated a former employee he shall not without reasonable cause terminate or vary his employment : Penalty £100. Section 19 (1) provides that where an employer is convicted of an offence under this division, (*a*) the Court may order that a portion of the fine imposed shall be paid to the employee ; and (*b*) whether or not an order has been made to this effect the Court may order that the employer shall pay to the employee such compensation as the Court thinks reasonable. Division 2 contains ss. 22-34. Section 27 provides that an employer shall in the engagement of any person for employment, engage, in preference to any other person, a person entitled to preference unless he has reasonable and substantial cause for not doing so. Section 30 provides that an employer shall not without reasonable cause terminate the employment of such a person. Section 33 provides that a person who contravenes these provisions shall be guilty of an offence punishable on conviction by a fine not exceeding £100 or imprisonment not exceeding six months or both and that where a person is convicted the Court may order that a portion of the fine imposed shall be paid to such person entitled to preference as the Court specifies in the order. Division 3 provides for the suspension of contracts of apprenticeship where an apprentice has become or becomes engaged on war service and for the revival of such contracts. Section 41 provides that where the contract is revived the apprentice shall be entitled to resume his apprenticeship and shall have absolute preference in employment over any apprentice engaged during his absence on war service and the employer shall not refuse to permit the apprentice to resume his employment : Penalty £100. There is a provision for the setting up of an apprenticeship authority. Section 37 provides that where an apprentice has become or becomes engaged on war service and an apprenticeship authority has not already been notified by the apprentice's employer, the employer shall forthwith notify an apprenticeship authority accordingly : Penalty £50. Section 41 of the *Acts Interpretation Act* 1901-1941 provides that the penalty set out at the foot of any section or sub-section of any Act shall indicate that any contravention thereof, whether by act or omission, shall be an offence against the Act punishable upon conviction by a penalty

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not exceeding the penalty mentioned. Section 44 provides that all pecuniary penalties for any offence against any Act may, unless the contrary appears, be recovered in any Court of summary jurisdiction. The words " punishable upon conviction " in s. 41 indicate that the penalties cannot be recovered in a Civil Court but must be enforced in criminal proceedings. Section 2 (2) of the *Acts Interpretation Act* provides that it shall bind the Crown, so that this Act contemplates that the Crown may be convicted and fined for contravention of an Act imposing a penalty by which it is bound.

The effect of Divisions 1, 2 and 3 of Part II. is to create new statutory duties binding on employers and to impose specific remedies for their non-performance. In such a case the question arises, as it has so often arisen before, whether these are the only remedies or whether any person within the protected class who suffers special damage can bring a civil action for damages against the employer.

The general principle is that if an Act creates a liability not existing at common law and provides a special and particular remedy for enforcing it, that is the only remedy. But this *prima facie* construction can yield to a sufficient indication of an intention where the purpose of the legislation is directed to benefit or protect a particular class of persons in a particular manner. In such a case the provision of a particular remedy is by no means decisive that the legislature intended that there should be no other remedy. The fact that the statutory remedy may enure for the benefit of the person injured by the breach lends cogency and weight to an intention that this was to be the only remedy. But it is not conclusive, and other matters have to be considered. One must look at the nature of the injuries likely to arise from a breach of that duty, the amount of the penalty imposed for a breach of it, and the kind of person upon whom it is imposed, before one can come to a proper conclusion as to whether the legislature intended the statutory remedy to be the only remedy for the breach of the statutory duty : *Groves* v. *Wimborne* (1) ; *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co. Ltd.* (2) ; *Monk* v. *Warbey* (3) ; *Square* v. *Model Farm Dairies (Bournemouth) Ltd.* (4) ; *Martin* v. *Western District of Australasian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department)* (5) ; *Minister for the Army* v. *Parbury Henty & Co. Pty. Ltd.* (6). Section 19 of the *Re-establishment and Employment Act* provides for compensation where an employer is convicted of an offence under Division 1 not only out of the fine

(1) (1898) 2 Q.B. 402, at p. 416.
(2) (1921) 1 K.B. 616.
(3) (1935) 1 K.B. 75, at pp. 84, 85.
(4) (1939) 2 K.B. 365, at pp. 375-377.
(5) (1934) 34 S.R. (N.S.W.) 593, at pp. 596-598.
(6) (1945) 70 C.L.R. 459, at p. 511.

but by means of an independent order and that the like proceedings may be taken upon an order as if the order were a judgment or order of the Court in favour of the employee. The section therefore creates what is in substance a complete civil remedy in addition to its penal sanctions and I can see no justification for departing from the general rule that the performance of the duties created by the division cannot be enforced in any but the statutory manner.

There is no similar provision for making an order for compensation in Division 2 and it seems to have been considered by the legislature that it was not necessary to give a person who is merely entitled to preference in employment as full a right of compensation as a person who is entitled to reinstatement in his former employment. So the only compensation provided is compensation to the extent of the fine. There is however the additional sanction of liability to imprisonment for six months. It is unlikely that the legislature should have intended to confine the remedies for breach of the duties created by Division 1 to the statutory remedies but to give a civil right of action for breach of the duties created by Division 2. The matter was not fully argued and I do not wish to express a final opinion. But I have at present a strong impression that the remedies for breach of duty by an employer at any rate in the case of Division 1 are limited to those prescribed by the Act itself.

It is certainly most unusual if not unique for legislation to provide for the prosecution of the Crown. But there is no constitutional difficulty in the way of the Sovereign binding himself in Parliament. It is a question in each case of the extent to which he is intended to be bound. Here, as I have said, both the *Re-establishment and Employment Act* and the *Acts Interpretation Act* bind the Crown. The Crown means of course not His Majesty in person but the Government of the Commonwealth or State of the day. It was never open at common law to sue the Crown in tort. But nevertheless the Privy Council held that under a New South Wales Act the Crown in right of the State of New South Wales could be so sued: *Farnell* v. *Bowman* (1); cf. *The Crown* v. *Dalgety & Co. Ltd.* (2). Under the Australian Constitution, aided by the *Judiciary Act*, the Crown in right of the Commonwealth can be sued for breach of contract or in tort. The House of Lords has recently said that legislation on this subject in England is long overdue (*Adams* v. *Naylor* (3)).

There is a rule of construction as old as the hills recently referred to by Lord *Macmillan* in *London and North Eastern Railway Co.* v.

(1) (1887) 12 App. Cas. 643.
(2) (1944) 69 C.L.R. 18.
(3) (1946) 62 T.L.R. 434.

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Berriman (1), " ' The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity.' " In the same case Lord *Simonds* cited words to the same effect used by *James* L.J. delivering the judgment of the Privy Council in *Dyke* v. *Elliott* (2): " ' Where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument according to the fair common-sense meaning of the language used and the court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.' " (3).

The plain literal and grammatical meaning of the definitions in each division in Part II. of the *Re-establishment and Employment Act* is that the Crown, whether in right of the Commonwealth or of a State, is to be included in the employers, subject to the duties, remedies, penalties, and obligations to make compensation described in the division. There is no scintilla of indication of any intention in the Act that the Crown should be subject to the obligations of an employer but not liable to the express statutory remedies for breach. Such an intention would produce the effect that the Crown could not be convicted of an offence and the employee could not recover compensation.

Even if I am wrong in my present opinion that the obligations of an employer can only be enforced in the manner prescribed by the Act, and an intention can be discovered in its purview and language to give an employee a civil right of action for damages, I fail to see how upon the fair common-sense meaning of the language used it would be possible to discover in the Act, by which the Crown is expressly bound, an intention that its express duties should not be enforced against the Crown by the remedies expressly prescribed but only by some other remedy lurking in the Act by implication. There could be no civil remedy for breach of s. 37, so that if the magistrate is right the duty which it creates could not be enforced against the Crown.

Section 13 of the *Crimes Act* 1914-1941 provides that unless the contrary intention appears, any person may (*a*) institute proceedings

(1) (1946) A.C. 278, at p. 295.
(2) (1872) L.R. 4 P.C. 184, at p. 191.
(3) (1946) A.C., at p. 313.

for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth or (*b*) institute proceedings for the summary conviction of any person in respect of any offence of the law of the Commonwealth punishable on summary conviction. A common informer can therefore launch a prosecution against the Commonwealth. At common law he was entitled to receive any fine which was imposed and to retain it for his own benefit. This right has been abrogated or modified by statutes in most cases. There is no express Commonwealth statute on the point, but ss. 79 and 80 of the *Judiciary Act* 1903-1940 provide that the common law of England as modified by the Constitution and by the statute law of a State shall govern all Courts exercising Federal jurisdiction in that State. The Acts relating to fines and penalties vary in the different States. They usually contain a provision to the effect that any fine that is imposed shall be paid into consolidated revenue for the public use of the State. See, for instance, the *Penalties Act* 1928 (Vic.), s. 3, and the *Acts Interpretation Act* 1915-1936 (S.A.), s. 29. But some of these statutes also contain a provision to the effect that in the absence of a direction to the contrary the informer may receive a portion of the fine. See, for instance, the *Fines and Penalties Act* 1901-1933 (N.S.W.), s. 5 (3), *The Acts Shortening Act* 1867 (Q.), s. 25. In some States, therefore, part of the fine imposed upon the Commonwealth could become payable to the common informer and the absurdity of the court imposing a fine which the Commonwealth would have to pay to itself would not always arise. Further, this absurdity is substantially removed by the power given to the Court by the *Re-establishment and Employment Act* itself to order payment of a portion of the fine to the employee and to make an order for compensation against the employer.

There might be a difficulty in determining in what Court the Commonwealth could be prosecuted. But it is a matter arising under a law made by the Parliament within s. 76 (ii.) of the Constitution, and as at present advised I cannot see why the Commonwealth could not be prosecuted in the State Courts under the combined effect of s. 13 of the *Crimes Act*, s. 44 of the *Acts Interpretation Act* and s. 39 (2) of the *Judiciary Act*. As the question of jurisdiction was not fully argued I express no final opinion on this point. If the Commonwealth can commit the principal offence any of its employees who aid or abet its commission could be prosecuted under s. 5 of the *Crimes Act* and against them there would be no procedural difficulties.

Different means are provided in the different States for recovering a penalty. In New South Wales it cannot be recovered by levy

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and distress except in the case of a corporation: *Justices Act* 1902 (N.S.W.), s. 82, as amended by No. 6 of 1940, s. 2 (1) (n). In Victoria it can be recovered by levy and distress: *Justices Act* 1928 (Vic.), s. 103. I have not looked at the relevant Act in the other States. But any difficulty of recovering the penalty or compensation vanishes in the case of the Crown because it must be presumed that the Crown will meet its obligations out of moneys to be provided by Parliament for this purpose: *Minister of Supply* v. *British Thomson-Houston Co. Ltd.* (1); *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (2).

For these reasons I am of opinion that the magistrate was wrong in holding that the Commonwealth could not commit an offence under s. 18 of the *Re-establishment and Employment Act.*

Counsel for the respondent contended, however, that the evidence before the magistrate did not prove that an offence had been committed or, if it had, that the respondent had aided or abetted its commission. There may well be considerable substance in these contentions, but counsel for the appellant pointed out that they had not been considered by the magistrate and that there might be further evidence available. In these circumstances I would allow the appeal, set aside the order dismissing the information and remit the case for hearing to the magistrate.

Appeal dismissed with costs. Order nisi discharged.

Solicitors for the appellant, *Walter Kemp & Townsend*, Melbourne.

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1943) 1 K.B. 478, at p. 492. (2) (1946) 72 C.L.R. 269.