HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

JILL McNAMARA (McGRATH) APPELLANT

AND

CONSUMER TRADER AND TENANCY TRIBUNAL & ANOR RESPONDENTS

McNamara (McGrath) v Consumer Trader and Tenancy Tribunal
[2005] HCA 55
29 September 2005
S56/2005

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 23 February 2004 and, in place thereof, order that:*
   - *(a) Leave to appeal to that Court be granted;*
   - *(b) The appeal is allowed with costs; and*
   - *(c) The orders of Dunford J are set aside and in their place order:*
     - *(i) Appeal allowed with costs;*
     - *(ii) Set aside the decision of the Consumer Trader and Tenancy Tribunal dated 8 April 2002;*
     - *(iii) Remit the matter to the Tribunal to be determined according to law.*
3. *The above costs orders are made against the second respondent only.*

On appeal from the Supreme Court of New South Wales

Representation:

S C Churches with S D Ower for the appellant (instructed by Marrickville Legal Centre)

No appearance for the first respondent

M G Sexton SC, Solicitor-General for the State of New South Wales with J M Jagot for the second respondent (instructed by Crown Solicitor for New South Wales)

CATCHWORDS

McNamara (McGrath) v Consumer Trader and Tenancy Tribunal

Landlord and Tenant – Applicability of the *Landlord and Tenant (Amendment) Act* 1948 (NSW) ("the LTA Act") – Appellant was a tenant of the Roads and Traffic Authority of New South Wales ("the RTA") in respect of certain premises ("the Premises") – The RTA sought from the Consumer Trader and Tenancy Tribunal an order for vacant possession of the Premises pursuant to the *Residential Tenancies Act* 1987 (NSW) ("the Tenancies Act") – Appellant argued that Premises were "prescribed premises" under the LTA Act and therefore exempt from the application of the Tenancies Act – Whether the RTA entitled to the benefit of an exemption from the application of the LTA Act for "the Crown in right ... of the State".

Statutes – Construction – The RTA was constituted under the *Transport Administration Act* 1988 (NSW) ("the Transport Act") – Transport Act, s 46(2)(b) provides that the RTA "is, for the purposes of any Act, a statutory body representing the Crown" – Whether "a statutory body representing the Crown" entitled to the benefit of a statutory exemption in favour of "the Crown in right ... of the State".

Words and phrases – "the Crown in right of the State", "statutory body representing the Crown".

Landlord and Tenant (Amendment) Act 1948 (NSW), s 5.
Transport Administration Act 1988 (NSW), s 46(2)(b).

1 GLEESON CJ. I agree with the orders proposed by McHugh, Gummow and Heydon JJ, and with their reasons for those orders.

2 Section 46(2)(b) of the *Transport Administration Act* 1988 (NSW) ("the 1988 Act"), provides that, for the purposes of any Act, the Roads and Traffic Authority of New South Wales ("the RTA") is a statutory body representing the Crown. Section 5 of the *Landlord and Tenant (Amendment) Act* 1948 (NSW) ("the LTA Act"), provides that the LTA Act does not bind the Crown in right of the State of New South Wales. The question is whether the combined effect of those two provisions is that the LTA Act does not bind the RTA.

3 In *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*[1] this Court, by a narrow majority[2], held that an identically worded provision in s 4(2) of the *Transport (Division of Functions) Act* 1932 (NSW) ("the 1932 Act"), in combination with the LTA Act, had the effect that the LTA Act did not bind the Commissioner for Railways. The competing views as to the meaning of s 4(2) were summarised in the dissenting judgment of Kitto J as follows[3]:

> "In the Supreme Court a majority of their Honours treated this provision as if it meant that, in considering the applicability of any provision of any Act to the commissioner, he shall be deemed to represent the Crown. If that were the true meaning, the result in this case would necessarily be that the immunity of the Crown from s 62 of the [LTA Act] would involve the immunity of the commissioner as a notional agent of the Crown in relation to the possession of the subject land. But the language of s 4(2) does not appear to me to bear this construction. It is, no doubt, more than a definition section, but its natural meaning would seem to be that whenever you find in an Act a provision dealing with statutory bodies described as representing the Crown, you are to deem the Commissioner for Railways to be such a body and apply the Act to him accordingly."

4 There were, and still are, numerous provisions in Acts dealing with statutory bodies described as representing the Crown. In brief, Kitto J, with whom Fullagar J agreed, rejected the view that s 4(2) meant that any reference in any Act to the Crown included a reference to the Commissioner for Railways. (If the Commissioner were to be given all the privileges and immunities of the Crown, why would that be limited to those given by statute and not include those given by common law?) Rather, he considered it meant that, where a provision

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1 (1955) 93 CLR 376.

2 Williams, Webb and Taylor JJ; Fullagar and Kitto JJ dissenting.

3 (1955) 93 CLR 376 at 400-401.

in an Act referred to statutory bodies representing the Crown, then that reference would include the Commissioner for Railways.

5 Section 46(2)(b) of the 1988 Act presents the same question of construction as arose in relation to s 4(2) of the 1932 Act, and this case presents the same problem of the interaction with the LTA Act as arose in *Wynyard Investments*. Even though, technically, the decision in *Wynyard Investments* concerned a different statute, and therefore does not govern the present case directly, nevertheless a preference for the reasoning of the minority in that case would not of itself justify a different conclusion in the present case. The point of construction is one on which different views are fairly open. Having regard to the subject matter, it may readily be inferred that the 1988 Act was drafted with an understanding of the judicial interpretation that had been placed upon the words of the 1932 Act. This Court would undermine its own authority if it departed from the effect of a previous decision on a question of statutory construction merely because of a later preference for another view[4]. There is, however, more to it than that.

6 First, as both Kitto J and Fullagar J emphasised, the outcome in *Wynyard Investments* is difficult to reconcile with the earlier decision of this Court in *Rural Bank of NSW v Hayes*[5].

7 Secondly, the issue runs deeper than the interpretation to be placed upon a particular statutory formula. As Kitto J pointed out in *Wynyard Investments*[6], the question that must be decided is whether the application to the subject (there, the Commissioner) who invokes the Crown's immunity (there, conferred by s 5 of the LTA Act) would be, in legal effect, an application of it to the Crown. It is not merely one of attributing to someone the status of a representative of the Crown. It concerns the relationship to the Crown in which the subject stands "in respect of the particular matter in which the impact of the relevant provisions is incurred".

8 Thirdly, the correct approach to such a question is that stated by Gibbs CJ in 1982 in *Townsville Hospitals Board v Townsville City Council*[7]:

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4 cf *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576 at 584.

5 (1951) 84 CLR 140.

6 (1955) 93 CLR 376 at 394-395.

7 (1982) 149 CLR 282 at 291.

> "All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention."

That was the approach that prevailed in this Court at the time of the enactment of the 1988 Act, and that has prevailed ever since.

9 Fourthly, even if the minority view as to the meaning of s 4(2) of the 1932 Act had been accepted in *Wynyard Investments*, the statutory formula there employed would have had useful work to do, and would probably have been repeated in the 1988 Act. It is, therefore, far from clear that the New South Wales Parliament enacted s 46(2)(b) of the 1988 Act on the faith of the decision of this Court in *Wynyard Investments*. In argument in the present appeal, close attention was given to whether the New South Wales Parliament had so acted, but that was not shown to have been the case.

10 In those circumstances, this Court should not be inhibited from giving effect to its own opinion on the issues of principle and of statutory construction that arise in the present case.

11 McHUGH, GUMMOW AND HEYDON JJ. The second respondent, the Roads and Traffic Authority of New South Wales ("the RTA"), is a statutory corporation constituted pursuant to s 46 of the *Transport Administration Act* 1988 (NSW) ("the Transport Act"). By operation of that statute[8] there was transferred to the RTA all real and personal property previously vested in various statutory bodies including the Commissioner of Main Roads ("the Commissioner"). This included the property situated at 67 Cromwell Street, Croydon Park, a suburb of Sydney ("the Premises"). These comprise a brick and tile bungalow constructed in the 1920s.

12 Mrs McNamara, the appellant, has resided at the Premises continually since 1981 and is tenant of the RTA. The litigation giving rise to this appeal stems from an attempt by the RTA to obtain vacant possession of the Premises.

13 The appellant's husband and the Commissioner were parties to an initial tenancy agreement executed in 1981. The appellant resided with her husband at the Premises up to the time of his death in 1985 and she has since been in actual possession of the Premises. Moreover, in 1986, the appellant signed a further fixed term tenancy agreement with the Commissioner. Throughout the period covered by these events and subsequently, rent has been paid, first to the Commissioner, and then to the RTA. There has been no lease of the Premises registered under s 5A of the *Landlord and Tenant (Amendment) Act* 1948 (NSW) ("the LTA Act"). Nor has there been a fair rents determination made under that statute in relation to the Premises.

14 The first respondent ("the Tribunal") was established by s 5(1) of the *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW) ("the Tribunal Act"). It is empowered by s 5(2) to "exercise such functions as are conferred or imposed on it by or under any Act". One such Act is the *Residential Tenancies Act* 1987 (NSW) ("the Tenancies Act"). This provides (s 64(1)) that, if a landlord gives notice of termination of a residential tenancy agreement under Pt 5 of that Act and the tenant fails to deliver up vacant possession of the relevant residential premises on the day specified, the landlord may, not later than 30 days after that day, apply to the Tribunal for an order terminating the agreement and an order for possession of the premises.

15 The RTA has sought to utilise these provisions. The ultimate issue for this Court is whether the Tribunal has statutory competence to deal with the matter. The appellant denies that competence and her submissions should be accepted.

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8 Sched 7, Item 24.

We turn to explain why this is so, beginning with some further narration of the facts.

16 On 5 October 2000, the RTA served on the appellant a 60-day termination notice in respect of the Premises and, on 27 December 2000, it filed with the Tribunal an "Application for an Order – Residential Tenancies Act 1987" seeking an order for vacant possession of the Premises. In proceedings before the Tribunal, the appellant submitted that the Premises were "prescribed premises" within the meaning of s 8(1) of the LTA Act[9], and that therefore they attracted the application of Pts 2, 3, 4 and 5 of that statute. The Tenancies Act (s 6(2)(a)) exempts from the application of the statute "premises to which Parts 2, 3, 4 and 5 of [the LTA Act] apply". The appellant contended that as a result the Tribunal had no jurisdiction with respect to the application by the RTA for an order for vacant possession of the Premises.

17 On 8 April 2002, the Tribunal determined that it did have jurisdiction. The Tribunal decided that the RTA had the benefit of the exemption provided for in s 5 of the LTA Act. That section reads:

> "This Act shall not bind –
>
> (a) the Crown in right of the Commonwealth or of the State; or
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> (b) The Housing Commission of New South Wales."

The result of this reasoning was that the appellant could not resist the RTA's application for vacant possession by relying upon the exemptions in the Tenancies Act for "prescribed premises" under the LTA Act.

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9 The text of the relevant definition reads:

> "'prescribed premises' means –
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> (a) where a dwelling-house does not form part of other premises – that dwelling-house;
>
> (b) where premises consist only of a number of dwelling-houses – those premises and each of those dwelling-houses; and
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> (c) where premises consist partly of dwelling-houses and partly of other premises – such part of the premises as consists of dwelling-houses and each dwelling-house of which that part consists, and includes any land or appurtenances leased with any prescribed premises as defined in paragraph (a), (b) or (c) of this definition".

The litigation

18 The appellant filed a summons in the Supreme Court of New South Wales, seeking to appeal from the decision of the Tribunal with respect to a matter of law, pursuant to s 67 of the Tribunal Act. Dunford J dismissed the summons with costs and remitted the proceedings to the Tribunal for further hearing. In so deciding, his Honour referred to s 46(2)(b) of the Transport Act, which provides that the RTA "is, for the purposes of any Act, a statutory body representing the Crown". Dunford J held that the construction of this provision and its relationship with s 5 of the LTA Act were governed by what was said by a majority (Williams, Webb and Taylor JJ) in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*[10]. In that case the minority comprised Fullagar J and Kitto J. The principal reasons of the minority were given by Kitto J.

19 The appellant sought leave to appeal to the Court of Appeal from Dunford J's decision. The Court of Appeal (Meagher JA and Young CJ in Eq) refused such leave, delivering brief ex tempore reasons and citing *Wynyard Investments* in support of its conclusions. It is from that decision that, by special leave, the appellant brings her appeal to this Court. In accordance with the principle repeated in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*[11], the Tribunal, the first respondent, did not take an active part in this appeal. The active disputant has been the RTA.

The question in this appeal

20 The question in this appeal is one concerned principally with the application of a statutory exemption. Less apparent, however, is the precise formulation of the question thus identified. Several points should be made in that regard. First, this Court is not invited to determine whether the RTA constitutes, for the purposes of s 5 of the LTA Act, "the Crown in right … of the State".

21 Secondly, the Court is not asked to consider whether the RTA is entitled to claim, in the words of Jordan CJ in another context, "the benefit of the Crown's prerogative privileges and immunities, including that of not being bound by statute unless an intention in that behalf appears"[12]. This last question could

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10 (1955) 93 CLR 376.

11 (1980) 144 CLR 13 at 35-36.

12 *Skinner v Commissioner for Railways* (1937) 37 SR (NSW) 261 at 269.

only have arisen in these proceedings if the RTA had sought to escape the reach of the LTA Act by establishing the following two propositions: one is that it is entitled to claim for itself the benefit of the presumption, identified in *Bropho v Western Australia*[13] as a rule of statutory construction, that the Crown is not bound by a general statutory provision; and the other is that there is nothing in the LTA Act either to displace that presumption or to suggest a legislative intention to bind the RTA. Given the express terms of s 5 of the LTA Act, the RTA chose to take what promised to be a less circuitous route towards its desired destination.

22 Thirdly, in *Bass v Permanent Trustee Co Ltd*[14], six members of this Court remarked upon the inapt use in modern conditions of expressions such as "shield of the Crown" and "binding the Crown". The various senses in which the expression "the Crown" has been used in constitutional theory were discussed in *Sue v Hill*[15]. In s 5(a) of the LTA Act "the Crown in right ... of the State" identifies what was described in *Sue v Hill* as "the executive as distinct from the legislative branch of government [in this case, in New South Wales], represented by the Ministry and the administrative bureaucracy which attends to its business"[16]. For present purposes, to ask whether the RTA forms part of that bureaucracy is apt to mislead, because that question conceals the issue in this appeal.

23 That issue, in broad terms and to adapt the language employed by Kitto J in *Wynyard Investments*[17], is whether "the application of [the LTA Act] to [the RTA] would be, in legal effect, an application of it to the Crown". If so, then the RTA may invoke the immunity granted in terms by s 5 of the LTA Act to "the Crown in right ... of the State". It should be noted that such a conclusion would not depend upon the RTA establishing an identity between itself and the Crown.

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13 (1990) 171 CLR 1.

14 (1999) 198 CLR 334 at 347 [17]. See also *Commonwealth v Western Australia* (1999) 196 CLR 392 at 409-411 [31]-[39], 429-432 [105]-[110].

15 (1999) 199 CLR 462 at 497-503 [83]-[94].

16 (1999) 199 CLR 462 at 499 [87]. See to similar effect the statement by Gleeson CJ and Gaudron J in *Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 [33].

17 (1955) 93 CLR 376 at 394.

Nor, as Kitto J also pointed out, would such a conclusion be arrived at by asking, glibly, whether the RTA "represents" the Crown[18].

24 Rather, a successful invocation of the s 5 immunity by the RTA must have as its basis a finding to the effect that the operation of the LTA Act upon it would result, again in Kitto J's words, in "some impairment of the existing legal situation of the Sovereign"[19]. The mode of reasoning thus outlined was adopted by this Court in *NT Power Generation Pty Ltd v Power and Water Authority*[20] and the appellant stressed the importance of that case in considering the present authority of the reasoning of the majority in *Wynyard Investments*.

Extending a statutory immunity of the Crown

25 *Wynyard Investments* was decided in 1955. Consideration of the present appeal conveniently commences by focusing upon the decision of this Court in 1982 in *Townsville Hospitals Board v Townsville City Council*[21]. That case preceded the enactment of the Transport Act which established the RTA. At issue in *Townsville* was whether the Board was bound by the provisions of a by-law which required, before the erection of a building, that plans and specifications for that building, as well as a written application for approval, be submitted to the relevant local authority. The Board sought to rely, in support of its position, upon a limited exemption from these requirements that was engaged, pursuant to s 4 of the *Building Act* 1975 (Q), where a building was to be erected "by or on behalf of a person or body who *represents the Crown* in right of the State" (emphasis added).

26 Murphy, Wilson and Brennan JJ agreed with the judgment of Gibbs CJ. His Honour said[22]:

> "All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to

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18 (1955) 93 CLR 376 at 394.

19 (1955) 93 CLR 376 at 393. See also *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 79 ALJR 1 at 34-35 [166]-[170]; 210 ALR 312 at 357-359.

20 (2004) 79 ALJR 1 at 34-35 [166]-[170]; 210 ALR 312 at 357-359.

21 (1982) 149 CLR 282.

22 (1982) 149 CLR 282 at 291.

confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention."

27 This reasoning sets at a high level the threshold degree of control exercisable by the Crown over the appellant Board at and above which it might be said that the operation of the by-law upon the Board would impair the existing legal situation of the Crown in right of the State of Queensland. "Control" is used here in the sense apparent from a statement of Lord Reid[23], namely of control and direction of activities.

28 The relevance of what was said by Gibbs CJ in *Townsville* to assessing the significance of the supposition that the framers of s 46(2)(b) of the Transport Act have relied upon the earlier majority judgment in *Wynyard Investments* will be discussed later in these reasons.

29 More immediately, the statement of principle by Gibbs CJ in *Townsville* invites consideration of whether the ambit of the immunity afforded to the Crown in right of New South Wales in s 5(a) of the LTA Act is confined by the presence in that section of par (b). This, it will be recalled, identifies, as an alternative to par (a), The Housing Commission of New South Wales. Had the legislature intended to extend that immunity to such statutory bodies as the RTA, it would have been unnecessary to include the explicit reference in par (b) to the Housing Commission, a statutory corporation constituted pursuant to the *Housing Act* 1941 (NSW).

30 This is especially so, given the principal holding in *North Sydney Municipal Council v Housing Commission of New South Wales*[24]. The New South Wales Full Court there held that the Housing Commission was in such a position vis-à-vis the Crown that it was entitled to rely upon the presumption that a general statute does not bind the Crown[25]. However, thereafter, in *Electricity Commission of New South Wales v Australian United Press Ltd*, Street CJ suggested that[26]:

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23 *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584 at 616.

24 (1948) 48 SR (NSW) 281 at 284.

25 The statute stated that the Commission, in the exercise of its powers, authorities, duties and functions, was "subject to the control and direction of the Minister".

26 (1954) 55 SR (NSW) 118 at 123. See also the judgment of Brereton J at 128-129.

> "even if it may have been unnecessary to make express reference to the Housing Commission in order to exclude that body from the operation of [the LTA Act], I think that the specific mention of the Commission is more likely to be due to a superabundance of caution on the part of the legislature rather than to any indication of a legislative intent as to the meaning of the word 'Crown'".

31 Against the reasoning of Street CJ may be set an observation by Dixon J in *Grain Elevators Board (Vict) v Dunmunkle Corporation*[27]. His Honour remarked that, had land owed by statutory bodies enjoying the privileges and immunities of the Crown been intended to come within the exemption from rates for "land the property of His Majesty"[28], there would have been no need also to provide explicitly for similar exemptions in respect of "land vested in, among other bodies, the Victorian Railways Commissioners, the Minister for Public Instruction and the Board of Land and Works"[29]. Of course, it is necessary to note too that Dixon J was there remarking upon a statutory provision that purported to confer an exemption upon the property of the Crown, rather than upon the Crown itself. The question that Dixon J was answering in *Grain Elevators* thus differed markedly from that which arises in this appeal[30].

32 However, given that the RTA sought to place itself within the immunity conferred upon the Crown in s 5 of the LTA Act solely by means of s 46(2)(b) of the Transport Act, it is unnecessary presently to determine the significance of s 5(b). Nor, for the same reason and despite the circumstance that the Chief Executive Officer of the RTA is "in the exercise of his or her functions, subject to the control and direction of the Minister"[31], is it necessary to consider whether

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27 (1946) 73 CLR 70.

28 As provided for in s 249(1) of the *Local Government Act* 1928 (Vic).

29 (1946) 73 CLR 70 at 84.

30 See (1946) 73 CLR 70 at 84:

> "The parties seemed inclined to argue the case as if the question was whether the [Grain Elevators] Board was an agency of the Crown enjoying the Crown's privileges and immunities and as if the consequence of an affirmative answer to that question would be that the land rated, though vested in point of property in the [Grain Elevators] Board, would enjoy the exemption conferred upon land the property of His Majesty. I cannot agree in the adoption of any such test."

31 Transport Act, s 49.

the operation of the LTA Act upon the RTA would actually entail "an interference with some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown"[32]. Nevertheless, the test so expressed by Kitto J in *Wynyard Investments* and the contrast between it and what was said in earlier authorities are relevant to the construction of s 46(2)(b) of the Transport Act. To those issues we now turn.

A "statutory body representing the Crown"

33 As appears from the majority judgment in *Wynyard Investments*[33], the genesis of the expression, "statutory body representing the Crown", at least as an adornment in the statute book of New South Wales, may be found in s 4 of the *Local Government Act* 1919 (NSW) ("the 1919 Act"). That section originally provided in the following terms:

> "'Statutory body,' or 'statutory body representing the Crown,' includes the Board of Water Supply and Sewerage, the Hunter District Water Supply and Sewerage Board, the Sydney Harbour Trust Commissioners, the Board of Fire Commissioners of New South Wales, the Railway Commissioners for New South Wales, the Metropolitan Meat Industry Board, and any public body proclaimed under this Act as a statutory body representing the Crown."

There was thus no content given to the defined expression beyond the names of the public bodies either listed as falling within its scope or subsequently proclaimed as such. The expression was not employed, for example, as a shorthand signifier for those bodies which were entitled to receive the benefit of the prerogative privileges and immunities of the Crown. To the extent that those bodies identified in the definition were to benefit from the privileges and immunities conferred upon the Crown by the 1919 Act[34], this was achieved by another device. This was to define the term "Crown" in the 1919 Act so as to include any "statutory body representing the Crown"[35].

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32 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 396.

33 (1955) 93 CLR 376 at 386.

34 An example is afforded in s 132, which exempted certain lands vested in the Crown from local government rates.

35 *Local Government Act* 1919 (NSW), s 4.

34 Thereafter, in numerous pieces of New South Wales legislation, the expression "statutory body representing the Crown" was defined by reference to the definition given to it in the 1919 Act and the term "Crown" likewise defined to include any such statutory body[36]. However, this cannot be said of the LTA Act, in which the word "Crown" is not defined and, more importantly, the phrase "statutory body representing the Crown" does not appear.

35 It is true that that expression "representing the Crown" and like terms have long appeared in judgments as a convenient means of denoting either the entitlement of a statutory body to the privileges and immunities enjoyed by the Crown or the status of such a body as an agent of the Sovereign. In *Sydney Harbour Trust Commissioners v Wailes*[37], for example, O'Connor J spoke of a transfer of property "from one corporation, representing the Crown in one function of Government, to another corporation representing the Crown in carrying on another function of Government".

36 Jordan CJ in *Skinner v Commissioner for Railways*[38] distinguished between, on the one hand, a body that "represents the Crown" – which his Honour defined to mean either a "branch or department of the Government" or a "body which, though independent of the Government, performs functions which are inalienable Governmental functions" – and on the other, a "body independent of the Government with independent powers and discretions of its own"[39]. The issue in *Skinner* was whether the Commissioner for Railways enjoyed the Crown's immunity from discovery. The Crown in right of the State had been deprived of that immunity by statute[40] and it was held that the Commissioner could not be in a better position.

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36 See *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW), s 4; *Sydney Corporation Act* 1932 (NSW), s 2; *Hunter District Water, Sewerage and Drainage Act* 1938 (NSW), s 3; *Broken Hill Water and Sewerage Act* 1938 (NSW), s 3. See also Barnett, "Statutory Corporations and 'The Crown'", (2005) 28 *University of New South Wales Law Journal* 186 at 206-207.

37 (1908) 5 CLR 879 at 885.

38 (1937) 37 SR (NSW) 261.

39 (1937) 37 SR (NSW) 261 at 269-270.

40 *Common Law Procedure Act* 1899 (NSW), s 102.

37 The distinction which Jordan CJ drew in *Skinner* assumed that the question of whether the privileges and immunities of the Crown may extend to a given statutory body could be fully stated by asking whether that body "represents" the Crown. However, for the reasons given by Kitto J in his dissenting judgment in *Wynyard Investments*[41] and accepted by McHugh and Gummow JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[42], that assumption cannot hold true. Rather, "[t]he question", as Kitto J observed[43]:

> "is really not one of attributing to the subject the status of a representative of the Crown; for, even where 'representative' is an apt word to use, representation of the Crown generally is not what such a contention must be understood as necessarily asserting. The question concerns only the relationship to the Crown in which the individual stands in respect of the particular matter in which the impact of the relevant provisions is incurred."

38 However, the majority in *Wynyard Investments* (Williams, Webb and Taylor JJ) acted on the assumptions which underpinned the position advanced by Jordan CJ in *Skinner*. *Wynyard Investments*, like the present case, was concerned with the availability to a statutory corporation – the Commissioner for Railways (NSW) – of the immunity provided for in s 5 of the LTA Act. In invoking that immunity, the Commissioner sought to rely upon s 4(2) of the *Transport (Division of Functions) Act* 1932 (NSW) ("the Division of Functions Act"). This provided that "*for the purposes of any Act* the Commissioner for Railways shall be deemed a statutory body representing the Crown" (emphasis added). Williams, Webb and Taylor JJ framed as follows the issue that arose for consideration[44]:

> "The question at issue is a very familiar one. It arises with ever increasing regularity as Governments persistently enlarge the scope of their activities beyond those of a truly governmental character into the sphere of trade and commerce and for that purpose create statutory corporations which are not slow to claim that they are agents or servants

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41 (1955) 93 CLR 376 at 394-395.

42 (1996) 189 CLR 253 at 280.

43 (1955) 93 CLR 376 at 394-395.

44 (1955) 93 CLR 376 at 382.

> of the Crown (these being the proper words of description[45]) and as such entitled to the benefit of the prerogatives, privileges and immunities of the Crown."

Their Honours then said, in a passage which contains the core of their reasoning[46]:

> "The only way a statutory body could represent the Crown would be to act as the agent or servant of the Crown and this must be the meaning of the word 'represent' in [s 4(2) of the Division of Functions Act]. The representation is 'for the purpose of any Act', so that for the purpose of any Act the Commissioner for Railways must be deemed to represent the Crown."

It was held, on the basis of this asserted congruence between identification as representative of the Crown and entitlement to its privileges and immunities, that the Commissioner for Railways was not bound by the LTA Act.

39 In sharp contrast, Kitto J (with whom Fullagar J agreed) concluded that s 4(2) of the Division of Functions Act was more than a definition section. Rather, its natural meaning was that[47]:

> "whenever you find in an Act a provision dealing with statutory bodies described as representing the Crown, you are to deem the Commissioner for Railways to be such a body and apply the Act to him accordingly".

It should be added that the meaning given here to "deem" is an example of what Windeyer J later identified[48] as "the effect or meaning which some matter or thing has" and without importing any "artificiality or fiction". The significance of the limitation "for the purpose of any Act" is a matter to which we will return.

40 During the course of oral argument in this appeal, there was some debate as to whether, in order for the appellant to prevail, it was required that *Wynyard Investments* be overruled. However, this is a false issue. *Wynyard Investments* decided that a particular form of words in s 4(2) of the Division of Functions Act

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45 *International Railway Co v Niagara Parks Commission* [1941] AC 328 at 343.

46 (1955) 93 CLR 376 at 388.

47 (1955) 93 CLR 376 at 401.

48 *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65.

had a particular meaning: it is not authority that the reasoning process that commended itself to the majority when construing s 4(2) must dictate the construction of other legislation. It would be an error to treat what was said in construing one statute as necessarily controlling the construction of another; the judicial task in statutory construction differs from that in distilling the common law from past decisions[49].

41 It should be noted that what was at stake in *John v Federal Commissioner of Taxation*[50] was the application of s 51, the same section of the *Income Tax Assessment Act* 1936 (Cth), to facts "relevantly indistinguishable"[51] from those of *Curran v Federal Commissioner of Taxation*[52]. The relationship between this case and *Wynyard Investments* is not of that character. What was said in *John* respecting the criteria for the overruling of previous decisions[53] is not immediately applicable.

42 However, that does not mean that the Court is now at liberty to ignore the reasoning of the majority in *Wynyard Investments* and, as Gibbs J once put it[54], "to arrive at [its] own judgment as though the pages of the law reports were blank". Nevertheless, it remains the fundamental (and constitutional) responsibility of the Court not to allow the perpetuation of previous error in statutory construction[55].

43 The present issue is best posed by asking whether the earlier majority reasoning should be adopted in construing s 46(2)(b) of the Transport Act, or that of Kitto J preferred, and recognising that this requires the most careful consideration. In *Wynyard Investments*, Kitto J proposed, and a majority of this

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49 See *Ogden Industries Pty Ltd v Lucas* [1970] AC 113 at 127; *Brennan v Comcare* (1994) 50 FCR 555 at 572.

50 (1989) 166 CLR 417.

51 (1989) 166 CLR 417 at 435.

52 (1974) 131 CLR 409.

53 (1989) 166 CLR 417 at 438-439.

54 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599.

55 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 439-440; *Brennan v Comcare* (1994) 50 FCR 555 at 572-575.

Court accepted in *NT Power Generation*, that asking whether a statutory body is representative of the Crown does not correspond to asking whether it is entitled to the privileges and immunities of the Sovereign. The cogency of this should not be gainsaid. There then seems little reason to accept that a statutory provision stating that such a body is so representative should be sufficient to render available to it a statutory immunity expressed to be conferred upon the Crown.

44 This conclusion finds reinforcement in the circumstance that a body may be deemed to be a "statutory body representing the Crown" for a purpose other than direct engagement of some statutory immunity enjoyed by the instrumentalities of the executive government. Such a purpose may be to identify by some convenient label a class of statutory bodies, upon which (as was the case with the 1919 Act) an immunity or privilege of the Crown is then conferred by some other drafting device, or which (as is the case in s 5(1) of the *Crown Proceedings Act* 1988 (NSW)[56]) are intended to be treated differently from other entities defined as being "the Crown". These considerations would suggest that there is no automatic congruence between the phrase, "representing the Crown", and entitlement to its privileges and immunities. Moreover, these considerations afford some recognition to the use of the plural "purposes" in the phrase by which s 46(2)(b) of the Transport Act is prefaced.

"For the purposes of any Act"

45 This phrase confines the deeming effect of s 46(2)(b) to statutes of New South Wales[57]. If the reasoning advanced by Williams, Webb and Taylor JJ in *Wynyard Investments* were to be adopted in disposing of this appeal, the RTA would receive the benefit of the full panoply of the privileges and immunities enjoyed pursuant to statute by the Crown in right of New South Wales. But this

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56 The term "Crown" is defined in s 3 of the *Crown Proceedings Act* 1988 (NSW) as including "a statutory corporation, or other body, representing the Crown in right of New South Wales", but s 5(1) provides:

> "Any person, having or deeming himself, herself or itself to have any just claim or demand whatever against the Crown (not being a claim or demand against a statutory corporation representing the Crown) may bring civil proceedings against the Crown under the title 'State of New South Wales' in any competent court."

57 *Interpretation Act* 1987 (NSW), s 65.

would not, for example, extend to those prerogative immunities in litigation[58] which have not been displaced by statute. The majority in *Wynyard Investments* sought to explain this anomaly by attributing it to the circumstance that[59]:

> "the duties, powers and functions of the commissioner are derived so largely from statutes. Common law rights and obligations must often arise during their exercise but the Crown in New South Wales can be sued both in contract and in tort, and the commissioner would receive little benefit from any wider protection."

However, that, with respect, is unconvincing.

46 As previously discussed in these reasons, where the legislature creates by statute an immunity in the Crown, the criterion which it may be taken to have intended as determinative of whether and to what extent that immunity might cover entities other than the Crown is the possibility of impairment to the Crown's existing legal situation. The legislature may be taken to have intended that the precise nature of the duties, powers and functions of a statutory body should, in large part, determine whether that body may successfully invoke a statutory immunity enjoyed by the Crown. However, to accept in this appeal what was said by the majority in *Wynyard Investments* would be to suggest that, in the eyes of the New South Wales Parliament, the primary factor in determining the range of the Crown's statutory immunities susceptible to enjoyment by the RTA is the statutory origins of its duties, powers and functions, and not their nature or their impact upon the executive government. It is difficult to see why this should be so.

47 There is a further, and more emphatic, reason for rejecting the reasoning adopted by the majority in *Wynyard Investments*. If, as their Honours accepted, there is a congruence between "representing the Crown" and entitlement to its privileges and immunities, then the phrase "for the purposes of any Act" in s 46(2)(b) of the Transport Act must mean "for the purpose of determining whether the RTA may invoke an immunity or privilege conferred upon the Crown by any Act". This would be a distortion of its natural meaning. When seen in this light, it becomes apparent that their Honours' concern at the prospect

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58 A convenient list is to be found in Selway, *The Constitution of South Australia*, (1997), §7.2.11.

59 (1955) 93 CLR 376 at 387.

that Kitto J's reasoning would add unnecessary words to that phrase[60] was misplaced.

The significance of *Wynyard Investments*

48 It has already been suggested in these reasons that, for the appellant to succeed, the holding in *Wynyard Investments* need not be overruled. Nonetheless, it is appropriate to address the significance of the circumstance that the decision in *Wynyard Investments* may have formed part of the context in which s 46(2)(b) of the Transport Act was drafted.

49 To that end, more must said about the observations of Gibbs CJ, speaking for the Court, in *Townsville*. It will be recalled that the Court was there concerned with a statutory provision which contained language not dissimilar from that in s 46(2)(b) of the Transport Act. In determining whether the appellant Board fell within the terms of that language, specifically the expression "a person or body who represents the Crown in right of the State", Gibbs CJ remarked upon the reluctance of courts, in the absence of a clear indication of legislative intent, to extend the immunities and privileges of the Crown to statutory corporations[61]. His Honour also cited the judgment of Kitto J in *Wynyard Investments* as authoritative support for the proposition that it "is possible that the Board might be given the immunities and privileges of the Crown for one purpose and not for another"[62]. More importantly, Gibbs CJ rejected the notion of a perfect congruence between "representing the Crown" and being entitled to its privileges and immunities[63]:

> "Although the word 'represent' is not infrequently used in this context, it would be more precise to say that the question is whether the Board, in erecting the building, enjoys the privileges and immunities of the Crown."

50 Thus the assumptions in the reasoning of the majority in *Wynyard Investments* were not accepted in *Townsville*. Nor, it should be emphasised, did the Court in *Townsville* treat the reasoning in *Wynyard Investments* as foreclosing or controlling the construction of later legislation. These circumstances also

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60 (1955) 93 CLR 376 at 386.

61 (1982) 149 CLR 282 at 291.

62 (1982) 149 CLR 282 at 288.

63 (1982) 149 CLR 282 at 288.

form part of the context in which s 46(2)(b) of the Transport Act is to be understood.

51 That context, at the least, showed that the phrase, "statutory body representing the Crown", could act as a shorthand signifier for a statutory body entitled to the immunities and privileges enjoyed by the Crown. That this could be so, and was so understood, is shown by s 308(6) of the *Duties Act* 1997 (NSW) ("the Duties Act"). This provides:

> "*For avoidance of doubt*, in this section, the ***Crown*** includes any statutory body representing the Crown." (emphasis added)

When seen in the light of this provision, the reasoning in *Wynyard Investments* cannot have assumed talismanic significance for the framing of later New South Wales legislation.

52 Some consideration should also be given to the circumstance that the phrase "statutory body representing the Crown" is frequently employed in other New South Wales legislation as a reference point for identifying entities or individuals upon which powers, functions or privileges are conferred and duties imposed. For instance, s 4 of the *Confiscation of Proceeds of Crime Act* 1989 (NSW) defines the term "State authority" as follows:

> "a Minister of the Crown, a statutory body representing the Crown, a member of the Police Force or a person or body prescribed by the regulations for the purposes of this definition or of a class or description so prescribed".

And s 4 of the *Criminal Records Act* 1991 (NSW) provides[64]:

> "***public authority*** means a public or local authority constituted by or under any Act, a government department or a statutory body representing the Crown, and includes a person exercising functions on behalf of the authority, department or body".

Similarly, the term "public officer" is defined in s 3 of the *Criminal Procedure Act* 1986 (NSW) as including "an officer or employee of a statutory body representing the Crown", and this is replicated in the definition of "law

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64 A definition in identical terms appeared in s 57 of the *District Court Act* 1973 (NSW) and a similar, though more expansive and detailed, one appears in s 4 of the *Environmental Planning and Assessment Act* 1979 (NSW).

enforcement officer" in s 3 of the *Fines Act* 1996 (NSW). In none of these statutes is the expression "statutory body representing the Crown" defined.

53 These examples from the New South Wales statute book direct attention to a significant matter. This is that if, as the majority in *Wynyard Investments* asserted, a "statutory body representing the Crown" is neither more nor less than an agent or a servant of the Crown and as such entitled to its privileges and immunities, then an unacceptable level of uncertainty would be allowed to colour the identification of who or what is, for the purposes of a vast range of legislation in New South Wales, a "State authority" or a "public authority" or a "public officer" or a "law enforcement officer". This is because the decision whether a statutory corporation is entitled to the privileges and immunities of the Crown requires, in the absence of a provision such as s 46(2)(b) of the Transport Act, close attention to the functions of that body and the degree of control exercisable over it by the executive government. The New South Wales Parliament should not be taken to have designed such a result, and therefore, by extension, to have placed great reliance upon the reasoning in *Wynyard Investments*. This and the frequency with which the phrase "statutory body representing the Crown" appears in New South Wales legislation[65] would suggest that that phrase is but a verbal formula employed for a multitude of purposes and given content by such provisions as s 46(2)(b) of the Transport Act.

54 Particular reference has been made to an important revenue law, the Duties Act, and something more should be said respecting s 163ZU of that statute. This sets down as a criterion for the registration of a wholesale unit trust scheme a requirement that not less than 80 per cent of the units in the unit trust scheme be held by, among others, "the Crown in right of the Commonwealth, a State or a Territory (including any statutory body representing the Crown in right of the Commonwealth, a State or a Territory)". This may be taken prima facie as indicating that the expression "statutory body representing the Crown" is more than a verbal formula. Especially is this so if the Commonwealth statute book contains no provision in terms similar to s 46(2)(b) of the Transport Act, suggesting that the expression must derive its content from a source other than such a provision. However, in reading s 163ZU, one cannot separate the phrase "statutory body representing the Crown" from the words that follow it. The expression "any statutory body representing the Crown in right of the

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65 The phrase appears in some 138 statutes currently in force in New South Wales. The cognate expression "statutory corporation, or other body, representing the Crown" appears in the *Co-operative Schemes (Administrative Actions) Act* 2001 (NSW), s 13; the *Corporations (Administrative Actions) Act* 2001 (NSW), s 10; the *Crown Proceedings Act* 1988 (NSW), s 3; the *Luna Park Site Act* 1990 (NSW), s 9.

Commonwealth, a State or a Territory" thus refers to a concept quite different from that denoted by the contrasting expression "statutory body representing the Crown". Whereas the latter is a mere verbal formula, the former, by referring to the various polities within the Australian federal system, may serve as a shorthand signifier for those statutory bodies that are entitled to the immunities and privileges of the executive government in those polities.

Inconvenience or detriment

55 Finally, during oral argument the question was raised whether departure from the majority's reasoning in *Wynyard Investments* would be cause for inconvenience, either to the RTA or the Crown, for example, in relation to local government rates. However, this factor does not supply a convincing basis upon which to resist what has already been said in these reasons.

56 If the appeal were allowed, this would establish that the RTA was bound by the LTA Act and required to comply with the provisions therein dealing with the recovery of possession of prescribed premises (ss 62-87B). But, in relation to the example given, the term "Crown" is defined in the dictionary appended to the *Local Government Act* 1993 (NSW) ("the 1993 Act") as including "any statutory body representing the Crown". The RTA would therefore, by reason of this and s 46(2)(b) of the Transport Act, retain the benefit of those privileges conferred upon the Crown by the 1993 Act, including the exemption from rates for "land owned by the Crown, not being land held under a lease for private purposes"[66].

57 The device of so defining the expression "the Crown" to include any "statutory body representing the Crown" may be found in several New South Wales statutes, reference to some of which has already been made[67]. So, too, the device of providing explicitly that a particular immunity or privilege should be enjoyed both by the Crown and by a "statutory body representing the Crown"[68].

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66 The 1993 Act, s 555(1)(a).

67 See also the *Land Tax Management Act* 1956 (NSW), s 3(1); the *Building and Construction Industry Long Service Payments Act* 1986 (NSW), s 38(1); the *Luna Park Site Act* 1990 (NSW), s 9(3); the *Dividing Fences Act* 1991 (NSW), s 25(3); the Duties Act, ss 259(1), 308(6); the *Co-Operative Schemes (Administrative Actions) Act* 2001 (NSW), s 13(3); the *Corporations (Administrative Actions) Act* 2001 (NSW), s 10(3).

68 See the *Moratorium Act* 1932 (NSW), s 4(1); the *Printing and Newspapers Act* 1973 (NSW), s 3(4); the *Strata Schemes (Freehold Development) Act* 1973 (NSW), ss 8(2), 8A(3); the *Strata Schemes (Leasehold Development) Act* 1986 (NSW),

(Footnote continues on next page)

There is also in New South Wales a multitude of statutes which extend some immunity or privilege to the Crown without also providing explicitly for statutory bodies representing the Crown[69]. This suggests the exercise of legislative choice, rather than oversight, to limit the extent to which statutory bodies may be entitled to the benefit of the immunities or privileges of the executive government.

58 Any inconvenience which might be suffered by the RTA as a consequence of the construction of the legislation accepted in these reasons for judgment should not be a cause for alarm.

59 Furthermore, to allow this appeal would not cause inconvenience or detriment to the State, identified as the Crown in right of New South Wales. The State would retain the benefit of the presumption that it is not bound by statutes of general application. And to deny the RTA the benefit of s 5 of the LTA Act is not to foreclose a contention elsewhere that the RTA too should be able to benefit from that presumption on the grounds that the application of a given statute to its operations would, in legal effect, be an application of the statute to the Crown. In short, the principles articulated by Kitto J in *Wynyard Investments*, which protect the Crown from impairment to its existing legal situation, are not dependent upon an acceptance of the reasoning of the majority

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ss 7(2A), 10(3); the *Tow Truck Industry Act* 1998 (NSW), s 6(1); the *Rail Safety Act* 2002 (NSW), s 104(3).

69 See the *Conveyancing Act* 1919 (NSW), ss 129(6), 157(2), 178; the *Limitation Act* 1969 (NSW), s 10; the *Dangerous Goods Act* 1975 (NSW), s 41(3); the *Environmental Planning and Assessment Act* 1979 (NSW), ss 109M, 109N; the *Land and Environment Court Act* 1979 (NSW), s 64(1); the *Perpetuities Act* 1984 (NSW), s 5(2); the *Biological Control Act* 1985 (NSW), s 6(2); the *Insurance (Application of Laws) Act* 1986 (NSW), s 4(2); the *Confiscation of Proceeds of Crime Act* 1989 (NSW), s 11(2); the *Crown Lands Act* 1989 (NSW), s 170; the *Trade Measurement Act* 1989 (NSW), s 5(2); the *Grain Marketing Act* 1991 (NSW), s 98; the *Roads Act* 1993 (NSW), s 8; the *Sydney Water Act* 1994 (NSW), Sched 2; the *Agricultural Livestock (Disease Control Funding) Act* 1998 (NSW), s 31(2); the *Road Transport (Driver Licensing) Act* 1998 (NSW), s 6(2); the *Financial Sector Reform (New South Wales) Act* 1999 (NSW), s 4(2); the *Price Exploitation Code (New South Wales) Act* 1999 (NSW), s 16(1), (2); the *Fitness Services (Pre-paid Fees) Act* 2000 (NSW), s 7(2); the *Water Management Act* 2000 (NSW), s 312; the *Coal Industry Act* 2001 (NSW), s 52; the *Game and Feral Animal Control Act* 2002 (NSW), s 53; the *Institute of Teachers Act* 2004 (NSW), s 46(2).

in that case. The construction of s 5 of the LTA Act and of s 46(2)(b) of the Transport Act urged upon this Court by the appellant should be accepted and the appeal allowed.

Orders

60 The appeal should be allowed with costs. The order of the Court of Appeal should be set aside and in place thereof, leave to appeal to that Court should be granted, the appeal allowed with costs and the orders of Dunford J set aside. In place of the orders of Dunford J, the appeal to the Supreme Court should be allowed with costs, the decision of the Tribunal dated 8 April 2002 set aside and the matter be remitted to the Tribunal to be determined according to law. All the above costs orders should be made against the RTA, not the Tribunal.

61 HAYNE J. I agree with McHugh, Gummow and Heydon JJ.

62 In *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*[70] the Court held, by majority, that the Commissioner for Railways was the Crown in right of the State of New South Wales within the meaning of s 5(a) of the *Landlord and Tenant (Amendment) Act* 1948 (NSW). The majority (Williams, Webb and Taylor JJ) considered[71] that this conclusion followed from the provision in s 4(2) of the *Transport (Division of Functions) Act* 1932 (NSW) ("the Division of Functions Act") that "for the purposes of any Act" the Commissioner "shall be deemed to be a statutory body representing the Crown". As the dissenting reasons of Kitto J reveal, however, this conclusion about the construction of s 4(2) of the Division of Functions Act was not inevitable.

63 The present appeal concerns s 46(2)(b) of the *Transport Administration Act* 1988 (NSW). It provides that the second respondent, the Roads and Traffic Authority ("the Authority") is, for the purposes of any Act, a statutory body representing the Crown. This verbal formula is not materially different from the expression used in s 4(2) of the Division of Functions Act and considered in *Wynyard*. If the expression in *Wynyard* was construed as requiring the application of s 5(b) of the *Landlord and Tenant (Amendment) Act* to the Commissioner for Railways, the statutory body then in question, why does s 5(b) not apply to the Authority? Does not using the same verbal formula in s 46(2)(b) of the *Transport Administration Act* as was used in s 4(2) of the Division of Functions Act require the same conclusion about the *Landlord and Tenant (Amendment) Act* as was reached in *Wynyard*?

64 The arguments in favour of that conclusion would be powerful if, in the years between the decision in *Wynyard* and the enactment of the *Transport Administration Act*, there had been no development of the law relating to the privileges and immunities of the Crown. Those developments, in response to what was subsequently described[72] as the reach of "the activities of the executive government … into almost all aspects of commercial, industrial and developmental endeavour", included the recognition, in *Townsville Hospitals Board v Townsville City Council*[73], of three propositions of particular relevance.

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70 (1955) 93 CLR 376.

71 (1955) 93 CLR 376 at 385.

72 *Bropho v Western Australia* (1990) 171 CLR 1 at 19.

73 (1982) 149 CLR 282.

65 First[74], "[i]t is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention." Secondly, as had been pointed out by Kitto J in *Wynyard*[75], and was noted in *Townsville Hospitals Board*[76], a statutory body might be given the privileges and immunities of the Crown for one purpose and not another. Thirdly[77], "[a]lthough the word 'represent' is not infrequently used in this context, it would be more precise to say that the question is whether [the body concerned, in performing a particular function,] enjoys the privileges and immunities of the Crown."

66 The legislation now most immediately in question (s 46(2)(b) of the *Transport Administration Act*) was enacted in 1988 against the background not only of the decision in *Wynyard*, but also the subsequent development of the law relating to the privileges and immunities of the Crown. It follows that what was decided in *Wynyard* does not require the conclusion that the present appeal should fail. The construction of s 4(2) of the Division of Functions Act adopted in *Wynyard* should not be applied to s 46(2)(b) of the *Transport Administration Act*. It should not be applied because to do so would fail to give proper effect to the later recognition, in *Townsville Hospitals Board*, that the fundamental principles concerning Crown privileges and immunities require consideration of more than the single question regarded as determinative by the majority in *Wynyard*[78]: is the particular statutory body "to be regarded as an agent or servant of the Crown"? Rather, s 46(2)(b) is engaged by the various provisions found in other New South Wales legislation which use the phrase "statutory body representing the Crown" as a point of reference[79].

67 For these reasons, and the reasons given by McHugh, Gummow and Heydon JJ, the appeal should be allowed with costs against the Authority and consequential orders made in the terms their Honours propose.

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74 (1982) 149 CLR 282 at 291 per Gibbs CJ.

75 (1955) 93 CLR 376 at 394.

76 (1982) 149 CLR 282 at 288.

77 (1982) 149 CLR 282 at 288.

78 (1955) 93 CLR 376 at 383.

79 See, for example, *Confiscation of Proceeds of Crime Act* 1989 (NSW), s 4; *Criminal Records Act* 1991 (NSW), s 4; *Duties Act* 1997 (NSW), s 308(6).

68 CALLINAN J. If a New South Wales enactment states, as do many other enactments of that State, that for the purposes of any Act, a statutory creature represents the Crown, does that creature enjoy the benefit of the immunities that another enactment confers upon, or reserves to the Crown? This is the question that this appeal raises.

69 The facts, the relevant sections of the legislation, and the course of the proceedings so far, are fully stated in the joint reasons of McHugh, Gummow and Heydon JJ.

70 In *Wynyard Investments Pty Limited v Commissioner for Railways (NSW)*[80] this Court (Williams, Webb and Taylor JJ, Fullagar and Kitto JJ dissenting) was required to construe the words "for the purposes of any Act the Commissioner for Railways shall be deemed a statutory body representing the Crown"[81].

71 To deem something to be so is to decree, or to declare it to be so. The word "deemed" therefore adds little or nothing. Accordingly, in my opinion there is no material difference between the words construed in *Wynyard* and the expression that the Court has to construe in this case[82].

72 But before dealing with *Wynyard* I should refer to other, earlier authority in which language of the kind to be construed here was considered and given the operation preferred by the majority in the former. In *Skinner v Commissioner for Railways*[83], Jordan CJ (with whom Halse Rogers and Bavin JJ agreed) said this of s 4(1)(2) of the *Transport (Division of Functions) Act* 1932 (NSW)[84]:

> "Whatever might be the position of the Commissioner for Railways apart from this special provision of the Act of 1932, it is at least clear that he must now in New South Wales for the purposes of any Act be deemed a statutory body representing the Crown, and entitled to all such immunities as flow from that status."

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80 (1955) 93 CLR 376.

81 *Transport (Division of Functions) Act* 1932 (NSW), s 4(2).

82 Section 46(2)(b) of the *Transport Administration Act* 1988 (NSW) states that the Roads and Traffic Authority is "for the purposes of any Act, a statutory body representing the Crown."

83 (1937) 37 SR(NSW) 261.

84 (1937) 37 SR(NSW) 261 at 272.

73 Street CJ and Brereton J considered s 5(a) and (b) of the *Landlord and Tenant (Amendment) Act* 1948 (NSW) ("the LTA Act") in *Electricity Commission of New South Wales v Australian United Press Ltd*[85]. The Commission had been established by the *Electricity Commission Act* 1950 (NSW). It was subject to ministerial control and direction. The respondent there argued that even if the Commission were an agent of the Crown, the words "Crown in right ... of the State" in s 5(a) ought to be construed narrowly because the statutory language of s 5(b) made an express and separate exemption of the Housing Commission of New South Wales.

74 It was submitted that if the "Crown in right of New South Wales" meant "a statutory body representing the Crown", then the express clarification in s 5(b) of the LTA Act that it should not bind the Housing Commission would be redundant. That Parliament included a separate reference to the Housing Commission supported the drawing of a distinction between the "Crown in right of New South Wales" and "a statutory body representing the Crown". The argument was rejected by Street CJ on the basis that the express exemption reflected no more than a super-abundance of caution on the part of the legislature[86]. Brereton J thought the exemption amounted to the piling of precaution upon precaution[87]. In the result, their Honours concluded that the Commission was acting as a servant or agent of the Crown and could not be bound by the LTA Act.

75 In *Wynyard* the majority said this[88]:

> "The only way a statutory body could represent the Crown would be to act as the agent or servant of the Crown and this must be the meaning of the word 'represent' in this special provision. The representation is 'for the purpose of any Act', so that for the purpose of any Act the Commissioner for Railways must be deemed to represent the Crown."

76 The appellant asks this Court to prefer the reasoning and conclusion of Kitto J with whom Fullagar J agreed. His Honour put the matter this way[89]:

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85 (1954) 55 SR(NSW) 118.

86 (1954) 55 SR(NSW) 118 at 123.

87 (1954) 55 SR(NSW) 118 at 129.

88 (1955) 93 CLR 376 at 388 per Williams, Webb and Taylor JJ.

89 (1955) 93 CLR 376 at 396.

> "The point which I regard the cases as insisting upon is that when one turns, as one must, to examine the special legislation under which a statutory corporation acts (in a case where there is no express extension of the relevant Crown immunity to the corporation), one does so for a precise purpose. It is not to ascertain whether there is in some vague sense an approximation of the corporation to a government department. The object in view is to ascertain whether the Crown has such an interest in that which would be interfered with if the provision in question were held to bind the corporation that the interference would be, for a legal reason, an interference with some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown."

His Honour later said this[90]:

> "Moreover, it is difficult ... to suppose that an extension of the Crown immunity from the operation of statutes could have been intended without an intention to give the commissioner the advantages enjoyed by agents of the Crown not only for the purposes of Acts but for all the purposes of the law. Then, too, s 4(2) does not provide that the commissioner shall be deemed to represent the Crown: he is to be deemed 'a statutory body representing the Crown'. The expression has about it the ring of a stereotyped formula used in statutes as a generic description of public bodies of a more or less fixed class which are repeatedly grouped with the Crown as a subject of legislation, that is to say as the subject of specific exempting provisions."

He concluded his judgment in this way[91]:

> "A clear intention appears to me to emerge that, except as regards Acts which specially exempt statutory bodies described as representing the Crown, the commissioner shall be subject, to the same extent as other people, to the laws which Parliament sees fit to make from time to time. And when Parliament came to enact the [LTA Act] it did not exempt statutory bodies representing the Crown. It exempted only the Crown itself and one corporation, the Housing Commission of New South Wales.
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> In the result I am of opinion that the Commissioner for Railways is not entitled to invoke the Crown's immunity in order to escape from the provisions of the [LTA Act]."

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90 (1955) 93 CLR 376 at 401.

91 (1955) 93 CLR 376 at 402.

77 The appellant submits that the decision in *Wynyard* has been overtaken, perhaps even implicitly overruled, by subsequent authority. An instance of that, the appellant contends, is the approval by the majority (McHugh ACJ, Gummow, Callinan and Heydon JJ) of the approach of Kitto J in *Wynyard* in *NT Power Generation Pty Ltd v Power and Water Authority*[92] in which this was said[93]:

> "In *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*, Kitto J also identified another two classes of case. The first involves cases where[94]:
>
> > 'a provision, if applied to a particular individual or corporation, would adversely affect the exercise of an authority which he or it possesses as a servant or agent of the Crown to perform some function so that in law it is performed by the Crown itself'.
>
> The second class consists of cases[95]:
>
> > 'in which a provision, if applied to a particular individual or corporation, would adversely affect some proprietary right or interest of the Crown, legal, equitable or statutory'".

78 The expression of a preference by a majority of the Court for an approach to the statutory construction of an enactment which had earlier been adopted by dissenting judges in another case concerned with a different enactment of a different legislature, undoubtedly has persuasive value in a third case such as this one in which the statutory language is materially very similar. But the expression of that preference does not necessarily determine the third case even though the third case is in the same jurisdiction as the one in which the dissenting opinion was expressed. Other important considerations have to be taken into account, including the extent to which the decision of the majority in the first case has been followed or acted upon by legislatures and others.

79 The appellant referred to *Townsville Hospitals Board v Townsville City Council*[96]. There the relevant statutory language was "... a person or body who

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92 (2004) 79 ALJR 1; 210 ALR 312.

93 (2004) 79 ALJR 1 at 34-35 [168]; 210 ALR 312 at 358.

94 (1955) 93 CLR 376 at 394.

95 (1955) 93 CLR 376 at 394.

96 (1982) 149 CLR 282.

represents the Crown in right of the State"[97]. Gibbs CJ (with whom Murphy, Wilson and Brennan JJ agreed) proffered this caution[98]:

> "All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention."

That caution should of course be respected. It would deserve however even more respect if it had been accompanied by an identification and explanation of the other precise intention to be attributed to the legislature when it used the formula. For myself, I would not attribute to the legislature the sort of mindlessness that Kitto J seemed to think impelled the inclusion of the relevant language in the Act which his Honour was construing in *Wynyard*.

80 The appellant also sought to rely on *Bropho v Western Australia*[99]. There, six Justices (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ)[100] cited with approval a passage from *Potter v Minahan*[101]:

> "[it is] in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

81 The right to a protected tenancy could hardly however be described as a right enjoyed as a matter of fundamental principle. It is a right that owes its existence to statute. Its creation, by enactment, represents a marked departure from the general system of law of landlord and tenant. The Court did not in *Bropho* have to construe an expression of the kind that has been enacted here. It was a case in which reliance was placed by the respondent State upon an

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97 *Building Act* 1975 (Q) s 4(4).

98 (1982) 149 CLR 282 at 291.

99 (1990) 171 CLR 1.

100 (1990) 171 CLR 1 at 18.

101 (1908) 7 CLR 277 at 304 per O'Connor J (footnote omitted).

"entrenched presumption that a statute does not bind the Crown"[102] only. *Bropho* therefore offers little assistance in the resolution of this case.

82 *Wynyard* has stood for a long time. Only very powerful considerations would justify its overruling. I discussed some of the considerations to be taken into account in reversing earlier cases in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[103], a case relating to legal professional privilege. I will not repeat that discussion here. I adhere to the opinions that I expressed in it.

83 One particular consideration that I thought relevant and important in *Brodie v Singleton Shire Council*[104] is present here: that the common law principle or doctrine which a party wished to have overruled, or held to have been propounded in error, had been recognized or enshrined in legislation[105].

84 It is true that the appellant was able to identify no fewer than eighteen Acts of the New South Wales Parliament which confer a benefit upon the Crown, and which define the Crown to include "a statutory body representing the Crown". One example is the *Crown Proceedings Act* 1988 (NSW) which relevantly provides[106]:

> "In this Act:
>
> ...
>
> ***Crown*** means the Crown in right of New South Wales, and includes:
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> ...

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102 (1990) 171 CLR 1 at 14.

103 (1999) 201 CLR 49 at 101-105 [153]-[154], [158]-[159], [163]-[164].

104 (2001) 206 CLR 512 at 647 [374]-[375].

105 The principle was that highway authorities should have an immunity for non-feasance. Section 12(1) of the *State Roads Act* 1986 (NSW) provided:

> "The Authority has, and may exercise, in relation to a classified road or a toll work, the functions and immunities of a council in relation to a public road."

106 s 3.

(c) a statutory corporation, or other body, representing the Crown in right of New South Wales."

Language of that kind does suggest that there may well be a distinction between the Crown in right of New South Wales, and statutory bodies in that State representing the Crown.

85 But the provision in question here was enacted following *Wynyard*. In 1973, the *Transport (Division of Functions) Act* 1932 (NSW) was amended by the *Main Roads (Amendment) Act* 1973 (NSW). The sections in the *Transport (Division of Functions) Act* relating to the constitution of the Commissioner for Main Roads were deleted and inserted in the *Main Roads Act* 1924 (NSW) (ss 4A to 4C). The Commissioner appointed under the 1932 Act was deemed to be a corporation sole, and a continuation of the same legal personality despite the repeal of s 6 of that Act. Under s 4A(2)(f) of the *Main Roads Act*, the continued corporation was "... for the purpose of any Act, a statutory body representing the Crown."

86 The same provision also appears in the *State Roads Act* 1986 (NSW), which repealed the relevant part of the *Main Roads Act*, as amended. Section 6 of the *State Roads Act* constituted the Commissioner for Main Roads as a corporation sole, again a continuation of the same legal personality, and s 6(2)(g) provided that the continued corporation was "... for the purpose of any Act, a statutory body representing the Crown."

87 There was, as there almost always is in a case of this kind, the submission that to confer upon the State or any of its emanations, exemptions from any laws of any kind at any time, except in the most special of circumstances, is unfair, and that the Court ought to strive to construe the statutory language in such a way as to avoid that result. This is an attractive submission. But there are important caveats upon its unqualified acceptance. First, the language of the relevant enactment must be reasonably open to such a construction. Secondly, there may be an important public interest to be weighed against the private interest affected, the former of which the Court may be in a position inferior to that of Parliament to assess and bring into account. Thirdly, the Court should be restrained in the implication of words that the enactment does not contain, if an implication in order to achieve a particular result would be necessary. Fourthly, an even more cautious approach by the Court is desirable when the activity being undertaken under the enactment is not of a commercial kind, or the emanation of the State undertaking it, is not of a commercial or competitive character, or is not established deliberately as a separate corporate personality divorced and seen to be divorced from the State[107] for all or most purposes. One relevant

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107 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 616 [121].

consideration in that regard may be that the activities of the corporation are financed or subsidized by the State. As to this last matter, it has to be kept in mind that a great deal has been done in Australia since 1788 by or on behalf of the colonial, State and federal polities, that in other democracies tended to be done by persons engaged in private enterprise. It is not always easy therefore to categorize an activity or an enterprise in this country as either a commercial or State one. It is not surprising therefore that the Crown may sometimes claim an immunity, or an enactment may provide for it, in respect of an activity capable of characterization in more than one way.

88 There is no evidence that the second respondent here was engaged in a regular business of letting residential properties. That it was seems unlikely in view of its statutory objects and functions[108].

89 Having regard to the matters that I have mentioned and the further matters which I will summarize, I have concluded that the appeal should be dismissed.

90 The decision of the majority in *Wynyard* cannot be said to be plainly erroneous by any means, or as a failure to give effect to the legislative intention[109]. Their Honours in the majority did not think that the reference in the enactment there, as here, to representation for statutory but not other legal purposes demanded a different result. They explained themselves in this way[110]:

> "... the duties, powers and functions of the commissioner are derived so largely from statutes. Common law rights and obligations must often arise during their exercise but the Crown in New South Wales can be sued both in contract and in tort, and the commissioner would receive little benefit from any wider protection."

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108 The second respondent is constituted by Pt 6, Div 1A of the *Transport Administration Act* 1988 (NSW). Its functions are conferred by that Act and the following New South Wales Acts: the *Roads Act* 1993, the *Traffic Act* 1909, the *Motor Vehicles Taxation Act* 1988, the *Road Transport (Heavy Vehicles Registration Charges) Act* 1995 and the *Road Transport (Driver Licensing) Act* 1998.

109 see *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13 per Mason J.

110 (1955) 93 CLR 376 at 387.

91 The legislature of New South Wales has frequently enacted the same provision or its like since the decision in *Wynyard*[111]. The decision has stood now for 50 years. *Wynyard* has been applied in New South Wales and elsewhere on several occasions[112].

92 Furthermore, there are some statements in the reasons for judgment of Kitto J in *Wynyard* with which I am unable to agree. His Honour said there that there was no express extension of the relevant Crown immunity to the corporation. That was in a sense to beg the question. On the majority view, the words "representing the Crown" did constitute an extension expressed perhaps not in the precise language used by Kitto J, but in language little or no less unambiguous. For a body to represent the Crown must mean that it is to stand in the shoes of the Crown in carrying out its necessary and incidental statutory functions. Otherwise the phrase would be no more than an empty statutory formula. Crown immunity is one of the particular advantages historically available to the state, and it is difficult to believe that one of the purposes of legislating that a corporation represent the Crown was not to confer that, or at least some significant immunity upon it. So too, the reference by Kitto J to "some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown" is not particularly helpful. There was a time when all of these were claimed absolutely by the Crown. Nowadays it can be said that all of the activities undertaken by the State are, or should be undertaken, not in any regal, personal or capricious interest, but in the public interest and at public expense. That is a circumstance that can argue at least as much in favour of Crown immunity as against it. I am also inclined to doubt whether his Honour's pejorative description of the statutory formula as a stereotypical generic description of a class of public bodies repeatedly grouped with the Crown, assists in the resolution of the issue of immunity. Consistency of language is designed to produce consistency of result. Grouping with the Crown implies association, and the sharing of characteristics with, the Crown.

93 I acknowledge the strength of the arguments advanced in favour of the appellant. I am far from convinced however that acceptance of them would allow, as the appellant argues, the first respondent to claim an immunity in any

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111 For example, see the following New South Wales Acts: *Crown Lands Act* 1989, s 13(4); *Education Act* 1990, s 99(2); *Government Telecommunications Act* 1991, s 29(3); *Housing Act* 2001, s 6(4); *Motor Accidents Compensation Act* 1999, s 198(2); *Ports Corporatisation and Waterways Management Act* 1995, s 35(2).

112 *Aborigines Welfare Board v Saunders* [1961] NSWR 917; *Randwick Municipal Council v Commissioner for Government Transport* [1967] 1 NSWR 428; *Holflex Pty Ltd v Paradox Pty Ltd* (1989) 97 FLR 438; *Chief Commissioner of State Revenue v Darling Harbour Authority* (2001) 114 LGERA 97.

other circumstances. The first task, that Kitto J thought that the Court had to undertake, of identifying a power, or right, or privilege (of the Crown), may cause particular difficulty in this country in which State, and therefore Crown activities are, and historically have been, very diverse.

94 The most persuasive of the matters that argue in favour of the second respondent is the enactment by the New South Wales legislature of at least 80 Acts, to some only of which I have referred, containing exactly the same, or virtually the same, formula, and which have been identified in detail by the parties.

95 I would dismiss the appeal.