High Court of Australia

Jacobsen v Rogers [1995] HCA 6; (1995) 182 CLR 572; (1995) 69 ALJR 131; (1995) 37 ALD 321; (1995) 76 A Crim R 400 (17 February 1995)

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Statutes

HIGH COURT OF AUSTRALIA
MASON CJ(1), BRENNAN(2), DEANE(1), DAWSON(1), TOOHEY(1), GAUDRON(1) AND McHUGH(3) JJ

Statutes - Crown - Commonwealth Act authorizing issue of **search warrants** - Warrant to search State government premises - Crimes Act 1914 (Cth), s. 10.

HEARING

CANBERRA, 1994, April 19, 20; SYDNEY, 1995, February 17
17:2:1995

APPEAL from the Federal Court of Australia.

On 12 February 1992 a stipendiary magistrate for the State of Western Australia issued two **search warrants** authorizing two members of the Australian Federal Police Force, Johannes Jacobsen and Terence Dibb, to enter premises occupied by the Department of Fisheries of the State of Western Australia and to seize specified categories of documents. Peter Rogers, the Director of Fisheries for Western Australia, applied to the Federal Court for a declaration that the warrants were invalid and an injunction restraining the policemen from acting upon them. He also applied for an order of review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) of the decision of the magistrate to issue the warrants. French J. held that the warrants were authorized by s. 10 of the Crimes Act 1914 (Cth) and

dismissed the applications. The Director appealed to a Full Court of the Federal Court (Black CJ, Shepherd and Lee JJ.) which allowed the appeal, set aside the decision of the magistrate to issue the warrants and declared them invalid. The policemen appealed to the High Court by special leave.

ORDER

Appeal allowed.

Set aside the orders of the Full Court of the Federal Court made 16 July 1993.

Remit the matter to the Federal Court for determination in accordance with these reasons.

The respondent to pay the costs of the appellants of the appeal in this Court.

DECISION

MASON CJ, DEANE, DAWSON, TOOHEY AND GAUDRON JJ This appeal raises the question whether s.10 of the Crimes Act 1914 (Cth) binds the Crown in right of the State of Western Australia so as to subject it to the execution of two **search warrants** issued pursuant to that section. The two **search warrants** were issued by a stipendiary magistrate and authorized two members of the Australian Federal Police to enter premises of the Fisheries Department of Western Australia and to seize certain documents. The documents were returns which commercial fishermen were required to make pursuant to s.18 of the Fisheries Act 1905 (W.A.) and other documents which contained information concerning their catch of rock lobster in waters off the coast of Western Australia. That information was used by the Department in connection with research carried out by it to ensure that fisheries in waters off the State coast are managed on a sustainable basis.

2. The **search warrants** recite that the magistrate was satisfied that there were reasonable grounds for believing that the documents sought would afford evidence of the commission of offences against s.29D of the Crimes Act, namely, "offences of defrauding the Commonwealth in that cash payments received in respect of rock lobster were not declared to the Commissioner of Taxation thereby evading the payment of income tax" and related offences pursuant to the Taxation Administration Act 1953 (Cth).

3. Under s.19 of the Western Australian Fisheries Act:

"(1) A person who discloses or makes use of any information -

(b) furnished to him or obtained by him under this Act or in

connection with the execution of this Act,

commits an offence unless that information is disclosed or used -

(i) with the prior consent in writing of the person to whose activities that information relates;

(ii) for the purpose of giving effect to the objects of, and in the performance of a duty under, this Act; or

(iii) in circumstances in which that disclosure or use is permitted by this Act.

(2) A person having the custody of information referred to in subsection (1) shall, notwithstanding anything contained in any other law, not be required by subpoena or otherwise to produce that information to any court."

4. There was evidence that the confidentiality of the information furnished by fishermen in their returns made pursuant to s.18 of the Fisheries Act was important in ensuring the reliability of that information. It was said that unless the information was reliable the research and management systems of the Department would be fundamentally impaired.

5. The Director of Fisheries for Western Australia sought declaratory and injunctive relief against the magistrate and the two federal policemen to whom the warrants were issued. He also sought an order for review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) of the decision of the magistrate to issue the warrants. An order was made restraining the policemen from executing the warrants pending the resolution of these proceedings upon the Director giving an undertaking that he would "protect and preserve within the Department... all of the returns and any other thing to which the warrant the subject of these proceedings relates or may relate".

6. Section 10 of the Crimes Act provides:

"(1) If a Magistrate or Justice of the Peace is satisfied by

information on oath that there is reasonable ground for suspecting that there is in or upon any premises, aircraft, vehicle, vessel or place:

(a) anything with respect to which any offence against any law of

the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed;

(b) anything as to which there are reasonable grounds for

believing that it will afford evidence as to the commission of any such offence; or

(c) anything as to which there is reasonable ground for believing

that it is intended to be used for the purpose of committing any such offence;

or that any such thing may, within the next following 72 hours, be brought into or upon the premises, aircraft, vehicle, vessel or place, the Magistrate or Justice of the Peace may grant a **search warrant** authorising any constable named in the warrant, with such assistance, and by such force, as is necessary and reasonable, to enter at any time the premises, aircraft, vehicle, vessel or place named or described in the warrant, and to seize any such thing which he or she might find there.

(1A) A constable named in a warrant may, where it is necessary and

reasonable to do so for the purposes of executing the warrant, break open such doors and receptacles as are in or upon the premises, aircraft, vehicle, vessel or place named or described in the warrant and may do so with such assistance, and by such force, as is necessary and reasonable.

(2) Subsection (1) is not intended, and shall be deemed never to

have been intended, to limit or exclude the operation of a law of a Territory relating to the search of premises, aircraft, vehicles, vessels, places or persons in connection with offences against any law of that Territory."

7. Section 10 is derived from s.679 of the Queensland Criminal Code (1 Section 10 was in force at all times material to these proceedings. However, it has since been repealed and another provision substituted by the **Crimes (Search Warrants and Powers of Arrest)** Amendment Act 1994 (Cth). For the purposes of this judgment, the present tense will be used). The nature of a **search warrant**, such as is authorized by s.10, was recently discussed in George v. Rockett (2 [1990] HCA 26; (1990) 170 CLR 104 at 110). The legislation seeks to balance the need for an effective system for the investigation of crime against the need to protect the individual from arbitrary invasion of his privacy and property. The warrant itself is simply a document, issued by a person with statutory power to do so, authorizing the doing of acts which would otherwise be illegal (3 See Reg. v. I.R.C.; Ex parte Rossminster Ltd. [1979] UKHL 5; (1980) AC 952 at 1000). The acts which it authorizes constitute an invasion of premises without the consent of the persons in lawful possession or occupation of them and the seizure of things answering the description contained in the legislation. In other words, what would otherwise be a trespass ceases to be so when done pursuant to a valid warrant. And since acts done pursuant to the warrant are lawful, any intentional interference with them when they are carried out by a public officer will constitute the offence of obstruction under s.76 of the Crimes Act.

8. It is against this background that one must ask the question whether s.10 binds the Crown in right of Western Australia which, in the present context, means the executive branch of government of that State.

9. It must, we think, now be regarded as settled that the application of the presumption that a statute is not intended to bind the Crown extends beyond the Crown in right of the enacting legislature to the Crown in right of the other polities forming the federation (4 See Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd. [1979] HCA 15; (1979) 145 CLR 107). Thus, in construing a Commonwealth statute, there is a presumption that it is not intended to bind the Crown in right of the various States as well as the Crown in right of the Commonwealth. Whether this wide view of the presumption rests upon the controversial and somewhat artificial doctrine of the indivisibility of the Crown (5 ibid. at 128-129 per Stephen J; Reg. v. Canadian Transport Commission (1977) 75 DLR (3d) 257 at 264), or whether it is justifiable upon the basis that there is but one body of statutory law in the federation, regardless of its source, which is presumed to apply to subjects and not to the Crown (6 See Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd. (1979) 145 CLR at 135-136 per Mason and Jacobs JJ), is something which it is unnecessary to pursue, particularly in the light of the decision of this Court in

Bropho v. Western Australia (7 [1990] HCA 24; (1990) 171 CLR 1).

10. Before the decision in Bropho, the presumption had been elevated to a rule of construction that the Crown was only bound by a statute by express mention or necessary implication. Moreover, the necessary implication was required to be manifest from the very terms of the statute in such a way that it was possible to say that "at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound" (8 Province of Bombay v. Municipal Corporation of Bombay (1947) AC 58 at 63). In Bropho, the Court denied the stringency and inflexibility of that rule and affirmed that it must be the legislative intention which ultimately prevails. The majority said (9 (1990) 171 CLR at 21-22):

> "Once it is recognized that the rule does not, of itself, provide an impregnable foundation for its own observance, there can remain no basis in principle for unqualified insistence upon the rule as an inflexible one, with the stringent implications which recent cases have accorded it. In other words, once it is accepted that a legislative intention to bind the Crown may be disclosed notwithstanding that it could not be said that that intention was 'manifest from the very terms' of the statute or that the purpose of the statute would otherwise be 'wholly frustrated', fundamental principle precludes confinement of the general words which the legislature has used in a way which will defeat that intention. Such a legislative intent must, of course, be found in the provisions of the statute - including its subject matter and disclosed purpose and policy - when construed in a context which includes permissible extrinsic aids. If such a legislative intent does appear from the provisions of a statute when so construed, it must necessarily prevail over any judge-made rule of statutory construction including the rule relating to statutes binding the Crown."

Since s.10 of the Crimes Act predates the rigid test laid down by the Privy Council in Province of Bombay v. Municipal Corporation of Bombay (10 (1947) AC 58) and was enacted during a period when authority in this country supported the view that the rule of construction is not "inflexible, but is merely a presumption in favour of a particular meaning", no problem is encountered in the application of the presumption in accordance with the explanation of it provided by Bropho (11 (1990) 171 CLR at 22-23). The legislation was clearly not drafted upon the basis of the law as it was later expounded.

11. Section 10 is not expressed to bind the Crown and in this

respect may be contrasted with s.85ZQ of the Crimes Act which provides that Pt VIIC binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island. But Pt VIIC embodies a discrete legislative scheme with respect to pardons, quashed convictions and spent convictions which was added to the Crimes Act in 1989 (12 See Crimes Legislation Amendment Act 1989 (Cth), s.10) as a result of recommendations made by the Law Reform Commission (13 Report No.37, Spent Convictions (1987)). Moreover, other provisions of the Crimes Act which are not expressed to bind the Crown clearly do so by implication. For example, Pt IC, which deals with the investigation of Commonwealth offences, necessarily directs itself to the activities of Commonwealth and State officers. The presence of s.85ZQ does not, therefore, indicate that s.10, which is in Pt IA of the Crimes Act, is not intended to bind the Crown. It is to s.10 itself - to its subject matter and evident purpose - that one must turn for any indication that the presumption is rebutted.

12. The section is concerned with the investigation and prosecution of crime. That is a function of the executive government and the section operates in aid of that function. It does not, in that regard, impose any duty or obligation on the Crown; it is facultative, providing a means by which the Crown may perform its role more effectively. Clearly the section applies for the benefit of the Crown, even if it may not be said to bind it, and the question is whether, in providing a facility of which the Crown might avail itself, the legislature intended the Crown to be immune from the exercise of authority under the same section. In one sense, it may be said that when a **search warrant** is obtained on behalf of the Crown in respect of Crown premises, the Crown is consenting to the search and seizure which the execution of the warrant entails and there is no occasion to question the force of the section to bind the Crown. But that is to ignore the reality of the situation in which the Crown bears not one, but many aspects. As was observed in the Engineers' Case (14 Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920) 28 CLR 129 at 152), executive power "is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown".

13. It is, we think, important to recognize that the Crown, being relevantly the executive branch of government, carries out in modern times multifarious functions involving the use and occupation of many premises and the possession of many things. It carries out those functions through servants and agents who, notwithstanding that they act with the authority of the Crown, have no immunity from the

ordinary criminal law (15 See Bropho v. Western Australia (1990) 171 CLR at 21, 26; A. v. Hayden [1984] HCA 67; (1984) 156 CLR 532 at 580-582). The Crown itself may not be subjected to criminal liability, save in the most exceptional circumstances (16 See Cain v. Doyle [1946] HCA 38; (1946) 72 CLR 409 at 424), but those who actually occupy Crown premises or hold Crown property are in a different position. There may exist on Crown premises things which, whether the property of the Crown or not, will afford evidence as to the commission of an offence or which are intended to be used for the purpose of committing an offence, whether the offence is one committed or to be committed by a servant or agent of the Crown or someone else. Such things as financial records maintained by government institutions or the contents of post office boxes or baggage held at airports operated by or on behalf of the Crown afford good examples. Indeed there may be things on Crown premises which have nothing to do with the conduct of the department or authority in question. Nevertheless, on the respondent's argument, they would be beyond the reach of a **search warrant** issued pursuant to s.10.

14. In our view, it cannot have been intended by the legislature that a **search warrant** issued under s.10 of the Crimes Act should stop short of Crown premises with the result that criminal offences might go unpunished or, at the very least, that their investigation and prosecution might be made more difficult. It is no answer to say that the Crown might voluntarily relinquish those things which might otherwise be sought under a **search warrant** and would do so because of its concern in the investigation and prosecution of crime. Apart from the obvious case where Crown premises are controlled by a person who is suspected of committing the offence in question and who is unlikely to relinquish any incriminating material voluntarily, the objectives of government departments and agencies and their general obligation to maintain confidentiality (17 For example, Public Service Regulations (Cth), reg.35) are likely to conflict with the objectives of those agencies whose function it is to investigate and prosecute criminal offences. Section 10, in arming the executive government with authority to investigate criminal offences by the exercise of powers of search and seizure, does not contemplate that it should be powerless where the premises or property in relation to which it seeks to exercise those powers are Crown premises or Crown property. That would be inconsistent with the main purpose of s.10 which, for that reason, sufficiently exhibits an intention to rebut the presumption that it does not bind the Crown. It may be added that, having regard to the Crown's interest in the administration of justice, the presumption must in any event have less strength than in other circumstances (18 See Bropho v. Western Australia (1990) 171 CLR at 23).

15. Of course, in relation to specific property the legislature may exclude the operation of s.10 and on at least one occasion has in fact done so (19 See Commonwealth Electoral Act 1918 (Cth), s.390A). And where the public interest in maintaining the confidentiality of particular documents in the possession of government or a government agency ought to prevail over the public interest in the prosecution of crime, then those documents have in our view public interest immunity from search and seizure under s.10.

16. In Baker v. Campbell (20 [1983] HCA 39; (1983) 153 CLR 52), this Court held by a majority that the doctrine of legal professional privilege is not confined to judicial and quasi-judicial proceedings and extends to the compulsory disclosure of communications in extrajudicial proceedings. In particular, it was held to extend to search and seizure under a warrant issued pursuant to s.10 of the Crimes Act. The majority referred to the principle that a basic common law doctrine is not to be abrogated except in the clearest of terms and held that s.10, being silent upon the matter, did not exclude the doctrine of legal professional privilege. Public interest immunity reflects public policy as does legal professional privilege (21 See Norwich Pharmacal v. Customs and Excise Commissioners [1973] UKHL 6; (1974) AC 133 at 206-207), although it has never been thought to be confined to judicial and quasi-judicial proceedings (22 See The Commonwealth of Australia v. John Fairfax and Sons Ltd. [1980] HCA 44; (1980) 147 CLR 39 at 52). In accordance with the approach adopted in Baker v. Campbell, it is open to the Crown to resist the seizure under a s.10 **search warrant** of documents to which public interest immunity attaches.

17. As is demonstrated by Baker v. Campbell and by this case, if a dispute arises as to the existence of the immunity, means are available to obtain a judicial determination of the issue. In any event, practical difficulties in giving effect to the immunity in the context of the execution of a **search warrant** would seem to us to be an inadequate reason for holding the doctrine to be inapplicable. Such practical difficulties as exist are not insurmountable. That is demonstrated by the guidelines agreed in 1986 between the Australian Federal Police and the legal profession on the execution of **search warrants** on lawyers' premises where a claim of legal professional privilege is made (23 See "Guidelines on the Execution of **Search Warrants** on Lawyers' Premises" (December 1986) 21 Australian Law News 21; see also Forsyth v. Arno (1986) 65 ALR 125; Federal Commissioner of Taxation v. Citibank Ltd. (1989) 85 ALR 588).

18. Public interest immunity has a particular application in the case of information gleaned upon the basis of confidentiality. As

Viscount Dilhorne said in Norwich Pharmacal v. Customs and Excise Commissioners (24 (1974) AC at 189):

"I do not accept the proposition that all information given to a government department is to be treated as confidential and protected from disclosure, but I agree that information of a personal character obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose, is to be regarded as protected from disclosure, even though there is no statutory prohibition of its disclosure."

And in Conway v. Rimmer Lord Reid said (25 [1968] UKHL 2; (1968) AC 910 at 946):

"If the state insists on a man disclosing his private affairs for a particular purpose it requires a very strong case to justify that disclosure being used for other purposes."

The principle does not appear to depend upon the encouragement of candour but rather upon the consideration that the public interest is best served by preserving the basis upon which the information was given. It may be necessary for the proper functioning of the public service to withhold documents where failure to do so would impair confidence in its assurances (26 See Sankey v. Whitlam (1978) 142 CLR 1 at 39). Confidential information of a business character required to be given by a statute which prohibits the disclosure of the information and protects it from production to a court would appear to present a particularly strong case for immunity. Nevertheless, even where the private right to confidentiality is of some magnitude and its preservation is in itself in the public interest, it must be weighed against the public interest in disclosure for the purposes of the investigation and prosecution of the offences in question (27 ibid. at 60-62). Ultimately, that issue may require judicial determination but, as we have said, if the warrant is executed in a reasonable manner, as it must be (28 Federal Commissioner of Taxation v. Citibank Ltd. (1989) 85 ALR at 598-599, 618-619), there is no reason why that issue may not be resolved by a court.

19. The power of the Commonwealth Parliament to enact s.10 of the Crimes Act was not questioned before us. Plainly the Commonwealth has power to aid the investigation and prosecution of offences, the creation of which is incidental to the execution of its legislative powers. Nor are the circumstances such, in our view, as to raise any presumption that the Commonwealth did not intend the legislation to bind the States. It is true that in In re Foreman and Sons Pty. Ltd.; Uther v. Federal Commissioner of Taxation, Dixon J said (29 [1947] HCA 45; (1947) 74

CLR 508 at 529):

> "A federal system is necessarily a dual system. In a dual political system you do not expect to find either government legislating for the other."

An expectation is somewhat less than a presumption and, as the next sentence of Dixon J's observation indicates, is not always realized (30 ibid):

> "But supremacy, where it exists, belongs to the Commonwealth, not to the States."

Moreover, that case was concerned with the "question of State legislative power affecting to control or abolish a federal fiscal right" (31 The Commonwealth v. Cigamatic Pty. Ltd. (In Liquidation) [1962] HCA 40; (1962) 108 CLR 372 at 378). It is in that context that Dixon J made his remarks.

20. Once it is seen that the Commonwealth intended by s.10 to bind its own executive government, there is no reason to suppose that it did not intend to bind the executive governments of the States. To reach any other conclusion would suggest that the Commonwealth intended to curtail the investigation and prosecution of offences against its laws where the States are concerned but not where the Commonwealth itself is concerned. In the enactment of s.10 the legislature must be taken to have relied upon the full extent of its legislative power which, by virtue of s.109 of the Constitution, prevails over any conflicting State legislation.

21. Other considerations would govern the effect upon the Commonwealth executive of State legislation authorizing search and seizure but it is by no means apparent that the Commonwealth, or at least the agencies through which it operates, would be immune (32 See Pirrie v. McFarlane [1925] HCA 30; (1925) 36 CLR 170 at 182-183, 218-219, 228-229). The question of Commonwealth immunity from State legislation is a difficult one which has not yet been fully resolved, but it is clear that the States, acting pursuant to the powers which they possess under the Constitution, are not subordinate to the federal government (33 See Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 at 50 per Latham C.J). Of course, the Commonwealth in the exercise of its paramount legislative power may restrict the effect of State legislation upon its operations. But it has always been recognized that the Commonwealth may be affected by State laws of general application (34 See, e.g., Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd. [1940] HCA 13; (1940) 63 CLR 278 at 308; The

Commonwealth of Australia v. Bogle [1953] HCA 10; (1953) 89 CLR 229 at 260). A law authorizing the issue of search and seizure warrants may be such a law, particularly when it binds the occupier of premises subjected to a warrant only by relieving those to whom the warrant is issued from tortious liability. Under s.52 of the Constitution the Commonwealth has exclusive legislative power with respect to Commonwealth places, but State laws apply pursuant to s.4(1) of the Commonwealth Places (Application of Laws) Act 1970 (Cth). It is, however, unnecessary in this case to determine the effect of State legislation of a kind similar to s.10.

22. For these reasons we would allow the appeal and set aside the order of the Full Court of the Federal Court which set aside the decision to issue the warrants in question. Since the judge at first instance rejected the submission that public interest immunity could have an application in relation to the execution of a warrant under s.10, we would remit the matter to the Federal Court to consider, in the light of these reasons, whether there is immunity in this case.

BRENNAN J Section 10 of the Crimes Act 1914 (Cth) confers (35 It is convenient to use the present tense although s.10 has been repealed and new provisions substituted by the **Crimes (Search Warrants and Powers of** Arrest) Amendment Act 1994 (Cth). Section 10 was in force at all times material to these proceedings) on a constable named in a **search warrant** issued pursuant to that section authority "to enter at any time the premises, aircraft, vehicle, vessel or place named or described in the warrant, and to seize any such thing which he or she might find there". The constable may be authorized to seize "anything" which answers one or more of the descriptions contained in s.10(1)(a), (b) or (c) (hereafter "relevant things"). Relevant things are -

"(a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed;

(b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or

(c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence".

The warrant may be issued for execution in or upon "any premises, aircraft, vehicle, vessel or place". The constable's entry may

lawfully be effected "with such assistance, and by such force, as is necessary and reasonable". The Parliament's unqualified references to any premises, etc., to be entered at any time in order to seize anything answering the statutory description was necessitated, no doubt, by the impossibility of foreseeing either the innumerable permutations of circumstances in which federal offences might be committed or the classes of things that might evidence the commission of federal offences.

2. In this case, the question is whether the powers conferred by the general terms of s.10 are qualified by an exemption in favour of documents which are said to be the property of and in the custody of the Crown in right of the State of Western Australia. The documents are returns which have been furnished in accordance with s.18 of the Fisheries Act 1905 (W.A.) relating to the quantity of rock lobster taken by licensed fishermen and purchased or received by nominated companies in Western Australia. Section 19 of that Act provides:

" (1) A person who discloses or makes use of any information -

(a) contained in a return furnished under section 18(1); or

(b) furnished to him or obtained by him under this Act or in connection with the execution of this Act,

commits an offence unless that information is disclosed or used -

(i) with the prior consent in writing of the person to whose activities that information relates;

(ii) for the purpose of giving effect to the objects of, and in the performance of a duty under, this Act; or

(iii) in circumstances in which that disclosure or use is permitted by this Act.

(2) A person having the custody of information referred to in

subsection (1) shall, notwithstanding anything contained in any other law, not be required by subpoena or otherwise to produce that information to any court."

However, if s.10 is a valid law of the Commonwealth and the powers thereby conferred are not impliedly qualified so as to permit the confidentiality provisions of the Fisheries Act of Western Australia to operate according to their tenor, s.10 prevails over the

confidentiality provisions to the extent of any inconsistency between them: s.109 of the Constitution.

3. It is a question of construction whether the powers conferred by s.10 of the Crimes Act are qualified. Although much of the argument before this Court proceeded on the footing that the question was whether the Parliament of the Commonwealth intended, or should be taken to have intended, that the Crown in right of a State be bound by s.10 of the Crimes Act, I venture to suggest that that is not the appropriate question to be considered in determining this appeal.

4. The question whether a statute "binds" the Crown depends upon the circumstances including the terms of the statute, its subject matter, the nature of the entity in respect of which the question of applicability of the statute arises, the nature of the mischief to be redressed, the general purpose and effect of the statute and the nature of the activities of the Crown which would be affected if the Crown be bound (36 Bropho v. Western Australia [1990] HCA 24; (1990) 171 CLR 1 at 23, 27-28. See also Registrar of the Accident Tribunal v. Federal Commissioner of Taxation [1993] HCA 1; (1993) 178 CLR 145 at 171). These are factors of varying importance and their relevance can be seen clearly when the statute under examination imposes duties, liabilities, or restrictions on legal capacity in general terms without expressly imposing the duty, liability or restriction on the Crown. They are factors of importance when the statute prescribes a canon of conduct to be obeyed, creates a remedy for a wrong, imposes a particular liability or preserves the property of subjects (37 See, for example, Bropho; Minister for Works (W.A.) v. Gulson [1944] HCA 27; (1944) 69 CLR 338; Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd. [1979] HCA 15; (1979) 145 CLR 107 and the three kinds of statutes mentioned in the Magdalen College Case [1572] EngR 413; (1615) 11 Co Rep 66b at 72a-72b [1572] EngR 413; (77 ER 1235 at 1243-1244)). But s.10 does not operate in any of these ways. It confers a power of entry, search and seizure but it imposes no more than a passive obligation to suffer the exercise of the power conferred. A subject who is the owner or occupier of a place that is entered and searched or who is the owner or custodian of a relevant thing that is searched for and seized is not subjected to a duty, liability or restriction on capacity (except in that passive sense). The subject is not bound by the law to obey some canon of conduct or to discharge any duty or liability. Nor does s.10 constrain the conduct of a State or impose on it any duty, liability or restriction on legal capacity (except in the passive sense).

5. When a law of the Commonwealth imposes a duty or liability on a

class or restricts the legal capacity of a class, a question may arise as to whether the term used to describe the class should be construed to include a State. In such a context, the question may be posed in the form: does the law "bind" the State? But when the law confers on a repository a power expressed in unqualified terms and an exercise of the power is capable of affecting places owned or occupied by a State or things belonging to or in the custody of a State, a different question must be asked in order to determine whether the State is immune from exercise of the power. The question is whether the power is so limited that it does not extend to an exercise affecting the State. The question of the extent of a power is not the same as the question of membership of a class on whom a law imposes a duty, liability, or restriction on legal capacity.

6. If it were possible to resolve this case by analogy with cases where the issue was whether a law of the Commonwealth defined a canon of conduct binding on a State or its servants, much assistance would be derived from Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd. In that case, Gibbs ACJ acknowledged (38 (1979) 145 CLR at 122-123) that "the Commonwealth can legislate so as to bind a State" although "the States are neither subjects of the Commonwealth nor subordinate to it". As the States are not subjects of the Commonwealth, general expressions such as "any person" used to describe those on whom a statutory duty is imposed are not read as including the State, unless the statute so provides expressly or by necessary implication (39 The rule in relation to the State is a particular application of the same rule in relation to the Crown: British Broadcasting Corpn. v. Johns (1965) Ch 32 at 78-79). But s.10 does not use any general expression to describe the persons on whose premises the s.10 powers may be exercised or the persons who may own or have in their custody the relevant things that might be searched for and seized. There is no occasion to consider whether a general expression is to be read down to exclude the States. In my respectful opinion, the problem in the present case cannot be resolved by analogy with cases where a statute imposes a duty or liability on, or restricts the legal capacity of, a class described by a general expression.

7. The critical question of construction in this case cannot be whether the State is "bound" by s.10. If an affirmative answer were given to this question, s.10 would simply be construed according to the natural meaning of its terms. If a negative answer were given to this question, how could the limitation on the power conferred by s.10 be expressed? Would the power be held to stop short of authorizing a search on any premises belonging to or occupied by a State? Or would there be no power to search for and seize anything belonging to or in the custody of a State? There is no recognized canon of construction

which warrants the reading down of "any... place" to exclude places belonging to or occupied by a State or the reading down of "anything" to exclude things belonging to or in the custody of a State.

8. However, if the Parliament's power to enact s.10 is limited in a way that protects the States, that limitation creates a corresponding limitation on the scope of the power conferred by s.10, albeit s.10 is expressed without qualification. But constitutionally implied limitations apart, there is no term in the text of s.10 which can be read down to create a State immunity corresponding with any intention that could reasonably be imputed to the Parliament.

9. The purpose for which the powers of entry, search and seizure are conferred are the prevention, detection and prosecution of offences against laws of the Commonwealth. To the extent that there is any limitation imposed on the exercise of the powers conferred by s.10, the powers cannot be exercised to effect their purpose. If State premises were excluded from entry and search, those premises could become alsatias for criminal activity; if State documents were exempt from search and seizure, the gathering of evidence for Commonwealth prosecutions would be in the discretion of the Executive Governments of the States. There is nothing in the text of s.10 or in the nature of the powers it confers which warrants an implication in the text exempting State premises from the places in which those powers might be exercised or State documents from the things which might be seized. If any limitation on the generality of the language of s.10 is to be implied, the implication must be derived either from general principles of the common law or from a limitation on the constitutional power of the Commonwealth to enact s.10. The respondent and the intervening States invoked both these grounds.

Common law principles: public interest immunity

10. A legislature is assumed to have intended not to override important common law principles or rights unless the text of the statute clearly reveals a contrary intention (40 Baker v. Campbell [1983] HCA 39; (1983) 153 CLR 52 at 88, 96-97, 116-118, 123, 132). It was on this principle that a power of search and seizure was held in Baker v. Campbell to be limited so as to allow for claims of legal professional privilege (41 ibid). It was submitted that, by analogy, the powers conferred by s.10 are impliedly limited to allow for the operation of what is now called "public interest immunity". Some such limitation, it is admitted, must be allowed in order to protect documents such as Cabinet papers, the confidentiality of which is essential for the proper government of the State. (Or, if Commonwealth places or

Commonwealth documents were the subject of a warrant, for the proper government of the Commonwealth). Although such an immunity of government is recognized by the courts and applied under the rubric of public interest immunity in the conduct of litigation (42 The Commonwealth v. Northern Land Council [1993] HCA 24; (1993) 176 CLR 604), any such immunity which qualifies the generality of the power conferred by s.10 must be attributed to a constitutional limitation on power rather than to the common law principle of public interest immunity.

11. A claim of public interest immunity must be allowed or refused according to a value judgment made by a court (43 Sankey v. Whitlam (1978) 142 CLR 1 at 38-39, 58-59, 95-96, 110). There is no opportunity to apply public interest immunity when there is no court making the requisite judgment. Such a value judgment could not be formed impartially by those seeking to exercise, or by those seeking to resist the exercise of, the power. If, upon a contested attempt to exercise the power, the status quo were to be preserved pending resort to a court, the question for the court might not be appropriate for judicial determination. For example, where a warrant is executed in the course of an enquiry into whether a suspected offence has in fact occurred, the circumstances bearing upon the public interest might be extremely problematic and appropriate for executive rather than judicial evaluation. As the s.10 powers are investigatory, there may be no way of assessing the likelihood that any search would result in the seizure of any relevant thing, or has resulted in the seizure of a thing that would ultimately be found to have a relevant connection with the commission of an offence against Commonwealth law. Further, if a search pursuant to a warrant has resulted in the seizure of a document the confidentiality of which must be maintained in the public interest, the breach of confidentiality could not be repaired by submitting the issue of public interest to a court.

12. A plea of public interest immunity is a plea to be exempted from an obligation to discover or produce documents or to have admissible evidence excluded in curial proceedings. Section 10 does not purport to impose any obligation with respect to the production of documents nor does it affect the admissibility of evidence. If a confidential document is seized under a **search warrant**, its confidentiality must be respected by any person into whose custody the document comes subject to the use of the document for the purposes for which the power of entry, search and seizure is granted. It may therefore be used for the detection and prosecution of federal offences, but its admissibility in evidence on any prosecution - and its consequent public dissemination - is subject to the court's ruling on public interest immunity. But public interest immunity has nothing to say, in my respectful opinion, about the scope of the powers conferred by

s.10.

Constitutional implications: capacity of States to function

13. The limitation which might affect the Commonwealth's power to make a search and seizure law in aid of valid criminal laws of the Commonwealth is the implied limitation precluding the making of laws which impair the capacity of a State to function as such (44 Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31; Queensland Electricity Commission v. The Commonwealth [1985] HCa 56; (1985) 159 CLR 192 at 205-206, 217, 221-222, 226, 231, 247, 260). There may be a similar limitation, arising from s.61 of the Constitution, precluding the making of laws which impair the capacity of the Executive Government of the Commonwealth from functioning as such. These are the implications which protect, inter alia, the confidentiality of Cabinet documents. But if we are concerned with the implied limitation protective of the States, the circumstances in the present case do not establish that execution of the warrant would exceed the power of entry, search and seizure which the Parliament can constitutionally confer. At all events, there is no evidence to show that the limitation has been exceeded.

14. Section 19 of the Fisheries Act of Western Australia enables an assurance of confidentiality to be given to fishermen and others who furnish information pursuant to s.18 of that Act. That assurance enhances the reliability of the information thus provided, thereby assisting the Government to administer the fishery. Although the execution of a **search warrant** under s.10 may vitiate the assurance, and the function of administering the fishery may be made more difficult thereby, the State's capacity to function is itself unimpaired. The State is still entitled to be furnished with accurate returns in conformity with s.18 of the Fisheries Act, though the faith reposed in the returns may be diminished.

15. It follows that, although the powers conferred by s.10 must be exercised within the limits corresponding with the limits of legislative competence of the Parliament, the scope of the power conferred by s.10 is sufficient to support the entry, search and seizure which the appellants wish to undertake in accordance with the **search warrant**. Accordingly, the appeal must be allowed and the order of French J dismissing the consolidated applications restored.

McHUGH J The question in this appeal is whether s.10 of the Crimes

Act 1914 (Cth) authorises the issue of a warrant to enter premises of the Crown in right of a State for the purpose of taking possession of documents of the Crown that might afford evidence of offences against Commonwealth law. Section 10 authorises the issue of a **search warrant** to enter premises when there is reasonable ground for suspecting, inter alia, that there is in or upon those premises "anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of" an offence against a law of the Commonwealth.

The factual background

2. On 12 February 1992, Mr Kenneth Moore, a stipendiary magistrate for the State of Western Australia, issued two **search warrants** authorising two members of the Australian Federal Police Force to enter premises occupied by the Department of Fisheries of the State of Western Australia and to seize specified categories of documents. Detective Constable Terence Dibb, one of the police officers, swore the Information in support of the grant of the warrants. He alleged that the documents in question contained information furnished to the Department by crayfish processors, crayfishermen and the operators of boats that carried crayfish. Detective Dibb swore that he believed that access to the documents would provide reliable evidence of the true extent of the crayfish harvest from a particular area off the Western Australian coast in the financial years 1 July 1986 to 30 June 1990. He swore that he believed that a comparison between the individual returns and records filed with the Department and the returns of income filed with the Commissioner of Taxation would establish significant discrepancies between the actual value of the catch in those years and the value of the catch declared as income for the purpose of the Income Tax Assessment Act 1936 (Cth) "both globally and in respect of individual crayfishermen, crayfish processors and carrier boat operators". The discrepancies would afford evidence as to the commission of various offences under the Crimes Act and the Taxation Administration Act 1953 (Cth).

3. In the Federal Court, French J held that the warrants in question were authorised by s.10 of the Crimes Act. He dismissed an application by the Director of Fisheries for Western Australia for an order quashing the decision to issue the warrants. The Full Court of the Federal Court (Black CJ, Sheppard and Lee JJ) allowed an appeal by the Director of Fisheries, ordered that the decision of the stipendiary magistrate to issue the warrants be set aside and declared the warrants invalid.

The Fisheries Act 1905 (W.A.)

4. The Fisheries Act is an Act for the regulation of the fishing industry and fish farming and for the conservation and management of fisheries and aquatic animal and plant life and for purposes connected therewith. Section 18(1) of the Act requires every person engaged in any of the operations referred to in s.18(2) to furnish a return in writing in or to the effect of the prescribed form "as to the catch, sales, output, purchases, receipts, fishing gear used, time occupied in fishing, or business of that person". Section 18(2) contains 13 categories of operations. All of them relate to fishing. Section 18(4) provides for penalties in the event of neglect or failure to furnish a return.

5. Section 19 of the Fisheries Act makes it an offence for a person to disclose or make use of any information contained in a return furnished under s.18(1). There are exceptions for information that is disclosed or used with the consent in writing of the person to whose activities the information relates and information that is disclosed or used for the purpose of giving effect to the objects of the Act or as permitted by the Act. Section 19(2) provides:

> "A person having the custody of information referred to in subsection (1) shall, notwithstanding anything contained in any other law, not be required by subpoena or otherwise to produce that information to any court."

The Crimes Act 1914 (Cth)

6. At the relevant time, s.10 of the Crimes Act was, so far as is relevant, as follows:

> "(1) If a Magistrate or Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in or upon any premises, aircraft, vehicle, vessel or place:
> (a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed;
>
> (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or
>
> (c) anything as to which there is reasonable ground for believing that

it is intended to be used for the purpose of committing any such offence;

or that any such thing may, within the next following 72 hours, be brought into or upon the premises, aircraft, vehicle, vessel or place, the Magistrate or Justice of the Peace may grant a **search warrant** authorising any constable named in the warrant, with such assistance, and by such force, as is necessary and reasonable, to enter at any time the premises, aircraft, vehicle, vessel or place named or described in the warrant, and to seize any such thing which he or she might find there.

(1A) A constable named in a warrant may, where it is necessary and reasonable to do so for the purposes of executing the warrant, break open such doors and receptacles as are in or upon the premises, aircraft, vehicle, vessel or place named or described in the warrant and may do so with such assistance, and by such force, as is necessary and reasonable."

7. The literal meaning of s.10 authorised the issue of the warrants in question. But the Full Court of the Federal Court held that s.10 was not intended to bind the Crown either in right of the Commonwealth or of the States. In reaching that conclusion, the Full Court relied on the presumption that a statutory provision in general terms is not intended to bind the Crown (45 Bropho v. Western Australia [1990] HCA 24; (1990) 171 CLR 1 at 15). The members of the Full Court were unable to find anything in the subject-matter, purpose or policy of s.10 or the Crimes Act generally that overrode the presumption. I agree with that conclusion. However, I think that there is an even surer ground for holding that the warrants are invalid. Nothing in s.10 or the rest of the Crimes Act displays an intention, either expressly or by necessary implication, to displace the presumption that the legislature of a member of a federation does not intend its legislation to apply to another member of the federation. In In re Foreman and Sons Pty. Ltd.; Uther v. Federal Commissioner of Taxation (46 [1947] HCA 45; (1947) 74 CLR 508 at 529), Dixon J said:

> "A federal system is necessarily a dual system. In a dual political system you do not expect to find either government legislating for the other."

8. As a result of this expectation, the presumption is that the Crown in right of a State is not bound by Commonwealth legislation. That presumption was not always accepted as a rule of construction in this Court. In R. v. Sutton (47 [1908] HCA 26; (1908) 5 CLR 789), the Court held

that a State government was not entitled to the benefit of the presumption that Commonwealth legislation is not intended to bind the Crown. A clear majority of the Court relied on the fact that the Crown in right of the Commonwealth was a separate juristic person from the Crown in right of a State. O'Connor J said (48 ibid. at 805) that, outside the exercise of his powers, the King's representative in a State was "no more than an individual subject of the King". But in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (49 [1920] HCA 54; (1920) 28 CLR 129) ("the Engineers' Case"), the Court rejected the idea that the Crown was not one and indivisible. Consequently, in Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd. (50 [1979] HCA 15; (1979) 145 CLR 107 at 122-123, 128-129, 136), the Court held that there is a presumption that legislation of the Commonwealth is not intended to bind the Crown in right of the Commonwealth or the States. Gibbs ACJ said (51 ibid. at 123):
"Legislation of the Commonwealth may have a very different effect when applied to the government of a State from that which it has in its application to ordinary citizens. It seems only prudent to require that laws of the Parliament should not be held to bind the States when the Parliament itself has not directed its attention to the question whether they should do so."

So in Bradken, the Court held that the Trade Practices Act 1974 (Cth) did not bind the States although it expressly bound the Crown in right of the Commonwealth.

9. A similar rule of construction is applied in the federations of the United States and Canada. In Will v. Michigan Department of State Police (52 [1989] USSC 118; (1989) 491 US 58 at 65), White J, giving the judgment of the majority of the Supreme Court, said:

"(T)he ordinary rule of statutory construction (is) that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government', it must make its intention to do so 'unmistakably clear in the language of the statute'... Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States".

10. In United States v. Bass (53 [1971] USSC 192; (1971) 404 US 336 at 349), Marshall J, giving the majority judgment in the Supreme Court, said:

"In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

11. In Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission (54 (1989) 61 DLR (4th) 193 at 227),

Dickson CJC, who gave the leading judgment in the Supreme Court of Canada, approved the following passage in a Comment in the Canadian Bar Review (55 (1978) 56 Canadian Bar Review 145 at 150):

"In a federal system it makes some sense to put the onus on a legislature to specially include the other level of government within its enactments if they are to so extend in a restrictive way. This preserves a degree of freedom to the various political units within the federation that is consistent with their mutual independence."

12. Accordingly, in the present case one begins with the presumption that s.10 of the Crimes Act was not intended to bind the Crown in right of the Commonwealth or in right of the State of Western Australia. However, Mr Heenan, QC, for the police officers, while accepting that there was a presumption that the Crown in all its emanations was not bound by s.10, contended that the subject-matter of the section indicated a legislative intention to bind the Crown both in right of the Commonwealth and in right of the States. Mr Heenan pointed to the statement of Griffith CJ in Sydney Harbour Trust Commissioners v. Ryan (56 [1911] HCA 64; (1911) 13 CLR 358 at 365) where his Honour referred to a statement of Lord Coke in the Magdalen College Case (57 [1572] EngR 413; (1615) 11 Co Rep 66b at 72a [1572] EngR 413; (77 ER 1235 at 1243)). In Magdalen, Lord Coke said that one kind of statute that always binds the Crown without naming it is a statute "for the suppression of wrong". Mr Heenan pointed out that s.10 is intended to facilitate investigation of offences against the Commonwealth. He said that the public interest requires that all evidence that is relevant to proof of a crime be available to the prosecution whether or not that evidence is on premises owned or occupied by the Crown in right of the Commonwealth or a State. Accordingly, it was contended that s.10 must be taken to bind the Crown in all its emanations.

13. In my opinion, however, neither the subject-matter of s.10 nor its apparent purpose is sufficient to overcome the presumption that, unless an intention to affect the Crown is clearly discernible, the Crown, whether in right of the Commonwealth or a State, is not affected by legislation of the Commonwealth. The terms of s.10 authorise the seizure of the property and entry upon the premises of private individuals. The plain words of the section allow no escape from that conclusion. But nothing in those words implies an intention to override the presumption that legislation does not apply to the Crown. If they do, the presumption that statutes do not bind or apply to the Crown must now be regarded as a very weak one.

14. In addition, the subject-matter of s.10 makes it less rather than more likely that Parliament intended s.10 to apply to the Crown. If s.10 applies to the Crown, it would mean that, on the information of any person, a magistrate or justice of the peace could authorise a constable to enter any government institution in Australia and seize papers that are alleged to contain evidence of the commission of a crime against the Commonwealth. Prima facie, parliamentary papers, cabinet papers, court papers and national security and defence papers could be seized. In an endeavour to meet these consequences of his submission, Mr Heenan contended that s.10 was probably subject to a claim for public interest immunity in relation to the production of such documents. That is to say, the power to seize relevant documents is subject to those claims of privilege that are recognised by the common law. Mr Heenan pointed out that this Court has already held that s.10 does not extend to requiring the production of documents which are the subject of legal professional privilege (58 Baker v. Campbell [1983] HCA 39; (1983) 153 CLR 52).

15. Although this Court has held that s.10 of the Crimes Act does not extend to authorising the seizure of documents that are protected by legal professional privilege, it does not follow that every other claim of common law privilege is an answer to a s.10 warrant. A claim of public interest immunity, for example, is different from a claim of legal professional privilege. Subject to well defined exceptions, a claim of legal professional privilege is a complete answer to a demand under a subpoena or a **search warrant**. But a claim of public interest immunity is always a relative claim. It must be weighed against the public interest sought to be achieved by the execution of the compulsory process. When a claim for public interest immunity is made in the course of judicial or quasi-judicial proceedings, in respect of a subpoena or a motion for discovery, the relevant court can weigh the public interest in a court of justice having access to relevant evidence against the claim for immunity and decide where the balance of the public interest lies. In that context, a claim of public interest immunity assumes that the documents sought are both relevant to and admissible in support of an issue that is being litigated. But the documents and property that may be seized under a **search warrant** are not confined to documents that are admissible in evidence in judicial proceedings. They include documents and property that do no more than "afford evidence as to the commission" of a crime.

16. If a claim of public interest immunity was an answer to a **search warrant**, a court would have to determine the claim and decide where the balance of the public interest lies. Even if the court examined

the seized documents or property, it would find it difficult to evaluate the competing public interests unless it was fully informed by the person who obtained the warrant as to the importance of the seized material to the ongoing investigation. Moreover, a **search warrant** is frequently executed before any judicial proceedings have commenced. In many cases, it will be far from certain that judicial proceedings will be commenced; there may only be a suspicion that a crime has occurred. Consequently, if a claim of public interest immunity is an answer to a s.10 warrant, then, in many cases, the person who obtained the warrant would have to disclose to the court and the opposition the state and goals of the investigation and would need to have access to the seized material. If access to the documents or property was allowed and the claim for immunity later upheld, the reason for the immunity would be undermined, if not defeated. If disclosure of the state and goals of the investigation were required and the claim for the immunity later rejected, the investigation might be prejudiced. Disclosure and access would be inimical to one or other of the respective public interests whichever of those interests ultimately prevailed. The practical difficulties of allowing a claim of public interest immunity as an answer to a demand under a **search warrant** are obviously very great. They tend to suggest that a claim of public interest immunity should not be permitted as an answer to a **search warrant** unless made so by statute.

17. However, in this appeal, it is not necessary to decide whether public interest immunity can ever be an answer to a demand under a **search warrant**. If the construction of s.10 for which Mr Heenan contends is correct, the section still empowers a justice of the peace or stipendiary magistrate to authorise the seizure of the most important and secret documents in the country even if a claim of public interest immunity is available. That would mean that in every case the claim of public interest immunity would have to be weighed against the public interest in examining evidence relevant to the commission of crime. Take as an example the case of documents recording information received by the Taxation Department. Section 16 of the Income Tax Assessment Act prohibits the disclosure in court of documents containing such information except for the purposes of carrying into effect the provisions of the Income Tax Assessment Act. In terms, s.16 has nothing to say about documents being seized by **search warrant**. Yet it is hardly to be supposed that the Commonwealth in enacting s.10 of the Crimes Act intended that a magistrate or justice of the peace could authorise a constable to seize income tax returns held by the Commissioner of Taxation. It is true that, if s.10 authorised the entry onto the premises of the Commissioner of Taxation for the purpose of seizing those returns, then, assuming a claim of public interest immunity was open, the Commissioner could raise the claim in respect of the documents. However, a court would be required

to weigh the claim of immunity for income tax returns against the public interest in having the returns available to the person who obtained the warrant (59 cf. Alister v. The Queen (1984) 154 CLR 404).

Almost certainly occasions would arise where the claim for public interest immunity would be rejected. The purpose of s.16(3) of the Income Tax Assessment Act, which is to ensure that the information in tax returns is not divulged to any court except for carrying out the purposes of that Act, would be defeated by the use of a **search warrant** although it could not be defeated by a subpoena or a motion for discovery (60 cf. Lander v. Mitson (1988) 83 ALR 466). I find it difficult to conclude in the face of s.16 of the Income Tax Assessment Act that s.10 of the Crimes Act was intended to allow such documents to be seized even though s.16 does not deal with the question of **search warrants**.

18. Moreover, s.10 of the Crimes Act does more than authorise the seizure of documents and things asserted to afford evidence of an offence. It authorises a constable with such assistance and by such force as is necessary and reasonable to enter premises at any time. It also authorises a constable, where it is reasonably necessary for the purposes of executing the warrant, to break open doors and containers on the premises with such assistance and by such force as is necessary and reasonable. The authority of a constable executing a **search warrant** extends to searching the persons of, and giving directions to, people on the premises. Failure to submit to the search or to obey the directions constitutes the offence of hindering or obstructing a constable in the execution of his duty (61 Towse v. Bradley (1985) 73 FLR 341). These considerations reinforce the conclusion that s.10 was not intended to apply to the premises or property of the Crown.

19. Because of the consequences of applying s.10 to the Crown, it is difficult to suppose that the general words of s.10 were intended to authorise the issue of warrants directed to Commonwealth departments whose information is protected by secrecy provisions similar to s.16 of the Income Tax Assessment Act (62 cf. Census and Statistics Act 1905 (Cth), s.19; Australian Security Intelligence Organization Act 1979 (Cth), s.92S). Once that conclusion is accepted in respect of documents whose confidentiality is protected by statute, there is no sensible reason for holding that other documents held by the Crown are in a different category.

20. Furthermore, nothing in s.10 indicates an intention to overcome the presumption that Commonwealth statutes do not apply to the Crown

in right of a State. In a federation, you do not expect one government to authorise the seizure of another government's papers or to authorise the forced entry of another government's premises. In Re Commissioner of Water Resources and Leighton Contractors Pty. Ltd. (63 (1990) 96 ALR 242), however, Byrne J held that s.18(4) of the Arbitration Act 1973 (Q.) authorised the issue of a subpoena directed to documents of the Commonwealth even though the Commonwealth was not a party to the arbitration. Mr Heenan relied on that decision. But in construing s.18, Byrne J made no reference to the presumptive rule that in a federation the legislation of one government does not apply to another government. Because his Honour did not refer to the existence of the presumption, I do not think that the decision can be supported. In any event, it is one thing to hold that the general words of a statute of one government authorise a judicial or quasi-judicial body to issue a subpoena duces tecum to another government in the federation. It is a very different matter to conclude that the general words of a statute of one government are intended to authorise the invasive procedures involved in the execution of a **search warrant** on another government's premises. To order a government to produce documents to a court or quasi-judicial body is not comparable to authorising a constable of police to make forceful entry onto that government's premises and to take possession of its documents.

21. For these reasons, I am of opinion that s.10 of the Crimes Act does not apply to premises in the possession of the Crown. This construction of s.10 no doubt causes difficulties for those who investigate the commission of criminal offences. On many occasions, documents and property having no connection with the Crown will be in the custody or possession of persons on Crown premises. There seems no sensible reason why a **search warrant** should not be executed in respect of such documents and property. However, to give s.10 a construction that would achieve that result seems to me to go beyond the scope of the judicial function. The conditions under which a **search warrant** authorised by s.10 ought to be executed on Crown premises to seize documents or property not belonging to the Crown is a matter for the legislative, not the judicial, process.

22. The appeal should be dismissed.
