IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S ECI 2020 01699

IN THE MATTER OF BRADBURY INDUSTRIAL SERVICES PTY LTD (IN LIQUIDATION) (ACN 121 279 847)

DAVID BARRY LOGISTICS PTY LTD (ACN 121 644 460) Plaintiff

v

GEOFFREY TRENT HANCOCK IN HIS CAPACITY AS LIQUIDATOR OF BRADBURY INDUSTRIAL SERVICES PTY LTD (IN LIQUIDATION) (ACN 121 279 847) and others according to the Schedule Defendants

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JUDGE:	M Osborne J
WHERE HELD:	Melbourne
DATE OF HEARING:	13, 14, 15, 16 and 20 September 2021
DATE OF JUDGMENT:	13 December 2021
CASE MAY BE CITED AS:	David Barry Logistics Pty Ltd v The State of Victoria & Anor
MEDIUM NEUTRAL CITATION:	[2021] VSC 828

ROYAL PREROGATIVE – Right of the Crown to *bona vacantia* - Disclaimed property as *bona vacantia* – Requirement that property be otherwise ownerless – Defeasibility of right to *bona vacantia* – *Bona vacantia* as a duty of the Crown – Statutory abrogation of Crown prerogative rights – Abrogation by necessary implication – Whether *Corporations Act 2001* (Cth) abrogates the prerogative right to *bona vacantia* – Whether *Australian Consumer Law and Fair Trading Act (2012)* (Vic) abrogates the prerogative right to *bona vacantia* – Whether disclaimed goods vest in the Crown in right of the Commonwealth or the State – *Re Usines de Melle & Firmin Boinot's Patent* (1954) 91 CLR 42 – *Re Wells; Swinburne-Hanham v Howard* [1933] Ch 29 – *Re Barnett's Trusts* [1902] 1 Ch 847 – *Dyke v Walford* [1846] 5 Moo. P.C. 434 – *Re Azoff-Donn Commercial Bank* [1954] Ch 315 - *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278 – (1940) 63 CLR 278 – *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 - *Barton v Commonwealth* (1974) 131 CLR 477 – *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 – *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 – *Ruddock v Vadarlis* (2001) 110 FCR 491 – *Ling v Commonwealth* (1994) 51 FCR 88 – *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] QB 26 – *Kelly v Commissioner of Department of Corrective Services* (2001) 52 NSWLR 533 – *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 - *Tubbs v Futurity Investments Ltd* [1998] 1

NZLR 471.

CORPORATIONS LAW – Liquidation – Disclaimer of goods under s 568F of the *Corporations Act 2001* (Cth) – Disclaimed goods are a hazardous waste – Application to vest disclaimed property in the Crown – Whether Court can order disclaimed property vest in an unwilling receiver – *Corporations Act 2001* (Cth) - *Australian Consumer Law and Fair Trading Act 2012* (Vic) – *EPA v Australian Sawmilling Company Pty Ltd (in liq)* – *Potter v Minahan* (1908) 7 CLR 277 - *Re Tulloch* (1978) 3 ACLR 808 – *Sullivan v Energy Services International Pty Ltd* (2002) 171 FLR 106 – *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	S Maiden QC with V Bell of Counsel	Hope & Co Legal
For the Third Defendant	J Brereton with M Hosking of Counsel	Victorian Government Solicitor

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HIS HONOUR:

Introduction

1 The plaintiff, David Barry Logistics Pty Ltd ('DBL') operates a small logistics services and warehousing business from a purpose built facility at Berends Road, Dandenong South ('the DBL Facility'). One of the services that DBL offers as part of that business is the storage of 'dangerous goods' as defined in s 3(1) of the *Dangerous Goods Act 1985* (Vic) ('*Dangerous Goods Act*'), and the DBL Facility has been purpose built to cater for such storage. DBL has operated the DBL Facility since the company was founded in 2006.

2 Until 29 July 2019, the second defendant Bradbury Industrial Services Pty Ltd ('Bradbury') operated a waste management services business specialising in resource recovery and recycling in the industrial sector and the transportation of recycled toxic and hazardous waste. Bradbury held a licence issued by the Environment Protection Authority ('the EPA') for the safe transport and disposal of hazardous goods including industrial waste ('Bradbury's EPA licence'). Its principal place of business was 16-18 Thornycroft Street, Campbellfield ('the Thornycroft Premises').

3 On or about 28 March 2018, DBL and Bradbury entered into an agreement pursuant to which DBL agreed to store certain goods at the Dandenong warehouse for Bradbury ('the first storage contract').

4 Between 10 April 2018 to 28 June 2018, pursuant to the first storage contract, Bradbury delivered 563 industrial bulk containers ('the 2018 IBCs') to DBL. The 2018 IBCs contained product identified as 'isopropyl alcohol, methanol, furnace oil, butanol, burner fuel AB and paint related material' ('the first delivery'). It is uncontroversial that each of those products were 'dangerous goods' as defined in s 3(1) of the *Dangerous Goods Act*. At all relevant times, DBL held an 'acknowledgement of storage and handling of dangerous goods' ('ASHDG'), issued by WorkSafe pursuant to r 66 of the *Dangerous Goods (Storage and Handling) Regulations 2012* (Vic) ('*DGS & H Regulations*').

5 Around 22 February 2019, DBL agreed to vary the first storage contract so as to allow for the receipt of additional IBCs from Bradbury ('the second storage contract'). A further 638 IBCs were delivered to DBL between 5 February 2019 and 29 March 2019 ('the 2019 IBCs'). The 2019 IBCs also contained dangerous goods, principally burner fuel AB.

6 On 5 April 2019, a fire occurred at the Thornycroft Premises, followed shortly afterwards by Bradbury's collapse.

7 On 19 July 2019, the first defendant, Geoffrey Trent Hancock ('Mr Hancock') was appointed as voluntary administrator of Bradbury pursuant to s 436A of the *Corporations Act 2001* (Cth) ('*Corporations Act*').

8 On 5 August 2019, Mr Hancock issued DBL with a notice of intention not to exercise any rights under the first storage contract or the second storage contract.

9 On 26 November 2019, the Mr Hancock was appointed liquidator of Bradbury ('the Liquidator') at the second meeting of Bradbury's creditors.[1]

10 On 10 December 2019, the Liquidator served DBL with a notice issued under s 568 of the *Corporations Act* headed 'ASIC Form 525: Disclaimer of Onerous Property' attempting to disclaim Bradbury's interest in the first storage contract and second storage contract ('the storage contract disclaimer').

11 On 13 March 2020, DBL wrote to the Liquidator and requested that he collect the IBCs[2] from the DBL Facility.

12 On 25 March 2020, the Liquidator again served DBL with a notice issued under s 568 of the *Corporations Act* headed 'ASIC Form 525: Disclaimer of Onerous Property', attempting to disclaim Bradbury's interest in the IBCs and their contents ('the IBC disclaimer').

13 On 1 April 2020, DBL wrote to the Liquidator's solicitors requesting, among other

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1 Mr Hancock is hereafter referred to as the Liquidator.

2 IBCs refers to the 2018 IBCs and the 2019 IBCs collectively.

things, that the IBC disclaimer be withdrawn and the Liquidator collect the IBCs from DBL's warehouse. The Liquidator refused to do so, maintaining that by reason of the IBC disclaimer, Bradbury no longer had any interest in the IBCs.

14 The receipt of the IBCs has been a disaster for DBL. The IBCs have occupied about 12% of the storage space at the DBL Facility without Bradbury or the Liquidator making payment.[3] Moreover, DBL contends that the majority of the contents of the IBCs are prescribed industrial waste ('PIW') within the meaning of the *Environment Protection Act 1970* (Vic) *('the Environment Protection Act 1970')*. DBL accepts that it agreed to store 'dangerous goods' within the meaning of the *Dangerous Goods Act* but says that it was not aware and had no reason to be aware that the contents of the IBCs in fact comprised PIW. DBL is not licensed to store or dispose of PIW, and contends that it would not have taken the IBCs had it known that they contained PIW.

15 Bradbury is in liquidation and will not collect the IBCs . If DBL now has to dispose of the PIW, DBL will need to engage an authorised receiver of PIW at a cost in the order of a million dollars.[4] DBL contends that it does not have the financial capacity to do so and as a result will likely be forced into liquidation itself.

16 On 8 April 2020 DBL, commenced this proceeding against the Liquidator and Bradbury, seeking orders pursuant to s 568B(2)(a) of the *Corporations Act* that the IBC disclaimer be set aside, and that pursuant to s 568B(2)(b) that Bradbury be ordered to remove all the IBCs from the DBL Facility.

Claims against the State of Victoria

17 The proceeding also included claims by DBL against the third defendant, the State of Victoria ('the State'). These claims were in the alternative to the claims against the Liquidator and Bradbury and proceed on the basis that the IBC disclaimer takes effect. First, DBL seeks declarations that the goods are *bona vacantia* and thereby vest in the State; alternatively, DBL seeks an order pursuant to s 568F(1)(b) of the *Corporations Act*

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3 Since 9 July 2019.

4 DBL has obtained a quotation from such an authorised recipient, Geocycle, with an estimated disposal cost of between $894,460 and $1,191,570.

vesting the goods in the State ('the s 568F(1)(b) claim'). Relatedly and consequently, in both cases DBL seeks an order that the State remove the IBCs from the DBL Facility.

18 On 30 August 2021, DBL, the Liquidator and Bradbury consented to orders dismissing the claim by DBL against the Liquidator and Bradbury. In the result, the IBC disclaimer took effect as and from 25 March 2020.[5]

19 The IBC disclaimer having taken effect, the only way in which DBL can mitigate the adverse financial consequences associated with the storage and removal of the IBCs and the associated disposal of the PIW is if it succeeds in its claim against the State.

20 The first claim ('the *bona vacantia* claim') is based on a Crown prerogative which DBL submits has been subsumed in the common law of Australia and which operates when property becomes ownerless.[6]

21 DBL contends that given the disclaimer by the Liquidator, the IBCs and their contents have become ownerless and thereby vest as a consequence of *bona vacantia* in the Crown in the State in which the goods are located (the '*bona vacantia* claim'). If DBL is successful in the *bona vacantia* claim, the IBCs vest in the State and DBL seeks orders that the State remove them.

22 The State argues that that the prerogative right to *bona vacantia* has been abrogated by pt 4.2 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) ('the *ACLFT Act*'); alternatively, by div 7A of pt 5.6 of the *Corporations Act*.[7]

23 Alternatively, the State argues that if *bona vacantia* applies, the prerogative right is the right of the Crown in right of the Commonwealth of Australia ('the Commonwealth'), not the Crown in right of the State of Victoria. Accordingly, the State argues that if the doctrine of *bona vacantia* has application, the goods vest in the Commonwealth not the State. If the State is correct, *the bona vacantia* claim must fail as DBL makes no claim

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5 See *Corporations Act*, s 568C(3).

6 *Re Wells; Swinburne-Hanham v Howard* [1933] Ch 29, 43-4, 50, 55 (Lawrence LJ) ('*Re Wells*'); *The King v Attorney-General of British Columbia* [1924] AC 213, 219; *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431, [94] ('*Brown*').

7 This is further explained at [114] onwards.

against the Commonwealth in this proceeding.

24 In relation to DBL's alternative s 568F(1)(b) claim, DBL confines its claim to the 2019 IBCs, delivered pursuant to the second storage contract between 5 March 2019 and 29 March 2019. DBL relies on the power given to the Court pursuant to s 568F(1)(b) of the *Corporations Act*, to order that 'disclaimed property vest in or be delivered to a person in or to whom it seems to the Court appropriate that the property be vested or delivered'. DBL submits that in the circumstances in which the 2019 IBCs were delivered, it is appropriate to make orders that the 2019 IBCs vest in the State.

25 It is foundational to the manner in which DBL advances the s 568F(1)(b) claim that: first, the proper exercise of the power to make an order under s 568F(1)(b) permits the making of a vesting order on an unwilling vestee; secondly, that the EPA and/or WorkSafe acted incompetently with respect to the circumstances attending to the disposal of the IBCs from Bradbury's premises in 2019; and thirdly, that the acts or omissions of the EPA and WorkSafe are matters which make it 'appropriate' to order that the 2019 IBCs vest in the State.

26 The s 568F(1)(b) claim is fact intense. In essence, DBL argues that the EPA at least was aware, or at the very least the EPA and WorkSafe ought to have been aware, that the IBCs constituted PIW and not merely dangerous goods, and yet jointly facilitated the removal of those goods from Bradbury's premises to the DBL Facility notwithstanding that it knew or ought to have known that DBL was not licensed to receive PIW.

27 The *bona vacantia* claim in contrast is predominantly, if not entirely, a question of the application of doctrine to the incontrovertible fact that the IBCs have been disclaimed by the Liquidator.

28 It is therefore convenient to consider the *bona vacantia* claim in the first instance before moving to the fact intense analysis necessary to determine the s 568F(1)(b) claim. As the *bona vacantia* doctrine only has application because of the IBC disclaimer, and as the State contends that the doctrine has been abrogated by div 7A of pt 5.6 of the *Corporations Act*, it is useful first to set out some of the salient *Corporations Act*

provisions.

The *bona vacantia* claim

***Corporations Act* provisions - disclaimer**

29 Section 568 of the *Corporations Act* appears in div 7A of the Act headed 'Disclaimer of Onerous Property'. Section 568(1) of the *Corporations Act* entitles a liquidator of a company to disclaim property of the company that consists of:

> (c) property that is unsaleable or is not readily saleable; or
>
> (d) property that may give rise to a liability to pay money or some other onerous obligation; or
>
> (e) property where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of realising the property..

30 Section 568A requires the liquidator to lodge a written notice of disclaimer and give written notice to each person who appears to the liquidator to have, or who may claim to have, an interest in the property.

31 Section 568B entitles a person who has or claims to have an interest in the disclaimed property to apply to the Court for an order setting aside the disclaimer before it takes effect.

32 Section 568C sets out when a disclaimer takes effect.

> (1) A disclaimer takes effect if, and only if:
>
> (a) in a case where only one application under section 568B for an order setting aside the disclaimer, or each of 2 or more such applications, is made within the period that that section prescribes for making the application--the application, or each of the applications, is unsuccessful; or
>
> (b) no such application is so made.
>
> (2) For the purposes of subsection (1), an application under section 568B is successful if, and only if, the result of the application, and all appeals (if any) arising out of the application, being finally determined or otherwise disposed of is an order setting aside the disclaimer (whether or not further orders are also made).
>
> (3) A disclaimer that takes effect because of subsection (1) is taken to have taken effect on the day after:

(a) if:

(i) the liquidator gave to a person notice of the disclaimer because of paragraph 568A(1)(b); or

(ii) notice of the disclaimer was published under subsection 568A(2);

before the end of 14 days after the liquidator lodged notice of the disclaimer--the last day when the liquidator so gave such notice or such notice was so published; or

(b) otherwise--the day when the liquidator lodged notice of the disclaimer.

33 Section 568D headed 'Effect of Disclaimer' deals with the effect of disclaiming:

(1) A disclaimer is taken to have terminated as from the day on which it is taken because of s 568C(3) to take effect, the company's rights, interests, liabilities and property in or in respect of the disclaimer property, but does not affect any other person's rights or liabilities except so far as necessary in order to release the company and its property from liability.

(2) A person aggrieved by the operation of a disclaimer is taken to be a creditor of the company to the extent of any loss suffered by the person because of the disclaimer and to prove for such a loss as a debt in the winding up.

34 Section 568E headed 'Application to set aside disclaimer after it has taken effect' reads:

(1) With the leave of the Court, a person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer after it has taken effect.

(2) The Court may give leave only if it is satisfied that it is unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect.

(3) The Court may give leave subject to conditions.

(4) On an application under subsection (1), the Court:

(a) may by order set aside the disclaimer; and

(b) if it does so--may make such further orders as it thinks appropriate, including orders necessary to put the company, the liquidator or anyone else in the same position, as nearly as practicable, as if the disclaimer had never taken effect.

(5) However, the Court may set aside a disclaimer only if satisfied that the disclaimer has caused, or would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer (and

making any further orders) would cause to:

(a) the company's creditors; and

(b) persons who have changed their position in reliance on the disclaimer taking effect.

35 Section 568F headed 'Court may dispose of disclaimed property' reads:

(1) **[In whom the Court may vest property]**

The Court may order that disclaimed property vest in, or be delivered to:

(a) a person entitled to the property; or

(b) a person in or to whom it seems to the Court appropriate that the property be vested or delivered; or

(c) a person as trustee for a person of a kind referred to in paragraph (a) or (b).

(2) **[Where Court may make order]**

The court may make an order under subsection (1):

(a) On the application of a person who claims an interest in the property, or is under a liability in respect of the property that this Act has not discharged; and

(b) after hearing such persons as it thinks appropriate.

(3) **[Vesting of property effective immediately]**

Subject to subsection (4), where an order is made under subsection (1) vesting property, the property vests immediately, for the purposes of the order, without any conveyance, transfer or assignment.

(4) **[Where property vests in equity]**

Where:

(a) a law of the Commonwealth or of a State or Territory requires the transfer of property vested by an order under subsection (1) to be registered; and

(b) that law enables the order to be registered;

the property vests in equity because of the order but does not vest at law until that law has been complied with.

The nature of the *bona vacantia* right

36 Before describing the *bona vacantia* right, it is helpful to first describe the term 'royal

prerogative'. The term 'royal prerogative' describes a bundle of discretionary rights, privileges, immunities and powers that were once exclusively enjoyed by the British monarch. These prerogatives were introduced into the colonies of Australia as part of the common law of England, and since Federation have remained vested in the Crown in the right of the Commonwealth and State governments.[8]

37 In this sense, the prerogative has been described as 'a relic of a past age,'[9] residuary of a time when the monarch was closely involved with the administration of government. In describing prerogative powers, Dicey wrote:[10]

> The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.

38 The term '*bona vacantia*', meaning vacant goods, designates a common law doctrine enshrining one of the most ancient prerogatives of the Crown. The essence of the doctrine is the Crown's entitlement to claim possession of ownerless personal property. The common law rule is founded on the notion that 'property must belong to somebody, and where there is no other owner … it is the property of the Crown'.[11] *Bona vacantia* thus comprises property that would have no owner unless claimed by the Crown; sometimes referred to as 'property at large'.[12] It does not include property where the owner of such is merely unknown or untraceable.[13]

39 The Crown's entitlement to *bona vacantia* was an aspect of the royal prerogative, passed down from the Monarch. In *Dyke v Walford*,[14] the first case in which the term *bona vacantia* was used, much consideration was given to the origins and history of the doctrine. Lord Kingsdown, in confirming the Crown's entitlement to the property of

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8 *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* (1940) 63 CLR 278, 304 (Dixon J) ('*Farley*'); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 226 [87] (Gummow, Hayne, Heydon and Crennan JJ) ('*Cadia*').

9 *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101 (Lord Reid) ('*Burmah Oil*').

10 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1962) 424.

11 *Re Wells* (n 6), 56 (Romer LJ).

12 *Re Barnett's Trusts* [1902] 1 Ch 847, 857 (Kekewich J).

13 Chris Ryan, 'The Crown and Corporate Bona Vacantia' (1982) 12 *Kingston Law Review* 75, 79.

14 [1846] 5 Moo. P.C. 434.

an individual who died intestate, recognised: [15]

> The origin of this right shows that, if it existed at all, it must have existed from the foundation of the Monarchy; it is the right of the Crown to '*bona vacantia*'; to property which has no other owner.

40 Defining the precise content and nature of the *bona vacantia* right is not without difficulty, given the fluidity with which the term has been used and applied over the past few centuries. It has been observed that 'precisely what that term has meant or encompassed in the past is difficult to identify,' particularly given that *bona vacantia* has 'meant different things at different times throughout the history of the common law.'[16]

41 However, jurisprudence and scholarship on the *bona vacantia* right indicates that it is most accurately conceived of as a proprietary interest, comparable to any other title in goods, which automatically 'vests in'[17] or 'devolve[s] upon'[18] the Crown in circumstances where personal property is rendered ownerless. This interest can arise in relation to 'personal property of every kind, both corporeal and incorporeal.'[19]

42 The *bona vacantia* right grants the Crown ownership of the goods in question, and thus the ability to possess, use, transfer or dispose of the property as it pleases. However, the Crown also takes the property subject to any debts, liabilities or encumbrances.[20]

The essential requirement that property be otherwise ownerless

43 The precondition to, and catalyst for, the right to *bona vacantia* is the property in question being truly ownerless,[21] in the sense that there is no one able to make a claim to title. In this sense, the *bona vacantia* right can be conceived of as a title of 'last resort'.

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15 Ibid, 495–6.

16 Chris Ryan, 'The Crown and Corporate Bona Vacantia' (1982) 12 *Kingston Law Review* 75, 78.

17 *Re Usines de Melle & Firmin Boinot's Patent* (1954) 91 CLR 42, 49 (Fullagar J) ('*Re Usines*').

18 *Re Higginson & Dean; Ex parte Attorney-General* (1899) 1 QB 325, 333 (Wright J).

19 *Re Wells* (n 6), 49 (Lawrence LJ). See also, in relation to intangible property being deemed *bona vacantia*: *Re Usines* (n 17), 49 (Fullagar J).

20 *Megit v Johnson* (1780) 99 ER 344 (Lord Mansfield).

21 *Re Wells* (n 6), 55 (Romer LJ); *In the Estate of Musurus, deceased* [1936] 2 All ER 1666, 1668; *British General Insurance Co Ltd v Attorney General* [1945] LJCCR 113, 121 (Wethered J); *Brown* (n 6), [89] (Campbell JA, with whom Bergin CJ and Sackville AJA agreed).

As Wethered J observed in *British General Insurance Co Ltd v Attorney General*:[22]

> The Crown takes *bona vacantia* as a right incident to the prerogative and the doctrine may be stated simply thus – the Crown, in virtue of the prerogative, is entitled to claim possession of all property, to which the prerogative extends, when no subject can make good a title thereto.[23]

44 Typically, common law has recognised five circumstances under which property may vest in the Crown as *bona vacantia*. These include:

(a) where persons die intestate with no next of kin, leaving the residuary estate undisposed of;

(b) where a company is dissolved and holds assets at the time of its dissolution;

(c) upon the failure of certain trusts, particularly of a charitable nature;

(d) where property is lawfully disclaimed; and

(e) where a rule of public policy renders goods ownerless.[24]

45 The common law doctrine excludes from its scope property the owner of which is merely unknown,[25] as well as goods that have been lost and then found.[26] However, beyond this, the circumstances under which property is rendered ownerless is of little moment. As affirmed by Romer LJ in *Re Wells, Swinburne-Hanham v Howard* ('*Re Wells*'):[27]

> The right of the Crown to *bona vacantia* depends upon the fact that there is no other owner of the property claimed, and cannot depend upon the particular reasons for the existence of that fact.

Distinction between bona vacantia and a right of succession

46 It is on this basis that the Crown's interest in *bona vacantia* can be distinguished from

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22 [1945] LJCCR 113.
23 Ibid, 121.
24 See further discussion of each of these categories in Noel D Ing, *Bona Vacantia* (Butterworths, 1971).
25 *Re Wells* (n 6), 50 (Lawrence LJ).
26 In respect of which, the finder will have good title against all but the true owner: *Armory v Delamirie* (1722) 93 ER 664.
27 *Re Wells* (n 6), 59 (Romer LJ).

a right of succession.[28] In contrast to the *bona vacantia* right, which is best conceived of as a distinct proprietary interest that is enlivened where goods are truly ownerless, succession 'imports some notion of continuity' of ownership, of title passing from one holder to another.[29] For this reason, the *bona vacantia* interest will invariably be defeated by any claim which takes the form of the latter.[30]

47 This distinction was elaborated by Kekewich J in *Re Barnett's Trusts*.[31] The case concerned a legacy given under the will of an Englishman to an Austrian resident. The Austrian resident died intestate, and the question arose as to whether the fund, which was located in England, would vest in the English Crown as *bona vacantia* or whether, under Austrian law, the succession would be 'confiscated as heirless property' by a state official. Kekewich J, in finding that the fund had vested in the English Crown, offered the following explanation of the nature of the Crown's right to *bona vacantia*: [32]

> [The Austrian state official] does not represent the deceased at all, except that by our law he is put in his place to defend actions by creditors or by persons claiming the estate against him. But he does not in any other sense represent the deceased. He does not claim through the persona of the deceased. He claims what is termed the "glans caduca," not the acorn on the tree, but the acorn which has fallen on to the ground from the tree. There is no possibility of getting at this property through the deceased. It is because there is no one who can claim through the deceased that the Crown steps in and takes the property. The Crown takes it because it is, as it is described in the cases, *bona vacantia*. It is property which no one claims - property at large - there is no succession. The Crown does not claim it by succession at all, but because there is no succession.
>
> …
>
> When there is no heir, some paramount authority steps in and claims it, not as against any one, but because there is no one to claim it at all.
>
> (underline added)

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28 See *Brown* (n 6), [89]-[101] (Campbell JA, with whom Bergin CJ and Sackville AJA agreed).
29 *In the Estate of Maldonado, Deceased* [1954] 2 WLR 64, 71 (Evershed MR).
30 Ibid.
31 *Re Barnett's Trusts* (n 12).
32 Ibid, 857–9.

Defeasibility of the bona vacantia right

48 Given that the *bona vacantia* right is premised on, and contingent upon, the property in question being otherwise ownerless, it follows that any other claim to title – no matter how weak or distant - will extinguish that of the Crown. As explained by Ing, in the context of the English legal system: [33]

> A relative with prior title may come forward after the Treasury Solicitor has administered as *bona vacantia* the estate of a person who died intestate but apparently without relatives; such a relative will be entitled to the balance of the estate in priority to the Crown. There is statutory provision for the revival, in some circumstances, of a dissolved company, with the consequent revesting in the company of any property which became *bona vacantia* on the dissolution.[34] It cannot, however, be considered unreasonable that the law may provide or recognise methods by which property, which has passed to the Crown as being apparently without an owner, should subsequently revert to private ownership, if this can be established.

49 Relatedly, it is well recognised that the Crown's *bona vacantia* interest in the estate of persons dying intestate will be extinguished in circumstances where another individual can establish their entitlement to such.[35]

50 Similarly, and of more relevance to the present circumstances, the Crown's *bona vacantia* interest in the assets of a dissolved company has been characterised as 'title which is liable to be defeated without its consent and even against its wish'[36] by the interests of creditors during winding up.[37] The Crown's *bona vacantia* interest in the assets of a dissolved company will likewise be extinguished if that company is reconstituted or revived. Such was the case in *Re C. W. Dixon, Ltd*,[38] where, in considering the effect that an order declaring the dissolution of a company void had on the assets of the company that had vested in the Crown as *bona vacantia*, Vaisey J found: [39]

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33 Noel D Ing, *Bona Vacantia* (Butterworths, 1971), 12.

34 Ing was here referring to ss 352 and 353(6) of the *Companies Act 1948* (UK). The substance of these provisions is preserved by s 1012(2) of the *Companies Act 2006* (UK), which makes the Crown's *bona vacantia* interest in the assets of a dissolved company subject to the possible restoration of the company.

35 See, eg, *Turner v Maule* (1849) 3 De G & Sm 497; *Attorney General v Kohler* (1861) 9 HL Cas 654.

36 *Re Azoff-Donn Commercial Bank* [1954] Ch 315, 329 (Wynn-Parry J).

37 Ibid. See also *Russian and English Bank v Baring Brothers & Company Ltd* [1936] AC 405, 426-427 (Lord Atkin).

38 [1947] Ch 251.

39 *Re C. W. Dixon, Ltd* [1947] Ch 251, 255 (Vaisey J).

> … any property which is supposed to have been vested in the Crown under s. 296 [of the *Companies Act 1929* (UK)],[40] either in fact never did so vest, or, in so far as it must be assumed to have vested, the vesting is avoided by my order.

51 Where property is rendered ownerless in circumstance not covered by statute, common law principles still apply.

Bona vacantia as a duty, rather than a right, of the Crown

52 It has been suggested by some that the Crown's claim to *bona vacantia* is more a 'matter of royal duty rather than royal dignity,' which finds its basis in the Crown's broader duty to maintain good order in the realm.[41] As Ing elaborates:[42]

> …whenever there are species of property which have no owner unless the Crown claims them, and this situation creates a possibility of mischief or leaves problems to be solved (even the problem of an asset holder being unable to obtain a good discharge), so it may be the duty of the Crown to remedy the situation by claiming such property as *bona vacantia*.

53 In a similar vein, as explained by Blackstone: [43]

> …*bona vacantia*, or goods in which no one else can claim a property… by the law of nature they belonged to the first occupant or finder; and so continued under the imperial law. But, in settling the modern constitutions of most of the governments in Europe, it was thought proper (to prevent strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burdensome to individuals) that these rights should be annexed to the supreme power by the positive laws of the state.

54 Such a conception appears to accord with earlier jurisprudence on the *bona vacantia* right, which focused on the Crown's right arising out of the necessity of ownership: 'property must belong to somebody.'[44]

55 While the right to *bona vacantia* has most commonly benefitted the Crown, conceptualising the doctrine as one of duty rather than privilege would permit the vesting of onerous property in the Crown as *bona vacantia*.

56 What emerges from the above is that the right to *bona vacantia* is a right which operates

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40 Which provided for the vesting of the assets of a dissolved company in the Crown as *bona vacantia*.
41 Ing, *Bona Vacantia* (n 33), 12.
42 Ibid, 11.
43 William Blackstone, *Commentaries on the Laws of England* (14th ed, 1803) vol 1, 298-299.
44 *Dyke v Walford* (n 14) 471.

to confer a proprietary interest in the Crown to property which has no owner, and that the Crown's interest is both subject to prior interests and encumbrances and defeasible.

Statutory abrogation

57 To address the State's contention that the Crown's right to *bona vacantia* has been statutorily abrogated, it is useful to consider the approach that has generally been taken by Australian courts to the abrogation of royal prerogative rights and powers.

58 Generally, Australian courts are reluctant to curtail the Crown's prerogative powers, rights and immunities, even following the introduction of comprehensive statutory regimes which address the same subject matter.

59 One area where courts have shown willingness to recognise abrogation is in circumstances where a prerogative right or power is markedly inconsistent with rights or benefits that have been statutorily conferred on individuals, or where its preservation would have the effect of interfering with such rights or benefits.

60 The right to *bona vacantia* has also been progressively abrogated, qualified and modified by the introduction of statutory provisions which either expressly recognise the Crown's right to *bona vacantia*,[45] or provide for the vesting of property in other entities in circumstances which otherwise would have fallen within the doctrine's remit. For example, s 601AD of the *Corporations Act* provides that the property of a deregistered company vests in either the Commonwealth or the Australian Securities and Investments Commission ('ASIC').[46] Pursuant to ss 601AD(3A) and (4), the Commonwealth and ASIC have 'all the powers of an owner over property vested in it'. Under s 601AE(1A) the Commonwealth is entitled to 'sell or dispose of the property as it sees fit', and under s 601AE(2), ASIC is entitled to 'dispose of or deal with the property as it sees fit'. These sections appear to mirror the content and nature

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45 See, eg, *Administration and Probate Act 1958* (Vic) s 70ZL, which stipulates that the Crown will take the residuary estate of persons dying intestate where no other person is entitled to such.

46 Section 601AD(1A) of the *Corporations Act* provides that all property held on trust by the company immediately before deregistration vets in the Commonwealth, whereas per s 601AD(2) all other property held by the company vests in ASIC.

of the Crown's common law entitlements as they relate to *bona vacantia*, and as such they impliedly abrogate the prerogative right in the events contemplated by those sections.[47]

61 The central question for a court in considering whether a royal prerogative has been impliedly abrogated by statute is whether, in interpreting the statute in question, a legislative intention to displace, alter or otherwise deprive the Crown of the relevant prerogative can be discerned. The nature and importance of the particular prerogative power or right, and the extent to which its operation is inconsistent or in direct conflict with the terms and intent of the statute, have also been relevant.

The royal prerogative and its relationship with statute

62 In *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* ('*Farley*'),[48] Evatt J offered a tripartite classification of the prerogative rights and powers held by the Crown, comprising: [49]

(a) executive prerogatives which entitle the Crown to perform certain acts;

(b) common law entitlements to benefit from certain preferences, immunities and exceptions which are denied to its subjects; and

(c) prerogatives which are of a proprietary nature.

63 This classification is of practical significance, in that Evatt J suggested that the division of these prerogatives between the Commonwealth and states broadly follows the separation of legislative powers in ss 51 and 52 of the *Constitution*. Accordingly, most executive prerogatives to act are vested in the Commonwealth, while the preferences and immunities of the Crown are shared between the Commonwealth and State governments, and the Crown's proprietary prerogatives are largely retained by the

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47 This is discussed further at [180] onwards.

48 *Farley* (n 8).

49 Ibid, 320–1 (Evatt J). It is important to note that the majority of Australian cases considering the principles applicable to the statutory abrogation of the royal prerogative have addressed prerogatives which fall within the first category described by Evatt J in *Farley* (n 8), that is, executive powers to perform certain acts. In this respect, it is worth mentioning that Evatt J's classification not only carries practical significance, as discussed above, but also interpretive significance.

States in their relevant domains.[50]

64 In terms of its legal basis, the royal prerogative forms part of the common law, and as a corollary, the exercise of prerogative powers, rights and privileges has the force of law. However, as a consequence of the fact that prerogative powers find their basis in historical usage, such powers have no codified source. A defining characteristic of the rights and powers comprising the royal prerogative is that such can be exercised independently of any statutory authorisation. The exercise of the prerogative is nevertheless subject to limitations derived from the common law.

65 Consistent with the notion of parliamentary sovereignty,[51] prerogative powers and rights must be exercised in accordance with statute, and are susceptible to legislative control.[52] A royal prerogative is only available as a source of power or legitimacy in circumstances not otherwise covered by statute.[53]

66 Statute will prevail where a prerogative right or power is inconsistent or in conflict with a corresponding right or power that is legislatively regulated or conferred, or where a statute imposes conditions, limitations or restrictions on the exercise of such prerogative. This curtailment or abrogation may be by express words within the statute, or more commonly, by necessary implication.

67 This principle, and the relationship between the royal prerogative and statute, was elucidated by the House of Lords in *Attorney-General v De Keyser's Royal Hotel Ltd* ('*De Keyser*').[54] The principle laid down in *De Keyser* has been directly incorporated into Australian case law, and has been summarised in a number of High Court decisions as follows: [55]

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50 Ibid, 321–3 (Evatt J).

51 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 539 (Lord Atkinson), 576 (Lord Parmoor); *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [33] (Black CJ); *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 139 [48].

52 *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 139 [48]; *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513, 552 (Lord Browne-Wilkinson).

53 *Burmah Oil* (n 9), 101 (Lord Reid).

54 *De Keyser* (n 51).

55 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459

> …when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament.

68 The central question is whether a legislative intention to displace, alter or otherwise deprive the Crown of the prerogative can be discerned from the statute. The relevant intention is 'that which is revealed to the court by ordinary processes of statutory construction.'[56] Statutory interpretation is, for this reason, the principal task to be undertaken when considering abrogation of a royal prerogative.

Implied abrogation of a royal prerogative by statute

69 The starting point for any discussion of judicial consideration of the statutory abrogation of a royal prerogative is *De Keyser*.[57] The case concerned the compulsory acquisition of De Keyser's Royal Hotel for use as a headquarters by armed forces during the War. The hotel's owners claimed compensation under a scheme set out under the *Defence Act 1842* (UK), which imposed an obligation on the Crown to compensate individuals whose properties were acquired for such purposes. The government, relying on its prerogative power to defend the realm, argued that it was not obliged to pay any compensation. The House of Lords, in rejecting the government's purported reliance on the prerogative, found that the enactment of the statute had caused the prerogative power to fall into abeyance.[58]

70 Although the judges were unanimous in reaching this conclusion, each adopted different reasoning. Lord Dunedin's approach set the lowest threshold for abrogation, finding that enactment of legislation relating to the same subject as a prerogative power was sufficient evidence of Parliament's intention to displace the prerogative. In so finding, Lord Dunedin reasoned that 'if the whole ground of something which

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(McHugh J), cited with approval in *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 69–70 [85] (McHugh, Gummow and Hayne JJ) ('*Jarratt*'), and *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ) ('*Northern Territory*').

56 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 601 [281] (Kiefel J), citing *Momcilovic v The Queen* (2011) 245 CLR 1, 74 [111]-[112], 133-134 [315], 141 [341], 235 [638].

57 *De Keyser* (n 51).

58 Ibid, 526 (Lord Dunedin), 539–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner), 575-6 (Lord Parmoor).

could be done by the prerogative is covered by the statute, it is the statute that rules.'[59]

71 Lords Atkinson, Moulton and Sumner, in their respective judgments, pointed to the fact that the statute in question conferred powers on the Crown of a similar nature to the prerogative, yet also placed a number of restrictions on the exercise of these powers.[60] For this reason, each concluded that, in enacting the legislation, Parliament could not have intended to preserve the prerogative's operation. Lord Atkinson explained: [61]

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislative (in the absence of compelling words) an intention so absurd.

72 Lord Parmoor, on the other hand, focused on the construction of the statute in question and its inconsistency with the continued operation of the prerogative, concluding: [62]

> The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.
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> …
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> The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be *taken away or abridged by express words, by necessary implication*, or … where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury or wrong.
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> …
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> [W]here a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

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59 Ibid, 526 (Lord Dunedin).
60 Ibid, 538–40 (Lord Atkinson), 554 (Lord Moulton), 561–2 (Lord Sumner).
61 Ibid, 539 (Lord Atkinson).
62 Ibid, 575-576 (Lord Parmoor).

(emphasis added)

73 Notwithstanding their Lordships' varying emphases, a consideration of the facts in *De Keyser* points to the irreducible conflict between the statute and the prerogative; their Lordships concluded that the prerogative had been impliedly abrogated. The statute allowed for resumption of property by the realm but on terms that that the owner receive compensation; the prerogative allowed for the taking of the property without payment. The two could not sit side by side and hence the House of Lords considered that the prerogative had been abrogated by necessary implication

The presumption against abrogation

74 The reasoning adopted in *De Keyser* has been approved in a number of Australian cases addressing the implied abrogation of prerogative powers and rights.[63] For the most part, Australian courts have routinely applied a presumption against the displacement or abrogation of prerogatives even where statutory regimes comprehensively cover the same subject matter.[64] This presumption was applied as early as 1909 in *Booth v Williams*, where Street J stated:[65]

> …it is presumed that the legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible.
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> (underline added)

75 For instance, in *Barton v Commonwealth* ('*Barton*'),[66] the High Court considered

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63 See, eg, *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 514 (Latham CJ); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372, 386 (Taylor J); *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ), 501 (Mason J) ('*Barton*'); *Brown v West* (1990) 169 CLR 195, 202, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Ling v Commonwealth* (1994) 51 FCR 88, 92 (Gummow, Lee and Hill JJ) ('*Ling*'); *Wik Peoples v Queensland* (1996) 63 FCR 450, 461-462 (Drummond J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J); *Ruddock v Vadarlis* (n 51), [33] (Black CJ), 539–540 [181]–[182] (French J, with whom Beaumont J agreed); *Oates v Attorney-General (Cth)* (2003) 214 CLR 496, 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ) ('*Oates*'); *Jarratt* (n 55), [85] (McHugh, Gummow and Hayne JJ), 84–85 [129] (Callinan J); *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Cadia* (n 8), 204 [14] (French CJ), 228 [94] (Gummow, Hayne, Heydon and Crennan JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 600–601 [279] (Kiefel J).

64 Peta Stephenson, 'The Relationship Between the Royal Prerogative and Statute in Australia' (2021) 44(3) *Melbourne University Law Review* 1001, 1017.

65 (1909) 9 SR (NSW) 421, 440 (Street J).

66 *Barton* (n 63).

whether the Commonwealth was capable of exercising a prerogative power to request the surrender and extradition of a fugitive from Brazil, or whether this power had been displaced by the *Extradition (Foreign States) Act 1966* (Cth). Australia did not have an extradition treaty in place with Brazil at the time, and, in interpreting the statute, the Court found that it only regulated extradition requests from treaty states. Accordingly, the Court held that the Commonwealth's prerogative power had not been abrogated by the statute's enactment.

76 In reaching this conclusion, the majority applied a presumption against abrogation. Barwick CJ held that 'the rule that the prerogative of the Crown is not displaced except by a clear and unambiguous provision is extremely strong,'[67] while Jacobs J recognised that 'an intention to withdraw or curtail a prerogative power must be clearly shown.'[68] Similarly, Mason J reasoned: [69]

> It is well accepted that a statute will not be held to abrogate a prerogative of the Crown unless it does so by express words or by implication, that is, necessary implication. Here, not only is there a conspicuous absence of express words, but the area of operation of the statute, limited as it is to extradition pursuant to treaty, does not extend to the whole of the area covered by the exercise of the prerogative or executive power; moreover, there is no inconsistency between the provisions of the statute and the exercise of that power...
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> …
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> Finally, and this in my view is the decisive consideration, the power to seek and obtain the surrender by a foreign state of a fugitive offender is an important power essential to a proper vindication and an effective enforcement of Australian municipal law. It is not to be supposed that Parliament intended to abrogate the power in the absence of a clearly expressed intention to that effect.
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> (emphasis added)

77 In *Ling v Commonwealth* ('*Ling*'),[70] the Federal Court considered whether the *Overseas Students (Refunds) Act 1990* (Cth) had abrogated the Crown's prerogative right to take assignments of choses in action. The Commonwealth had provided refunds on behalf of education providers to overseas students who were unable to undertake or

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67 Ibid, 488 (Barwick CJ).
68 Ibid, 508 (Jacobs J).
69 Ibid, 501 (Mason J).
70 *Ling* (n 63).

complete courses of study in Australia due to immigration policy changes in the wake of the Tiananmen Square massacre of 1989. The students, in turn, had assigned their contractual rights (including the implied right to be repaid upon failure to obtain a visa) with those providers to the Commonwealth. The Commonwealth then pursued recovery action for outstanding amounts against the institutions. Ling, an education provider, challenged the Commonwealth's action on the basis that the prerogative power it was predicated upon had been displaced by the Act. Relevantly, the Act contained various provisions which authorized the Commonwealth to obtain information and documentation from institutions and facilitated by way of recovery proceedings but did not specifically empower the Commonwealth to take assignment of the debts.

78 Citing *Booth v Williams* and *Barton*, the Court referred to the presumption against displacement and noted, 'the issue presented is essentially one of statutory construction.'[71] In considering the provisions and intention of the Act, the Court observed that it did not purport to create a new statutory right to take assignment of choses in action, but instead presumed that the Commonwealth had already exercised its prerogative power in taking assignment of the debts.[72] As such, the Court concluded: [73]

> …in our view the legislation is facultative in nature and is not concerned to displace or curtail the rights, including the prerogative rights, of the Commonwealth in relation to the taking and enforcement of assignments. The object of the [*Overseas Students (Refunds) Act 1990* (Cth)] is to assist the Commonwealth in proving its case in such proceedings, not to diminish any reliance the Commonwealth may make on the common law …

79 This reticence against presuming that statute abrogated the prerogative power was also applied by the Federal Court in the 2001 decision of *Ruddock v Vardalis*[74] in determining whether certain provisions of the *Migration Act 1958* (Cth) ('*Migration Act*') had displaced the executive prerogative to exclude non-citizens from Australian territory. The case arose in the wake of the Tampa incident, where the Commonwealth

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71 Ibid, 92 (Gummow, Lee and Hill JJ).
72 Ibid, 94 (Gummow, Lee and Hill JJ)..
73 Ibid, 97 (Gummow, Lee and Hill JJ)..
74 *Ruddock v Vardalis* (n 51).

prevented a vessel carrying hundreds of asylum seekers from entering Australia's territorial waters. In considering whether these actions fell within the scope of the Commonwealth's executive prerogative, or whether this prerogative had been displaced by the *Migration Act*, French J noted:[75]

> There is no place then for any doctrine that a law made on a particular subject matter is presumed to displace or regulate the operation of the Executive power in respect of that subject matter. The operation of the law upon the power is a matter of construction.

80 As such, his Honour considered the central question to be whether an intention to abrogate or curtail the prerogative could be discerned from the provisions of the *Migration Act*.[76] In the absence of express words to effect abrogation, French J held that it was necessary to determine whether the construction of the *Migration Act* evinced a 'clear and unambiguous intention' to deprive the executive of the prerogative.[77] His Honour also considered the question of whether the *Migration Act* 'operates in a way that is necessarily inconsistent with the subsistence of the executive power described' to be of relevance.[78] Much like the approached adopted in *Barton*, French J deemed the importance of the prerogative power in question to carry significant weight in determining whether it had been abrogated. In this respect, his Honour observed:[79]

> The greater the significance of a particular executive power to national sovereignty, the less likely it is that, *absent clear words or inescapable implication*, the parliament would have intended to extinguish the power.

81 In applying these principles to his construction of the *Migration Act*, French J found that the statute, 'by its creation of facultative provisions … cannot be taken as intending to deprive the Executive of the power necessary to do what it has done in this case.'[80] Accordingly, his Honour held that the inherent executive prerogative to deny non-citizens entry to Australia had survived the enactment of the *Migration Act*,

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75 Ibid, 540 [183] (French J).
76 Ibid, 545 [201]-[202] (French J).
77 Ibid, 545 [201] (French J).
78 Ibid, 545 [202] (French J).
79 Ibid, 540 [185] (French J).
80 Ibid, 545 [202] (French J).

notwithstanding the detailed provisions within the Act which conferred and regulated equivalent executive powers.[81] As Beaumont J agreed with French J's reasoning, no displacement of the prerogative power was found to have occurred.[82] In dissent, Black CJ did not apply a strong presumption against displacement, instead adopting a different test for abrogation and reaching a different outcome.[83]

82 The approach adopted in *Barton* was again affirmed by the High Court in *Oates v Attorney-General (Cth)* ('*Oates*'),[84] where it was held that the prerogative power to request extradition had also survived the enactment of the *Extradition Act 1988* (Cth) ('*Extradition Act*'). The Court recognised that 'the statute will not be held to have abrogated the power unless it does so by express words or necessary implication,'[85] and held that no intention to deprive the executive of the prerogative could be discerned from the *Extradition Act*. Instead, the Court found that the terms of the *Extradition Act* and its operation supplemented, rather than displaced, the underlying prerogative power.[86]

83 In each of the above cases, the absence of direct inconsistency between the statute and the prerogative power in question was emphasised. A degree of overlap or commonality in subject matter has been deemed insufficient to effect abrogation; what is required is substantial and comprehensive coverage of the prerogative's area of operation by statute, and a degree of inconsistency between the two, such that a clear intention on the part of Parliament to displace the prerogative can be discerned.[87]

84 If there is no inconsistency, and the prerogative right or power can continue to operate alongside the statutory provision, courts have been eager to find that the prerogative remains intact and unaffected. In *Barton* and *Ling*, this absence of inconsistency was an important factor in finding that the legislative intention was not to displace or

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81 Ibid, 545-546 [204].
82 Ibid, 514 [95] (Beaumont J).
83 Ibid, 501 [34] (Black CJ).
84 *Oates* (n 63).
85 Ibid, 511 [37] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).
86 Ibid, 511 [39] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ.
87 See *Ruddock v Vardalis* (n 51), [183] (French J).

abrogate the executive prerogative in question.[88] The 'facultative' nature of the relevant statutes has also been repeatedly highlighted in non-displacement cases; rather than displacing the prerogative, the statute in question has been interpreted as supplementing or enabling its exercise.[89] As a corollary, courts have been especially willing to uphold the presumption against abrogation where a statute is interpreted as assuming, or implicitly acknowledging, the continued operation of a prerogative power.[90]

Abrogation by necessary implication

85 Despite the stringency with which it has been adopted in some cases, the presumption against abrogation has not been applied, or has been rebutted, in a handful of others. A greater willingness to abrogate or displace a prerogative right or power has been displayed where the exercise or operation of that prerogative directly conflicts or is inconsistent with provisions laid down in statute.

86 Abrogation would also appear to be more easily found in circumstances where the preservation of a prerogative right or power would interfere with rights or benefits which have been conferred on individuals by statute. It has been suggested by some authors that, in cases involving 'the right to take property and to affect the liberty of individuals, it is preferable that the Executive should act according to law' as opposed to in reliance on a prerogative.[91] As such, in general, 'courts have opposed attempts by the government to interfere with the liberty, property, rights or expectations – construed broadly – of its citizens' in reliance on prerogative powers.[92] As was recognised by Purchas LJ in *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority*:[93]

> It is well established that the courts will intervene to prevent executive action

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88 *Barton* (n 63), 501 (Mason J); *Ling* (n 63), 97 (Gummow, Lee and Hill JJ).

89 See, eg, *Ling* (n 63), 97 (Gummow, Lee and Hill JJ); *Ruddock v Vadarlis* (n 51) 545 [202] (French J).

90 See, eg, *Ling* (n 63),97 (Gummow, Lee and Hill JJ); *Ruddock v Vadarlis* (n 51), 545 [202] (French J).; *Oates* (n 63), 511 [38]–[39] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ).

91 John Goldring, 'The Impact of Statutes on the Royal Prerogative; Australasian Attitudes as to the Rule in *Attorney-General v De Keyser's Royal Hotel Ltd*' (1974) 48 *Australian Law Journal* 434, 442.

92 Benjamin Saunders, 'Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute' (2013) 41(2) *Federal Law Review* 363, 379-382.

93 [1989] QB 26.

> under prerogative powers in violation of property or other rights of the individual where this is inconsistent with statutory provisions providing for the same executive action. Where the executive action is directed towards the benefit or protection of the individual, it is unlikely that its use will attract the intervention of the courts.[94]

87 For instance, the prerogative power of the Crown to dismiss public servants 'at pleasure' has been found to have been abrogated by contrary statutory provisions in a series of decisions,[95] commencing with *Bennett v Commonwealth*.[96] Here, a public service employee was suspended from work without pay after refusing to perform a task on the instructions of a trade union. The Commonwealth sought to rely on its prerogative power to dismiss public servants 'at pleasure'. However, Rogers J found that the enactment of *Public Service Act 1922* (Cth) had displaced the operation of any such prerogative. In so finding, his Honour observed that the Act constituted an exclusive code which governed the relationship between the Commonwealth and its public service, and its provisions comprehensively covered matters relating to suspension and dismissal.[97]

88 Likewise, in *Kelly v Commissioner of Department of Corrective Services*,[98] the New South Wales Court of Appeal considered whether provisions of the *Government and Related Employees Tribunal Act 1980* (NSW) which created a right of appeal upon dismissal for government employees had displaced the Crown's prerogative power to dismiss 'at pleasure'. Heydon JA observed that answering this question would require 'a close scrutiny of the legislation in order to see whether or not Parliament has in truth made inroads on the Crown prerogative.'[99] In interpreting the Act, his Honour noted that it contained no clause providing for the preservation of the Crown's common law prerogative to dismiss at pleasure, and found that its provisions establishing the right

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94 Ibid, 53 (Purchas LJ). Note, however, that in spite of these comments, the English Court of Appeal here upheld the validity of a decision of the Home Secretary to issue plastic bullets and tear gas to local police forces for use on protestors under the prerogative power to maintain the peace of the realm.

95 See, eg, *Bennett v Commonwealth* [1980] 1 NSWLR 581; *Singer v Statutory & Other Officers Remuneration Tribunal* (1986) 5 NSWLR 646 ('*Singer*'); *Barratt v Howard* (2000) 96 FCR 428; *Kelly v Commissioner of Department of Corrective Services* (2001) 52 NSWLR 533 ('*Kelly*'); *Sydney Ferries Corp v Morton* [2010] NSWCA 156 [91] (Basten JA, with whom Allsop P and Campbell JJA relevantly agreed).

96 [1980] 1 NSWLR 581.

97 Ibid, 584, 587 (Rogers J).

98 *Kelly* (n 95).

99 Ibid, 558 [58] (Heydon JA, with whom Giles JA agreed).

of appeal were sufficiently clear to support the conclusion that it had curtailed the prerogative.[100] Rolfe AJA agreed that it would be 'contrary to the rights thus provided' under the Act if an appeal could be destroyed by the exercise of the prerogative,[101] and thus found that the prerogative was curtailed to the extent of its inconsistency with the Act.[102]

89 More recently, in *Jarratt v Commissioner of Police (NSW)*,[103] in considering circumstances where a police commissioner had been dismissed without being given an opportunity to be heard, the High Court unanimously found that the prerogative to dismiss 'at pleasure' had, by necessary implication, been abrogated by the dismissal provisions set out in the *Police Service Act 1990* (NSW).

90 The Court recognised that, in enacting the statute, which dealt comprehensively with all matters concerning the police service and set out patent standards relating to the appointment and dismissal of officers, Parliament had clearly intended to displace the Crown's prerogative power to dismiss public servants at pleasure.[104] As observed by Callinan J, otherwise: '[w]hy make statutory provision for any of this if all that is involved, or is to be left unimpaired, is naked Crown privilege or prerogative?'[105] The Court considered the direct inconsistency between the provisions of the statute and the continued operation of the prerogative power to be of particular importance in making this finding, as it offered clear indication of the legislature's intention.[106] Other cases involving interferences with statutorily-conferred rights of individuals through the exercise of prerogative powers have been similarly decided. For example, in *Singer v Statutory & Other Officers Remuneration Tribunal*,[107] the New South Wales Supreme Court considered a conflict between a provision of the *Consumer Claims Tribunals Act 1974* (NSW) which guaranteed compensation for retired members of the Consumer Claims Tribunal and the Crown's prerogative power to dismiss public

100 Ibid, 558 [57].
101 Ibid, 570 [104] (Rolfe AJA).
102 Ibid, 571 [106].
103 *Jarratt* (n 55).
104 Ibid, 69–70 [85] (McHugh, Gummow and Hayne JJ), 84–85 [129], 87–88 [137], 89 [141] (Callinan J).
105 Ibid, 84 [129] (Callinan J).
106 Ibid, 69–70 [85] (McHugh, Gummow and Hayne JJ), 84–85 [129] (Callinan J).
107 *Singer* (n 95).

servants without compensation. In purported reliance on this prerogative, the New South Wales state government sought to implement a policy which denied compensation to statutory officers who retired before the expiry of their term. The Court found that the prerogative on which the government sought to rely in implementing the policy, and the policy itself, were inconsistent with the 'purpose'[108] and 'scheme and terms'[109] of the legislation. As a consequence, the prerogative was found to have been abrogated by necessary implication, and thus the policy was deemed unlawful.

91 In other cases, the inconsistency between a statutory scheme and a prerogative power or right has been significant enough to result in displacement. In *Brown v West*,[110] the High Court considered a conflict between the Commonwealth's prerogative power to set allowances and benefits for the legislature, and two Commonwealth statutes which provided that remuneration and postal allowances for members of Parliament were to be determined by the Commonwealth Remuneration Tribunal. The Court found the Minister's decree to be invalid, holding:

> A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope.[111]
>
> …
>
> It is a necessary implication of a statutory fixing of the amount of total expenditure that there is no residual executive power to increase it.[112]

92 In *Northern Territory of Australia v Arnhem Land Aboriginal Trust*,[113] in the course of considering whether persons holding licences under the *Fisheries Act 1988* (NT) were entitled to enter and fish in waters which lay within the boundaries of a grant under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), a majority of the High Court observed (as obiter) that the *Fisheries Act* had, by necessary implication,

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108 Ibid, 652 (Street CJ).
109 Ibid, 657 (Kirby P, with whom Hope JA agreed).
110 (1990) 169 CLR 195.
111 Ibid, 202 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
112 Ibid, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ)..
113 *Northern Territory* (n 55).

abrogated any public right to fish in tidal waters. Citing *De Keyser* and *Barton*, the Court observed that 'the comprehensive statutory regulation of fishing in the Northern Territory provided for by the *Fisheries Act* has supplanted any public right to fish in tidal waters.'[114] Although not concerned with a prerogative right or power, the Court's willingness to recognise abrogation of a public right by necessary implication in an analogous fashion is nevertheless informative, and indicative of the weight that courts attach to the enactment of a comprehensive statutory regime that is inconsistent with pre-existing common law rights, including prerogative powers.

93 Another area where willingness to find displacement of a royal prerogative by necessary implication has been shown is in relation to private proprietary rights.[115] In *Cadia Holdings Pty Ltd v New South Wales ('Cadia')*,[116] the High Court considered the interaction of the *Mining Act 1992* (NSW) ('the NSW Act'), the *Royal Mines Act 1688* (UK), ('the UK Act'), and the Crown's prerogative right to mines of gold and silver. The NSW Act provided for the grant of mining leases in respect of minerals, and established a scheme for the payment of royalties to the state government of New South Wales in respect of 'publicly owned minerals'. Such royalties were also payable in respect of 'privately owned minerals', however, the government was required to pay seven-eighths of those royalties to the owner of the minerals. Cadia owned land near Orange, New South Wales from which it operated two copper mines, subject to four mining leases granted under the NSW Act, and had paid royalties in respect of these mines over a ten year period. The ore recovered from these mines was intermingled gold and copper. Pursuant to the Act, and as the owner of the land, it sought repayment of seven-eighths of those royalties, on the basis that the minerals were privately owned. The State, in turn, argued that it was entitled to retain the royalties as the admixed minerals were publicly owned, by virtue of the Crown's

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114 Ibid, 58 [27] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

115 Noting, however, that this must be balanced against the presumption that "a statute does not divest the Crown of its property, rights, interests or prerogatives unless that is clearly stated or necessarily intended": *Commonwealth v Western Australia* (1999) 196 CLR 392, 410 [34], 411 [38] (Gleeson CJ and Gaudron J). See also *Attorney-General v Hancock* [1940] I KB 427, 439 (Wrottesley J); *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 124 (Gibbs A-CJ), 129 (Stephen J), 137-138 (Mason and Jacobs JJ).

116 (2010) 242 CLR 195.

prerogative right to mines of gold and silver.

94 The Court held that the Crown's prerogative right to mines of gold and silver had necessarily been abrogated by the enactment of the UK Act, which relevantly provided that no mine of copper, tin, iron or lead would be taken to be a royal mine, even if gold or silver were also extracted from the same mine. Through its reference to gold and silver, French CJ recognised that the UK Act was 'expressly directed to the scope of the prerogative right,'[117] while Gummow, Hayne, Heydon and Crennan JJ considered that it 'was directed immediately to the prerogative by stating a limitation upon what otherwise might be adjudged, reputed or taken to be its content.'[118] In this way, the Court held that the UK Act was clearly intended to modify or abridge the royal prerogative as previously recognised under the common law.[119]

95 Having so found, the Court recognised that the Crown's prerogative right to mines of gold and silver, as modified by the UK Act, was received into the colony of New South Wales as part of the common law of England, and the abridged form of the prerogative, as a right of a proprietary nature, vested in the Crown in the right of the State of New South Wales at Federation.[120] Accordingly, the Court held that the State's prerogative right to mines of gold and silver did not extend to the admixed mines on Cadia's land, with the consequence that the extracted minerals were deemed to be 'privately owned', and the royalties repayable to Cadia.[121]

96 More relevant to the circumstances of the present case, is *Re Azoff-Donn Commercial Bank* ('*Azoff-Donn*').[122] The *Companies Act 1948* (UK) ('the 1948 Act') permitted, in certain circumstances, the winding up by the Court in the United Kingdom of a foreign company. Wynn Parry J considered a creditor's petition for the compulsory

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117 Ibid, 218 [57] (French CJ).

118 Ibid, 229-230 [100] (Gummow, Hayne, Heydon and Crennan JJ).

119 Ibid, 218 [57] (French CJ), 230 [102]–[103] (Gummow, Hayne, Heydon and Crennan JJ). The common law rule, which held that the prerogative to royal mines could only be abridged by "patent precise words", was first set out in the *Case of Mines (R v Earl of Northumberland)* (1568) 1 Plow 310.

120 Ibid, 210-211 [31]-[34] (French CJ), 226-227 [87]-[89] (Gummow, Hayne, Heydon and Crennan JJ). Referring to *Farley* (n 8), the Court noted that the case was conducted on the assumption that the State was the repository of the relevant prerogative due to its proprietary nature, but did not explore the matter further, as it was not the subject of dispute.

121 Ibid, 218 [57] (French CJ), 230 [102]–[103] (Gummow, Hayne, Heydon and Crennan JJ).

122 [1954] Ch 315.

winding up of Azoff-Don Commercial Bank, which had been incorporated under Russian law and was dissolved some years prior under the laws of the Soviet Union, where its principal place of business had been. At the time of its dissolution, Azoff-Don held substantial assets in England, and the Crown claimed that these assets had vested in it as *bona vacantia*.

97 Section 399 of the 1948 Act permitted the winding up of unregistered companies including in circumstances where the company is dissolved. Section 400 provided that an overseas company which had been dissolved could be wound up under the 1948 Act provided it carried on business in Great Britain.

98 Section 354 of the 1948 Act provided that where a company is dissolved, all property rights vested in or held by the company immediately before the dissolution were deemed to be *bona vacantia*, and would vest and be dealt with in the same manner as other *bona vacantia* accruing to the Crown.

99 Section 352 of the 1948 Act permitted the court to make an order declaring the dissolution to be void on application made by the liquidator of the company, provided it was made within two years of the date of dissolution.

100 The Crown opposed the winding up on the basis that on dissolution the assets had been vested in the Crown as *bona vacantia* and that the Court could not make an order without the Crown's consent.

101 Wynn-Parry J granted the petition for winding up. In considering the Crown's submission that the assets of the company had vested in the Crown on dissolution, his Honour approached the matter by determining to what extent the Crown's prerogative had been abrogated by the 1948 Act. Given that the right of the Crown to *bona vacantia* was expressly mentioned in s 354 of the 1948 Act, his Honour considered that the right of the Crown to take property as *bona vacantia* was exhaustively stated by that section, but that such a right had to be construed in light of the balance of the provisions in the 1948 Act. Thus Wynn-Parry J found that the Crown's prerogative right to *bona vacantia* in the assets of a dissolved corporation had been modified by the

1948 Act, and did not operate in such a way as to override the detailed regime which applied in relation to the winding up process. Accordingly, his Honour explained that the Crown's rights were subject to the provisions for winding up:[123]

> The truth is that if the Crown's contention is correct the Act does not work, whereas if that contention is rejected it does work: a complete system of administration is applied to the company's affairs and at the end of the administration any surplus goes to the Crown as *bona vacantia* under section 354, where and where only the Crown's right to property as *bona vacantia* is mentioned. In my judgment, therefore, the highest title which the Crown can claim to the property of the company in this country is a defeasible title liable, as Lord Atkin said, to be defeated by the winding-up order. It is a title which is liable to be defeated without its consent and even against its wish in every case where the conditions prescribed by the Act as interpreted by the relevant authorities exist.
>
> (underline added)

102 In a similar vein, in *Food Controller v Cork*,[124] the House of Lords considered the impact of the *Companies (Consolidation) Act 1908* (UK) on the Crown's prerogative right of priority payment of debts. It was held that the priority payment regime for the payment of debts arising on the liquidation of a company was inconsistent with a Crown prerogative which accrued to Crown debts. The inconsistency between the provisions of the legislation and the prerogative was emphasised,[125] and provided clear evidence of the legislature's intention that the prerogative be curtailed.[126]

103 Efforts to prevent exercises of the prerogative from interfering with statutorily conferred rights and benefits have also been made in English case law. In *Laker Airways Ltd v Department of Trade*,[127] the English Court of Appeal considered an attempt by the Secretary of State to revoke Laker Airways' designation as an air carrier in reliance on a prerogative power. The Court found that the *Civil Aviation Act 1971* (UK) had abrogated the prerogative relied upon in carrying out the revocation. In separate judgments, members of the Court emphasised that the clear provisions of the Act could not be 'construed as leaving vested in the Crown, wholly unfettered and

123 Ibid, 329.
124 [1923] AC 617.
125 Ibid, 657 (Lord Birkenhead).
126 Ibid, 657 (Lord Birkenhead), 660 (Lord Atkinson),
127 [1977] QB 643.

beyond the control of the courts … a prerogative power,'[128] nor could the protections set out in the Act be subverted by recourse to the prerogative.[129] It was held that the Crown could not use its prerogative powers to interfere with or 'take away the rights of citizens'[130] particularly in respect of a valuable commercial right such as an aircraft licence.

104 In *R v Home Secretary; Ex parte Fire Brigade's Union*,[131] the House of Lords considered a decision made by the Home Secretary of the United Kingdom not to bring into effect a statutory scheme that had been established for compensating victims of crime, and to instead bring a different scheme into effect in purported reliance on a prerogative power. The majority found that the Secretary was not entitled to rely on prerogative to interfere with or set aside a statutory provision.[132] Lords Lloyd and Nicholls found that the Secretary had acted unlawfully by refusing to implement the will and intention of Parliament as expressed in the statute,[133] and Lord Browne-Wilkinson observed that:

> … it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute.[134]

105 Ultimately, what underpins cases in which abrogation by necessary implication has been recognised is a direct and insurmountable inconsistency between the provisions of the statute, and the prerogative power or right. Consistent with the fundamental principles of democracy, if the exercise of a prerogative power or right is directly inconsistent with or in contravention of the will and intention of Parliament, as discerned from the statute, abrogation will be the likely outcome. If, however, the two can be reconciled, courts have proved eager to protect and maintain the operation of prerogative rights and powers.

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128 Ibid, 722 (Lord Roskill).
129 Ibid, 707 (Lord Denning).
130 Ibid, 728 (Lawton LJ).
131 [1995] 2 AC 513.
132 Ibid, 551-552 (Lord Browne-Wilkinson), 571 (Lord Lloyd), 577-578 (Lord Nicholls).
133 Ibid, 571-572 (Lord Lloyd), 578 (Lord Nicholls).
134 Ibid, 552 (Lord Browne-Wilkinson).

106 It is against that background that it is necessary to consider the sphere of operation of the each of the statutes which the State contends give rise to an implied abrogation of the prerogative right to *bona vacantia.*

***Bona vacantia* and its application to goods the subject of a disclaimer**

107 The State's primary submission was that the application of *bona vacantia* had been abrogated by the *ACLFT Act* and the *Corporations Act.* However, the State submitted that there has been no decision by any Australian court which has definitively held that the doctrine applies in the first instance to goods the subject of a disclaimer by a liquidator.

108 The State accepts that there have been numerous cases which proceeded upon the assumption that the analogous doctrine of escheat operates in respect of real property that is being disclaimed by a Liquidator under s 568 of the *Corporations Act* (or by the trustee in bankruptcy under s 133 of the *Bankruptcy Act 1961* (Cth)) ('*Bankruptcy Act*').[135] However, the State notes that none of these cases involved disclaimer of personal property as distinct from real property.

109 The State does not make any submission about the position in relation to real property, including for the reason that this case does not concern real property and additionally because it submits that the position in relation to real property is affected by different considerations including the doctrine of radical title,[136] the operation of State and

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135 For example, *Re Middle Harbour Investments Ltd* [1977] 2 NSWLR 652, 661-663 (Bowen CJ in Eq); *Sandhurst Trustees Ltd v 72 Seventh Street Nominees Pty Ltd* (1998) 45 NSWLR 556, 564-565 (Bryson J); *Australia and New Zealand Banking Group Ltd v Fairfield City Council* [2016] NSWSC 668, [33]-[34] (Emmett AJA); *Environment Protection Authority & Anor v Australian Sawmilling Company Pty Ltd (in liq) & Ors* [2020] VSC 550; *Bank of Queensland Ltd v Western Australia* [2020] FCA 442, [36] (McKerracher J); *Commonwealth Bank of Australia v Queensland* [2021] FCA 22, [15] (Derrington J); *Westpac Banking Corporation v Burton* [2021] FCA 773.

136 Radical title has been described as meaning that ultimate ownership (if not beneficial ownership) of all land is in the Crown and that the interest which a subject can have in the land is ownership not of the land itself but of an estate in fee simple in it; see, generally *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 25-28 (Brennan J; Mason and McHugh JJ agreeing), 80-81 (Deane and Gaudron JJ), 122-123 (Dawson J), 180 (Toohey J); see also *Wik Peoples v Queensland* (1996) 187 CLR 1, 88-94 (Brennan CJ), 122-123, 127-129 (Toohey J), 139-143 (Gaudron J), 186-190 (Gummow J), 233-235 (Kirby J). That is, private interests in land derived from the Crown grant (either mediately or immediately) and are held 'of the' Crown. The capacity to exercise the sovereign rights in relation to land deriving from these principles was given to the colonies, and on Federation became that of the States: *New South Wales v Commonwealth* (1975) 135 CLR 337, 403-409 (Gibbs J).

Territory land laws, and possible limits on the power of the Commonwealth Parliament to make laws that materially affect the way in which the State exercises control of land.[137]

110 In New Zealand in the case of *Tubbs v Futurity Investments Ltd* ('*Tubbs*'),[138] it was assumed that disclaimed property would vest in the Crown although there appeared to be no argument advanced that the doctrine did not apply and the Court ultimately refused leave to disclaim. Likewise, in *Sullivan v Energy Services International Pty Ltd ('Sullivan')*,[139] Young C J in Equity of the Supreme Court of New South Wales noted the possibility that disclaimed property would vest in the Crown as *bona vacantia*. Again no submission was made that the doctrine had no application to personal property. In the result, his Honour set aside the disclaimer.[140]

111 Similarly, in *Menzies v Paccar Financial Pty Ltd (No 4*),[141] the New South Wales Court of Appeal, in considering the effect of a liquidator's disclaimer of equipment that a company had purchased under a loan agreement, observed: [142]

> It is at the very least arguable that the effect of a disclaimer of personal property by a liquidator is that the property vests in the Crown (whether in right of the Commonwealth or the State) as *bona vacantia*. It is for this reason that the conventional view is that the relevant manifestation of the Crown should be joined in any application affecting title or the right to possession of the disclaimed property.

112 In *Re Potters Oils Ltd*,[143] Harmon J sitting in the Chancery Division refused leave to allow a disclaimer made by a liquidator of a company with respect to 46,000 gallons of chlorinated waste oil stored by the company. In the course of hearing the application, Harmon J stated:[144]

> It seemed to me on the first hearing of the motion that if an order permitting disclaimer was made the chattel – for that is what in law the oil is – would be

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137 See *Commonwealth v Tasmania* (1983) 158 CLR 1, 139-141 (Mason J), 208-216 (Brennan J), 280-281 (Deane J).
138 [1998] 1 NZLR 471.
139 (2002) 171 FLR 106.
140 *Sullivan* is discussed more in depth at [178].
141 [2014] NSWCA 210.
142 Ibid [101].
143 [1985] BCLC 203, 205.
144 Ibid, 205.

> *bona vacantia,* being abandoned by its owner, and would probably vest in the Crown. If the oil was a 'hazardous substance', as the liquidator averred it seemed to me to be wrong to thrust such a chattel on the Crown without there being any consideration of the Crown's position.

113 In my view there is no difference in principle between the operation of escheat as it applies to land the subject of disclaimer by a liquidator and *bona vacantia* as it applies to personal property the subject of a disclaimer by a liquidator. The doctrine has its origin in the notion that 'property must belong to somebody'.[145] As noted above,[146] recognising that the doctrine derives from the Crown's broad duty to maintain good order in the realm, I see no reason to distinguish the position that pertains to land which in the event of disclaimer escheats to the Crown, and that of personal property which upon disclaimer vests by reason of *bona vacantia* in the Crown. In my view, the various cases which have proceeded upon the basis that the doctrine applied were right to do so.

Abrogation by Statute – the *ACLFT Act*

114 The State argues that that the prerogative right to *bona vacantia* has been abrogated by pt 4.2 of the *ACLFT Act*. As this regime does not expressly abrogate the *bona vacantia* prerogative, the necessary analysis is whether such right is abrogated by necessary implication.

115 Part 4.2 of the *ACLFT Act* applies to 'uncollected goods'. Section 54(1) relevantly provides that:

> Goods under bailment are uncollected goods if –
>
> (a) the goods are ready for delivery to the provider in accordance with the terms of the bailment, but the provider has not taken delivery of the goods and has not given directions as to their delivery; or
>
> …
>
> (d) the provider has not paid the relevant charge payable to the receiver in relation to the goods within a reasonable time after being informed by the receiver that the goods are ready for delivery.

116 The definitions relevant to pt 4.2 of the *ACLFT Act* are set out in s 3(1) of that Act and

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145 *Dyke v Walford* (n 14), 471.

146 At [52].

include:

> **Bailment** includes bailment for reward, bailment in the course of business, gratuitous bailment, involuntary bailment and any sub bailment;
>
> …
>
> **Provider** in part 4.2 means the person who gives possession of goods under a bailment (whether or not the person is the owner of the goods);
>
> …
>
> **Receiver** in part 4.2, means the person who takes possession of goods under a bailment.

117 'Relevant charge' is defined in s 55 of the *ACLFT Act* as 'the amount payable by the provider to the to the receiver for goods under bailment and payment of which entitles the provider to take delivery of the goods'.

118 It is clear that the IBCs are goods under bailment within the meaning of pt 4.2 of the *ACLFT Act*. Part 4.2 recognises bailment as the relationship between a provider of goods (who need not be the owner of the goods) and a receiver of goods. In this case, the provider is Bradbury (which is the party that gave possession of the IBCs to DBL) and the receiver is DBL.

119 I do not accept DBL's submission that the section does not apply because the goods no longer have any owner. The definition of 'bailment' includes bailment for reward which would include the first storage contract and the second storage contract. It also includes involuntary bailment which is consistent with the position after the storage contact disclaimer and the IBC disclaimer. There is no warrant to read the definition of 'provider' in a manner which excludes Bradbury because it is no longer the owner of the IBCs; Bradbury was the provider as owner when it gave possession of the goods under the bailment for reward and, as such, it falls within the definition of provider.

120 It is clear that the IBCs are ready for delivery to the provider (Bradbury) in accordance with the terms of the bailment but the provider has not taken delivery of the IBCs and

has not given directions as to their delivery.[147]

121 It is also clear that the provider (Bradbury) has not paid the relevant charge payable to the receiver in relation to the IBCs within a reasonable time after being informed by the receiver that the IBCs are ready for delivery.[148]

122 Section 56(4) of the *ACLFT Act* provides that:

> This part applies to the disposal of uncollected goods –
>
> (a) if there is no agreement between the provider and the receiver about their disposal; or
>
> (b) if there is an agreement about the disposal, only in respect of matters not dealt with by the agreement.

123 The part applies; the first storage contract and the second storage contract have been disclaimed by the storage contract disclaimer, such that there is now no longer an agreement between the provider and the receiver about disposal. Moreover and in any event neither the first storage contact nor the second storage contract dealt with disposal in circumstances where Bradbury was placed in liquidation and the Liquidator disclaimed Bradbury's interest in the IBCs.

124 Accordingly, the IBCs are 'uncollected goods' under s 54(1)(d) of the *ACLFT Act* and generally within the meaning of pt 4.2 of the *ACLFT Act*.

125 So much is clear; what is far more contestable is the State's submission that the regime provided for by pt 4.2 of the *ACLFT Act* is inconsistent with the prerogative right to *bona vacantia* applying to the uncollected goods to which pt 4.2 applies.

126 Section 58(1) of the *ACLFT Act* confers on a receiver (here, DBL) a right to dispose of uncollected goods:

> (a) in the case of low value uncollected goods (defined in s 3(1) as goods worth less than $200) after giving notice to the provider, by sale, destruction appropriation

147 On 13 March 2020, DBL wrote to the Liquidator to ask Bradbury to remove the IBCS and on 3 April 2020 the Liquidator wrote to DBL refusing to remove them.

148 On 13 March 2020, DBL wrote to the Liquidator to ask Bradbury to remove the IBCs and Bradbury has not paid DBL the amount owing in respect of the storage of the IBCs.

or other means (s 60);

(b) in the case of medium value uncollected goods (defined in s 3(1) as goods worth between $200 and $5000) after giving notice to the provider and the owner (where they are different people and the receiver is aware of this) and 28 days elapses, by public auction or by private sale (s 61);

(c) in the case of high value uncollected goods (defined in s 3(1) as goods worth more than $5000) after giving notice to the provider and the owner (where they are different people and the receiver is aware of this) and after 28 days elapses, by public auction or private sale (s 62); and

(d) in the case of perishable uncollected goods after giving notice, by sale, appropriation or destruction (s 65).

127 Section 59 of the *ACLFT Act* provides that:

> The provider, the owner of the uncollected goods or any other person with an interest in the goods is entitled, on payment of the relevant charge, to delivery of the goods at any time before their disposal.

128 Section 59 recognises an ongoing right enjoyed by both the provider and the owner in respect of the uncollected goods at any time prior to their disposal. The regime therefore recognises that the provider and the owner may not be one and the same and contains a mechanism in the case of medium value and high value goods for the owner to receive notification before the goods are sold.

129 The State submits that the creation of a statutory right on the part of the receiver to dispose of uncollected goods, including in some cases by destruction or appropriation, is 'plainly inconsistent' with the operation of the prerogative right to *bona vacantia* in respect of the goods. The State submits that rather than providing that uncollected goods should be owned by, or become the responsibility of the Crown, Parliament has legislated that where goods are left with a receiver and become uncollected goods within the meaning of pt 4.2 of the *ACLFT Act*, they should be disposed of by the receiver.

130 The State argues that the inconsistency is confirmed by s 75 of the *ACLFT Act*. Section 75 provides that a purchaser of goods sold under pt 4.2 of the *ACLFT Act* acquires good title to the goods (unless they had notice of certain matters) and that a receiver who disposes of goods by appropriation under pt 4.2 acquires good title to the goods. Accordingly, the State submits that pt 4.2 creates a regime for persons to acquire good title to uncollected goods without being granted those goods by the State. The State submits that this is inconsistent with the operation of the prerogative right to *bona vacantia* in respect of such goods.

131 Further, the State relies upon s 73 of the *ACLFT Act* which provides that if uncollected goods are sold by a receiver under pt 4.2, the receiver is entitled to retain the relevant charge out of the proceeds of the sale and any surplus funds are required to be dealt with in accordance with the *Unclaimed Money Act 2008* (Vic), which the State submits itself displaces the prerogative right to *bona vacantia* to the extent that it might otherwise apply to unclaimed money within the meaning of that Act.

132 The State therefore argues that Parliament has specifically regulated uncollected goods in a way that is inconsistent with the continued operation of the prerogative right to *bona vacantia* in respect of that subject matter. Accordingly, the State argues that the prerogative right must be taken to have been relevantly abrogated.

133 In my opinion, the regime is not inconsistent with the Crown obtaining ownership of disclaimed goods through the operation of *bona vacantia*. There is nothing in the scheme of pt 4.2 of the *ACLFT Act* which is inconsistent with the vesting of the uncollected goods in the Crown by reason of the operation of *bona vacantia*. Rather, pt 4.2 creates a regime whereby the receiver is entitled to sell the uncollected goods, ownership of which is now vested in the Crown, and to apply the sales proceeds in payment of the unpaid storage charge and then, in the event of such sale, to confer good title on the purchaser.

134 The regime does not speak to the circumstance where, as a result of the goods becoming ownerless by disclaimer, and by operation of the doctrine of *bona vacantia*,

the goods vest in the Crown.[149] The Crown simply stands in the same position as a previous owner, with the receiver's rights (to dispose of uncollected goods) applying in the same way as they would have applied had ownership remained with the original owner. As a practical matter, if the unpaid receiver (here, DBL) wishes to avail itself of the mechanisms in pt 4.2 of the *ACLFT Act* following disclaimer of goods by a liquidator, it merely needs to notify the Attorney-General as the representative of the owner of the goods.[150]

135 The Crown would then be entitled to exercise its rights as owner in the event that it wished to do so by paying the outstanding delivery charge and then obtain delivery of the goods as s 59 of the *ACLFT Act* recognises.

136 The *ACLFT Act* creates a right, but no obligation on a receiver, to dispose of the uncollected goods. Thus, I do not accept the State's submission that the *ACLFT Act* provides that goods 'should be disposed of by the receiver', which it relies upon in support of its submission that the *ACLFT Act* is a code operating to the exclusion of the doctrine.

137 There is no inconsistency between the continued operation of the prerogative right to *bona vacantia* and the *ACLFT Act*, much less an inconsistency of a direct and insurmountable nature such as to warrant the conclusion that by implication the *ACLFT Act* was to exclude the prerogative right.

138 As the analysis of the nature of the prerogative right set out above demonstrates, the Crown's proprietary interest acquired via *bona vacantia* is an interest which is both subject to prior encumbrances and defeasible. Similarly, in the case of real property, the existence of a mortgage does not prevent the operation of the analogous doctrine of escheat.

139 The existence of the prerogative right to *bona vacantia* and the rights of the unpaid

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149 Assuming for present purposes that the application of the doctrine has the effect that the goods vest in the State and not the Commonwealth.

150 The notice requirements require notice to be given to the provider in respect of low value, medium value and high value uncollected goods, but only require notice to be given to the owner in respect of medium value and high value uncollected goods.

receiver of goods under the *ACLFT Act* are easily reconciled; the Crown simply stands in the position of the former owner whose goods can be sold to facilitate the payment of unpaid storage charges and disposal in circumstances contemplated by the *ACLFT Act*, if the receiver so chooses.

140 Accordingly, I reject the State's submission that the *ACLFT Act* has impliedly abrogated the right of *bona vacantia*.

Abrogation by Statute – div 7A of pt 5.6 of the *Corporations Act*

141 The State also argues that the doctrine of *bona vacantia* has been abrogated by necessary implication by div 7A of pt 5.6 of the *Corporations Act*.

142 The State submits that the principle aspect of div 7A of pt 5.6 of the *Corporations Act* that is inconsistent with the prerogative right to *bona vacantia* in respect to personal property disclaimed by a liquidator is s 568F of the *Corporations Act*.[151] That provision confers on the Court a power to order that 'disclaimed property' vest in, or be delivered to:

(a) a person entitled to the property;

(b) a person in or to whom it seems to the Court appropriate that the property be vested or delivered; or

(c) a person as trustee for a person of a kind referred to in paragraph (a) & (b).

143 Under s 568F(2), such an order can only be made on the application of a person who claims an interest in the property, or is under a liability in respect of the property that the *Corporations Act* has not discharged before making the order. The provision requires the Court to hear such persons as it thinks appropriate.

144 Thus the State argues that the existence of a power to vest personal property that is disclaimed by a liquidator in a person other than the Crown , that is to say 'a person in or to whom it seems to the Court appropriate that the property be vested or

151 Extracted at [35].

delivered' – is inconsistent with the operation of the prerogative right to *bona vacantia* in respect of such property.

145 Property that vests in the Crown as *bona vacantia* has long been understood to vest automatically.[152] The position is slightly different in relation to land which escheats to the Crown.[153]

146 The State relies upon the judgment of Rares J of the Federal Court of Australia in *National Australia Bank Ltd v New South Wales* ('*National Australia Bank*').[154] In that case, following the bankruptcy of a registered proprietor of Torrens title land, the trustee in bankruptcy executed a disclaimer of the bankrupt's property pursuant to his right under s 133(1) of the *Bankruptcy Act*. The Registrar General considered that the land thereby escheated to the Crown in right of the State. The mortgagee bank then applied for a court order under s 133(9) of the *Bankruptcy Act* vesting its interest in the land on the condition that it sold the property, deducted what was due to it and paid the balance to the trustee in bankruptcy. Section 133(9) permitted such an order to be granted to a person in whom it seemed to the Court to be just and equitable that the title should be vested. Section 57(2)(b) of the *Real Property Act 1900* (NSW) required a mortgagee to serve notice on an existing mortgagor prior to exercising a power of sale upon default in payment under the mortgage.

147 His Honour ordered that the legal title of the land should be vested in the bank under s 133(9) of the *Bankruptcy Act* for the purpose of securing the moneys due to the mortgagee and notwithstanding the effect of the disclaimer.[155]

148 Rares J first considered whether the land escheated to the Crown, noting that a series of Australian cases decided prior to the enactment of s 13H and 13J of the *Real Property Act* and discussed by Bowen CJ in Equity in *Re Middle Harbour Investments Ltd*[156] recognised the difficulty that pertained to a position of a mortgagee after a disclaimer

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152 *Re Bonner* [1963] Qd R 488, 502-503 (Wanstall J) ('*Bonner*').
153 See *Re Middle Harbour Investments Ltd* [1977] 2 NSWLR 652, 663 (Bowen CJ in Eq).
154 (2009) 182 FCR 52.
155 Ibid, [29].
156 [1977] 2 NSWLR 652, 662A-G.

of land had occurred by a trustee in bankruptcy of the mortgagor. This difficulty had been adverted to by Sir George Jessel MR in *Re Mercer and Moore,*[157] who 'despaired that there was no one entitled to take the estate except the Crown,' before continuing:[158]

> This, however, is in no way of getting out of the difficulty – indeed you get into a worse difficulty here, for how are you to get the estate out of the Crown again? There are no means that I know of except by actual grant or by the will of the Crown to get back a legal estate, which would be a very awkward result and very prejudicial to many titles in this part of the country, especially where these titles are very common. If that is not so, I do now know where the estate is.
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> …
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> As I have said before, I am not sure here that the estate is in the Crown, but if it is not in the Crown I do not know where it is. At all events it is not in the trustee in bankruptcy, and has not been conveyed, therefore, to the present vendors. Therefore they cannot convey to the present purchasers. I have looked into the *Trustee Act*, and I do not see any mode of getting in the legal estate. The *Trustee Act* does not provide for want of an heir.

149 Importantly, the English legislation provided that after a disclaimer, any person interested in any disclaimed property could apply to the Court for an order to possess the property.[159]

150 Rares J also referred to *Re Condobolin Bila CDEP Ltd (deregistered)*.[160] In that case, Gyles J held that where land had been purchased by a company using grant moneys from a Commonwealth body, the Aboriginal and Torres Strait Islander Commission ('ATSIC'). The company was later wound up and its liquidator disclaimed the land. ATSIC had an interest in the land under a charge. As by that time ATSIC had been disbanded, the Commonwealth was its successor in title at law. The Commonwealth sought an order pursuant to s 568F of the *Corporations Act* that the land vest in it. Such an order was made in circumstances where the State submitted to any order that the Court might make.

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157 (1880) 14 Ch D 287.
158 Ibid, 295-6.
159 Ibid, 290.
160 (2006) 59 ACSR 682.

151 Rares J also referred to *Sandhurst Trustees Ltd v 72 Seventh Street Nominees Pty Ltd (in liq)*,[161] where Bryson J noted that where Crown land was passed under the provisions of the *Real Property Act*, the State's title was recorded as held for an estate in fee simple.[162] Bryson J observed that only the interest of the owner of the fee simple went out of existence on an escheat under the *Real Property Act* so that the land reverted to the Crown subject to any mortgages or charges,[163] before concluding that the Crown owned the fee simple as the consequence of an escheat on a disclaimer notwithstanding that no recording reflecting those events had been made in the register under s 13H of the *Real Property Act*.

152 In a passage relied upon by the State, Rares J then stated:[164]

> I think that the better view may be that by force of a disclaimer under the *Bankruptcy Act* (or Div 7A of Pt 5.6 of the *Corporations Act*) the title to the fee simple or other property does not escheat absolutely to the Crown in right of the State because the Court can make an order vesting that title in someone else. The Court's power to make such a vesting order is created by a law of the Commonwealth (s 133(9) of the *Bankruptcy Act* or s 568F(1) of the *Corporations Act*). By force of s 109 of the *Constitution* of the Commonwealth that law supplants any inconsistent automatic operation of a law of a State to the extent that some form of immediate and indefeasible escheat to the Crown in right of the State would otherwise have occurred. As I have observed, the ordinary incidents of an escheat are not readily seen as conformable with its suggested application to disclaimers. However, it is not necessary to express a final view, since this matter was not argued and I do not need to decide it.
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> In the administration of bankrupt or insolvent estates, there is good reason for the Court to be cautious before uncritical acceptance of the application of the ancient doctrine of escheat, in light of its power to vest the disclaimed property in a person the Court considers (judicially) appropriate. An order divesting the Crown in right of the State of property that fell in to its radical title by escheat, may entitle the Crown to compensation on just terms for the loss of that title under s 51(xxxi) of the *Constitution*, where, for example, the Court concluded under s 133(9) of the *Bankruptcy Act* that any surplus after a mortgagee sale should be distributed to the bankrupt's unsecured creditors. The permanent deprivation of that asset from the estate merely because the trustee in bankruptcy disclaimed may work an unfairness to the unsecured creditors and give a windfall to the Crown in right of the State.
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> In addition, given that now such disclaimers and vesting orders occur under laws of the Commonwealth, the question may arise as to whether any escheat or remaining interest in the property after a disclaimer should be treated as

161 (1998) 45 NSWLR 556.
162 Ibid, 563F.
163 *Sandhurst*, 564E.
164 *National Australia Bank* (n 154), [23]–[25].

> falling into the Crown in right of the Commonwealth rather than the State: cf *Attorney-General of Ontario* 8 App Cas 767. And, in *The King v Attorney-General of British Columbia* [1924] AC 213 at 218-219 esp at 219 Lord Sumner observed that the principles upon which escheat and *bona vacantia* fall to the Crown are that where there is no private person entitled, the Crown takes: see too *Land Law* (5th ed) where at pp 76-77 Professor Butt suggests that the only remnants in Australia of the doctrine of escheat are in the case of disclaimers by trustees in bankruptcy or liquidators. Because s 133(9) of the *Bankruptcy Act* preserves the possibility that the Court may vest disclaimed property in a person these doctrines may not operate in an unqualified way in the current legislative scheme. Once again, this is not the occasion to decide these questions, but they will require attention at some time.
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> (underline added)

153 The State thus argues that the Commonwealth has legislated so as to confer power under s 568F of the *Corporations Act* on the Court to make an order vesting title to property in someone other than the Crown to whom, by virtue of the doctrine of escheat or *bona vacantia*, the property has vested. By legislating as such, the State argues that the statute abrogates by necessary implication the prerogative right to *bona vacantia*.

154 The State submits that it is significant that in contrast to an application for an order to set aside a disclaimer under s 568B of the *Corporations Act*, which must be made within 14 days of the disclaimer, an application for an order under s 568F of the *Corporations Act* is not subject to any express time limit. An application for such an order could conceivably be made a considerable time after the disclaimer. The State submits that in the meantime, subject to any statutory provision altering the position, the property could not properly be regarded as having vested in the Crown.

155 The State further argues that such a conclusion is reinforced by the fact that, in s 568D(2) of the *Corporations Act*, Parliament has expressly provided for what is to occur in situations where a person is aggrieved by the operation of a disclaimer. Such a person is taken to be a creditor of the company that disclaims the property to the extent of any loss suffered by the disclaimer. In a case like the present, where no person is likely to make an application for an order under s 568F of the *Corporations Act* seeking to have the disclaimed property vest in or be delivered to them, the State contends that Parliament did not legislate that the goods should vest in the Crown as

bona vacantia, but that any person who suffers loss by reason of the disclaimer of the goods should prove in the winding up.

156 I do not accept that the fact that s 568D(2) of the *Corporations Act* entitles a person aggrieved by the operation of a disclaimer to be regarded as a creditor supports the submission that Parliament intended to abrogate the prerogative right to *bona vacantia*. The potential scope of operation of s 568D(2) extends to a range of circumstances unrelated to or not impacted in any way by whether goods the subject of disclaimer have either escheated to the Crown (in the case of land) or have vested in the Crown as *bona vacantia* in the case of personal property.

157 The common law applies so as to vest the goods in the Crown as *bona vacantia* unless a statute expressly or impliedly be taken to have abrogated the common law doctrine. The mere fact that s 568D entitles a person aggrieved by the operation of a disclaimer to prove in the winding up as a creditor to the extent of loss suffered has nothing to do with the question of ownership of property passing as a consequence of the operation of the doctrine. The passage of ownership in this way may, but need not, ameliorate the effect of disclaimer.

158 In the present case for example, the first and second storage contracts which are the subject of the storage contract disclaimer, have no doubt caused loss to DBL. DBL will be able to prove for that loss in the liquidation by reason of s 568D(2) of the *Corporations Act*.[165]

159 Nor do I find the State's submission as to the differential time limits which apply under s 568B of the *Corporations Act* of any moment. Whilst it is true that the time limit of 14 days which applies under s 568B contrasts with s 568F which imposes no time limit on the making of an application for a vesting order, this is a thin foundation for a submission that Parliament thereby intended that the doctrine of *bona vacantia* should no longer apply to disclaimed property.

160 The State's submission also overlooks s 568E of the *Corporations Act* which preserves

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165 Extracted at [33] above.

the ability of a person to apply for an order setting aside the disclaimer after it has taken effect. No time limit is provided in relation to such application. I shall return to the potential scope of s 568E and its relevance to the present circumstances in due course.

161 In the end, the State's submission ultimately comes down to the fact that s 568F of the *Corporations Act* permits the Court to make orders that disclaimed property vest in or be delivered to another person. In *National Australia Bank*, Justice Rares considered that title to disclaimed property be treated as temporarily vesting in the Crown in right of the State (or Territory) where the property was located, pending the final decision of the Court as to the person in whom the title would vest.[166] In that respect, his Honour considered that such a device could be regarded as convenient, 'so long as it respects' its statutory source; namely (in a bankruptcy) s 133 of the *Bankruptcy Act*, and respects the intention of the Commonwealth Parliament that this title in the Crown is not absolute or does not arise by escheat.[167]

162 The extension of Rares J's reasoning, so the State submits, is that div 7A of pt 5.6 of the *Corporations Act* can be treated as giving rise to the effectuation by statute of a temporary passing of title to the property to the Crown in right of the State on a basis where the title to the Crown is not absolute and has not arisen by escheat (or by analogy in the present case, by operation of the doctrine of *bona vacantia*).

163 DBL approaches the matter in a different way; it accepts that notwithstanding that *bona vacantia* results in the title to the goods vesting in the Crown, s 568F of the *Corporations Act* nevertheless permits a court to order that such property could vest in or be delivered to another person.[168] It acknowledges that the title which vests in or devolves upon the Crown by virtue of the doctrine of *bona vacantia* is not absolute, but it submits that such title, however it is passed, has never been regarded as indefeasible.

164 I agree with DBL's submissions. The State's submission assumes that the interest

166 *National Australia Bank* (n 154), [28] (Rares J).

167 Ibid.

168 In that respect DBL submits that the reference to 'disclaimed property' in s 568F must be construed as if it reads 'disclaimed property' which has vested in the Crown.

acquired by virtue of *bona vacantia* is indefeasible and therefore that s 568F of the *Corporations* Act which allows for its defeasibility is inconsistent. As the history and analysis above records,[169] a defining characteristic of the Crown's right to *bona vacantia* is its defeasibility. The interest that arises is one which can be later extinguished. The fact that property which has vested in the Crown by virtue of the doctrine of *bona vacantia* may nevertheless be defeated by reason of an order under s 568F of the *Corporations Act* is consistent with the nature of the historical proprietary interest obtained as a result of the operation of the Crown prerogative. This is recognised, for example, where the circumstances which led to the goods becoming *bona vacantia* are reversed, such as where a dissolved company is reinstated.

165 Thus, the submission that div 7A of pt 5.6 of the *Corporations Act* is necessarily inconsistent with the existence of the prerogative right in my view is overstated. The defeasibility of the Crown's interest in *bona vacantia* means that its continued operation is consistent with the disclaimer provisions under the *Corporations Act.* The interest taken by the Crown is a defeasible one liable to the balance of the *Corporations Act* provisions, in much the same way as was the case in *Re Azoff -Donn*.[170]

166 Another feature of the doctrine is that the Crown also takes the property subject to any debts, liabilities or encumbrances. Thus, the fact that s 568F of the *Corporations Act* might permit the making of an order vesting the disclaimed property in a mortgagee is also consistent with the historical underpinnings of the doctrine. Section 568F creates a statutory mechanism to get the title out of the Crown, thus overcoming the difficulty adverted to long ago by the Master of the Rolls in *Re Mercer and Moore.*[171] Arguably, it does nothing more. Alternatively, s 568F of the *Corporations Act* can be regarded as giving rise to an implied abrogation only to this extent; it says nothing about and is consistent with the vesting of title in the Crown but creates a statutory power of divestiture in the sense articulated in *Re Azoff-Donn*.[172]

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169 See discussion at [48] above.
170 (n 36)
171 *Re Mercer and Moore* (n 157).
172 (n 36).

167 There is another flaw with the State's submission. In many instances there will not be an application made for a vesting order under s 568F of the *Corporations Act* following the disclaimer of the property by a liquidator. If the State is correct and div 7A of pt 5.6 of the *Corporations Act* effects a statutory abrogation of the doctrine, then the goods will become ownerless as a consequence of the disclaimer. This is inconsistent with the historical underpinnings of the doctrine, which sought to avoid the mischief of property being ownerless.

168 Conversely, if s 568F is regarded as a statutory device to facilitate the making of orders that enable ownership to be transferred to either a prior encumbrancer or someone who later emerges with a better claim than the Crown, then this is entirely consistent with and co-exists neatly with the continued operation of the doctrine.

169 Such an approach also sits comfortably with the interaction between the operation of the doctrine of escheat arising from a disclaimer and the capacity of the State as an interested party to apply to the Court for an order setting aside the disclaimer before it takes effect under s 568B of the *Corporations Act.*

170 In *EPA v Australian Sawmilling Company Pty Ltd (in liq)* ('*TASCO*'),[173] the liquidators of the defendant company issued a notice of disclaimer in relation to land, formerly used as a sawmill, that contained large stockpiles of industrial waste. Garde J of this Court made orders upon the application of the EPA and the State pursuant to s 568B(2) of the *Corporations Act* to set aside the disclaimer. His Honour applied the orthodox analysis required by s 568B(3), which entitles the Court to set aside the disclaimer only if satisfied that the disclaimer would cause, to persons who have or claim to have interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors.

171 His Honour accepted that the disclaimer would cause prejudice to the EPA and the

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173 [2020] VSC 550. Upheld on appeal in *The Australian Sawmilling Co Pty Ltd (in liq) v Environment Protection Authority* [2021] VSCA 292 (Ferguson CJ, Sifris and Kennedy JJA). The issue on appeal was whether the liquidator of a company could be regarded as the occupier of the land, which is not an issue relevant to this case.

State that was grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors.[174] His Honour held that both the EPA and the State had interests in the subject land which entitled them to apply to the Court for an order setting aside the disclaimer.[175] The State's interest arose because the land devolved to the Crown on escheat following the disclaimer by the liquidator.

172 The EPA and the State argued that the prejudice to them if the disclaimer was not set aside amounted to a very large sum of money[176] and that the amount likely to be paid to the defendant's creditors whether or not the disclaimer was set aside would be nil. In effect, the consequence of the disclaimer taking effect was that the cost of the environmental clean-up would be passed on to the State. His Honour noted that the 'Court should be wary of disclaimers where environmental liabilities are to be passed on to taxpayers or innocent persons'.[177] Against the detriment to the State which would arise if the disclaimer was effective, his Honour noted that the liquidators enjoyed an indemnity from the sole shareholder of the company.[178] His Honour noted that the creditors of the company would not suffer any prejudice if the disclaimer was set aside; accordingly, his Honour set aside the disclaimer.

173 *TASCO* is illustrative of a way in which the Crown can take steps to avoid the liability for onerous environmental clean-up costs that would otherwise arise as a consequence of disclaimer (whether as a consequence of an escheat in the case of land or *bona vacantia* in the case of goods).

174 In the present case, the State did not apply to set aside the disclaimer before it took effect within the 14 day window under s 568B of the *Corporations Act*. Nor did the State make application for leave under s 568E of the *Corporations Act* to apply to the

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174 The creditors were not to receive a dividend in either case.
175 *TASCO* (n 173) [174] (Garde J)
176 Full details of a likely amount were contained in confidential evidence.
177 *TASCO* (n 173) [201] (Garde J).
178 The indemnifier was the sole shareholder from 2012 to 2018 but had been replaced by another related entity.

Court for an order setting aside the disclaimer after it had taken effect.[179]

175 Instead, the State adopted a different approach; one where it submitted that the doctrine of *bona vacantia* had been the subject of statutory abrogation.

176 It therefore remains a question for another day as to whether it would have been open to the State to set aside the disclaimer under s 568B of the *Corporations Act*; failing that, with leave under s 568E of the *Corporations Act*, and to advance arguments not dissimilar to those advanced in *TASCO*. In other words, it remains to be determined as to whether it would have been open to the State to submit that the effective passing on of the clean-up and disposal costs of the PIW in the IBCs presently stored at the DBL Facility to the State arising because of the operation of the doctrine of *bona vacantia* is a matter that entitles it as against the Liquidator to challenge the IBC disclaimer.[180]

177 Returning to *Tubbs*,[181] Hansen J of the High Court of New Zealand set aside a disclaimer of a liquidator with respect to numerous barrels of contaminated waste stored in a number of capacitors located in a foundry. The liquidator had to apply for leave to disclaim out of time. In refusing leave to effect the disclaimer out of time, his Honour noted that the effect of the disclaimer would be that the property would vest in the Crown.[182] It was further noted that in such circumstances, if the disclaimer was effected, the company in liquidation would avoid its regulatory obligations in relation to the storage and disposal of the goods and the obligation would be transferred on to others, ultimately resulting in a significant financial obligation for the Crown.[183]

178 Similarly, in *Sullivan*[184] a liquidator in a voluntary liquidation disclaimed numerous barrels of contaminated waste stored at a company's depot. Young CJ in Equity set

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179 Given that DBL initially took steps to challenge the disclaimer, the disclaimer did not take effect until such time as DBL discontinued its claim, when by reason of s 568C it is taken to have had effect as and from the time of the giving of the notice.

180 In other instances the Crown has purported to waive the prerogative.

181 [1998] 1 NZLR 471.

182 Ibid, 476.

183 Ibid, 478.

184 *Sullivan* (n 139).

aside the disclaimer, largely adopting the same reasons given by Hansen J in *Tubbs*, and concluded that the disclaimer was a device by those controlling the company to avoid liability for the contaminated waste.[185] His Honour noted that there was no appreciable prejudice to the creditors as they were all to be paid whereas the plaintiff would suffer significant prejudice (who was a bailee of the goods holding them in its depot). Young CJ in Equity noted the suggestion of counsel that the property is *bona vacantia* and may have vested in the Crown.

179 The provisions of the *Corporations Act* on which the State relies as evidencing inconsistency with the prerogative right to *bona vacantia* such as to give rise to an implied abrogation can be contrasted with those in *Re Azoff-Donn*.[186] In that case, the prerogative right to a company's assets arising as a consequence of dissolution could not co-exist with the statutory right which vested assets of a dissolved company in the Crown.[187]

180 Section 601AD of the *Corporations Act* does provide for assets of a deregistered company to vest in the Commonwealth or ASIC. For assets to so vest pursuant to s 601AD of the *Corporations Act* and to vest in the Crown pursuant to the prerogative gives rise to a clear inconsistency. Thus, in the case of the assets of a deregistered company, the prerogative has been partially abrogated.

181 No such inconsistency however arises in the case of a company in liquidation and where the liquidator has disclaimed property under div 7A pt 5.6 of the *Corporations Act*.

182 It is a little curious that the property of a deregistered company (noting that upon the completion of the winding up, the company may well be deregistered) by virtue of s 601AD of the *Corporations Act*, which impliedly abrogates the prerogative right to *bona vacantia,* vests in the Commonwealth or in the Commonwealth agency ASIC. However, property that is the subject of a disclaimer by a liquidator vests in the State

185 Ibid, [31]-[32].
186 (n 36).
187 *Companies Act 1948* (Vic), s 354.

by virtue of the continued operation of the prerogative. It may be that in particular circumstances, this form of prejudice may be availed of by the Crown in right of the State in arguing that the disclaimer should not take effect. Again, this is not a matter at issue in this case and must await another day.

183 In the result, therefore :

(a) goods which are the subject of a disclaimer by a liquidator and would otherwise become ownerless accordingly pass to the Crown by operation of the prerogative right (akin to a duty) of *bona vacantia*; and

(b) neither the *ACLFT Act* nor div 7A of pt 5.6 of the *Corporations Act* abrogate the operation of the doctrine.

184 The only remaining question therefore is whether the prerogative is a right of the State or the Commonwealth.

The State or the Commonwealth?

185 DBL submits that personal property the subject of *bona vacantia* vests in the Crown in right of the State in which it is physically situated and relies upon *Re Bonner (deceased)* (*'Bonner'*).[188] In *Bonner*, the deceased was illegitimately born and died intestate without leaving behind a widow or issue. The applicant, a lawful son of the deceased's mother, sought to claim the deceased's real and personal property and relied upon a letter signed by the Minister for Justice advising of the waiver of the escheat in the deceased's estate. In the course of considering the effectiveness or otherwise of the waiver, his Honour considered the Crown's right to take personalty as 'undoubtedly part of the prerogative which has existed from the foundation of the Monarchy. It is the right of the Crown to *bona vacantia*, to property which has no other owner'.[189] Although the case concerned the effectiveness of the waiver, it proceeded upon the basis that the land escheated to the Crown in right of the State in which it was physically situated and that the same pertained to the personal property which

188 *Bonner* (n 152) (Wanstall J).
189 Ibid, 500.

relevantly stood on the same footing as escheat.[190]

186 Similarly, in *Walsh v State of Queensland*,[191] Logan J considered the effect of a trustee in bankruptcy's disclaimer of a bankrupt's real property. His Honour held:[192]

> It would, in my view, be inconsistent with the views, expressed in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 66; 107 ALR 1, 48 by Brennan J, and CLR 114–115; ALR 86-7 by Deane and Gaudron JJ, to hold that the effect of an escheat was to vest the land in the Crown in right of the Commonwealth. Federation did not effect a vesting of unallocated land hitherto vested in the Crown in the colonies, in the Crown in right of the Commonwealth. I therefore respectfully agree with the view expressed in *ANZ v Fairfield* by Emmett AJA, that the effect of the disclaimer, subject to an order by a court of competent jurisdiction, is to escheat the land to the relevant State Crown, in this case the Crown in right of Queensland.

187 The State in contrast submits that in the case of personal property (as distinct from real property), disclaimed by a liquidator under s 568 of the *Corporations Act*, the prerogative right to *bona vacantia* is the right of the Crown in right of the Commonwealth, not the Crown in right of the State.

188 The State accepts that there are a number of cases in which courts have proceeded on the assumption that absent an order under s 568F of the *Corporations Act* (or s 133(9) of the *Bankruptcy Act*), the effect of a disclaimer of real property by a liquidator under s 568 of the *Corporations Act* (or by a trustee in bankruptcy under s 133 of the *Bankruptcy Act*) is to cause title to that property to escheat to the Crown in right of the State in which the relevant land is located, rather than the Crown in right of the Commonwealth.

189 In making the submission, the State relies upon *Cadia*.[193] The case concerned the prerogative right to royal metals (silver and gold), and that case was conducted on the assumption that the Crown in right of the State of New South Wales was the repository of the relevant prerogative. That assumption was based on the observation

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190 Ibid, 501 quoting with evident approval the decision of the Privy Council in *Attorney-General of Ontario v Mercer* [1882-3] 8 AC 767, 772, 778-9.

191 (2019) 369 ALR 725.

192 Ibid, 732 [30].

193 *Cadia* (n 8).

made by Evatt J in *Farley*:[194]

> It seems plain that, as a general rule, those prerogatives which, prior to federation, were exercisable through the King's representative in the area of a colony, are, so far as they partake of the nature of proprietary rights, still exercisable by the executives of the various States and for the benefit thereof.

190 However, the State points to the observations made by Gummow, Hayne, Heydon and Crennan JJ in *Cadia* that having regard to the rationale for the prerogative to royal metals – namely, to allow the Monarch to print coins and fund the defence of the Realm - 'it might well have been thought that if the prerogative respecting royal metals survives at all today under the common law of Australia it accrues to the executive authority of the Commonwealth'.[195] Their Honours noted that coinage and national defence were matters in respect of which powers of States were expressly limited.

191 In considering these submissions, it should be noted that *Cadia* involved the prerogative power with respect to mines of gold and silver. The observations of their Honours Gummow, Hayne, Heydon and Crennan JJ relied upon by the State must be considered in that context and were clearly *obiter* comments related to a question which was not at issue nor subject to argument in the case. In this regard, it should be noted that the case proceeded upon what was described as a long-standing assumption about the retention of that prerogative power by the States.[196] Thus, the relevant passage the majority judgment in its proper context reads as follows:[197]

> Justice Field, when Chief Justice of California during the gold-rush period, wrote in *Moore v Smaw*:[198]
>
> > "The right of the Crown, whatever may be the reasons assigned for its maintenance, had in truth its origin in an arbitrary exercise of power by the King, which was at the time justified on the ground that the mines were required as a source of revenue."
>
> He also observed that in modern times it is taxation which furnishes the means for the expenses of government, and while the right of coinage does pertain to sovereignty, the exercise of the right does not require ownership of the precious metals by a State. In any event, the right of coinage in the United States was that of the federal government. On the establishment of federation

194 *Farley* (n 8), 322.
195 *Cadia* (n 8), [87].
196 See, for example, French CJ at 211 [34].
197 *Cadia* (n 8), 225–6, [85]-[87].
198 Citing *Moore v Smaw* (1861) 17 Cal 199, 222.

> in Australia, while s 91 of the *Constitution* permitted States to grant aid to and bounty on mining for gold, silver and other metals, s 115 forbad the States to coin money. Further, insofar as the reasoning in the *Case of Mines* supported the prerogative of ownership as necessary to provide for national defence, s 114 of the *Constitution* forbids a State, without the consent of the federal Parliament, to raise or maintain any naval or military force.
>
> The executive power of the Commonwealth of which s 61 of the *Constitution* speaks enables the Commonwealth to undertake executive action appropriate to its position under the *Constitution* and to that end includes the prerogative powers accorded the Crown by the common law.[199] Dixon J spoke of common law prerogatives of the Crown in England, specifically the prerogative respecting Crown debts, as having been "carried into the executive authority of the Commonwealth."[200]
>
> However, the creation of the federation presented issues still not fully resolved of the allocation between the Commonwealth and States of prerogatives which pre-federation had been divided between the Imperial and colonial governments, and of their adaptation to the division of executive authority in the federal system established by the *Constitution*. If regard be had to the treatment by Justice Field of the rationale for the *Case of Mines*, it might well have been thought that if the prerogative respecting royal metals survives at all today under the common law of Australia it accrues to the executive authority of the Commonwealth.

192 Thus, it is plain that the tentative suggestion adverted to in *Cadia* was based upon the particular nature of the prerogative power with respect to the Monarch to mint coins (and as an incident of this power, the right to royal metals), which power under the *Constitution* was devolved to the Commonwealth, not the States.

193 In my view, this is a tenuous basis to depart from what Evatt J recognised in *Farley* as the general rule which applied to prerogatives in the nature of proprietary rights (in contrast to powers); that is, they are held by the States in the right of the Crown.[201]

194 Similarly, the State again relies upon *National Australia Bank Ltd*[202] where Rares J noted '… given that now such disclaimers and vesting orders occur under laws of the Commonwealth, the question may arise as to whether any escheat or remaining interest in the property after a disclaimer should be treated as falling into the Crown

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199 Citing *Barton* (n 63), 498 (Mason J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 61-62 [130], 83 [214].

200 Citing *Farley* (n 8), 304.

201 (1940) 63 CLR 278, 322.

202 *National Australia Bank* (n 154).

in right of the Commonwealth rather than the State'.[203]

195 It should be emphasised that his Honour merely noted that the question may arise and it appears clear that the matter was not the subject of argument.

196 The State also points to the statutory scheme created by div 7A of part 5.6 of the *Corporations Act* which includes the requirement under s 568A(1)(a) that in all cases where a liquidator disclaims property, the liquidator must lodge a written notice of the disclaimer with ASIC. The State contrasts this with the lack of any requirement for a liquidator to give notice to the Crown in right of the State absent any specific interest that the Crown in right of a State may have in relation to the disclaimed property. The State argues further that this analysis is consistent with the position of the property of a company that is deregistered and draws attention to s 601AD of the *Corporations Act*.[204]

197 The State accepts that s 601AD does not apply to property disclaimed by a liquidator under s 568 but submits that there is no principled reason why, in one case where a law of the Commonwealth produces the effect of terminating an entity's ownership of personal property (disclaimer under s 568), the property should vest in the Crown in right of the State in which the property happens to be located, and in another case (deregistration under pt 5A.1) the property should vest in the Commonwealth or ASIC.

198 I do not find these arguments persuasive. The *obiter* in *Cadia* arose in the context of the consideration of the relevant prerogative as one arising from the power to coin moneys, which in relevant domestic context was a power given under the *Constitution* to the Commonwealth.

199 In *Bonner*, Wanstall J considered in detail the transfer of the Crown's rights to personal property which had become *bona vacantia* from the British Crown to the Crown in the right of the State of Queensland. His Honour observed that the right of *bona*

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203 Ibid 60 [25] (Rares J).

204 See above at [60].

vacantia:[205]

> … belongs to the casual hereditary revenues of the Crown, which have, by successive sovereigns since George III , been surrendered to the Consolidated Fund in exchange for the Civil List, and thus placed at the disposal of Parliament. An example may be seen in the *Civil List Act* passed at the beginning of Queen Victoria's reign … This *Civil List Act*, as did those in respect of the fiscal prerogatives of other sovereigns before and since, expressly reserved to the Crown, subject to the statutes regulating the manner of its exercise, the power of disposition of escheats and personal property devolved to the Crown by reason of want of next of kin or personal representative of any deceased person.
>
> …
>
> The *Civil List Acts* of William IV and Victoria extended expressly to all the hereditary casual revenues of the Crown arising in any of the colonies or foreign possessions of the Crown, and so doubts arose as to the right of the colonial legislatures to appropriate and deal with them. Consequently there was an enacted by the Imperial Parliament *The Crown Revenues (Colonies) Act, 1852* … which recognised the right of the Colonial Legislatures to appropriate the produce of such revenues, including that arising from the sale of Crown lands (s.1), which includes escheats, and generally (s.2).
>
> …
>
> I have already shown how s 40 of the *Constitution Act* reserved to the Legislature the management of the Crown lands and the deposition of the proceeds and revenues arising from them. Similarly s 34 thereof carried to the consolidated revenue of the Colony "all territorial, casual and other revenues of the Crown (including royalties) from whatsoever source arising in this Colony" and s 37 established a civil list to be "accepted and taken by Her Majesty, Her Heirs and Successors" … "instead of" the said revenues. Here there is no reservation to the Crown or the Executive Government of the disposition of escheats or of the proceeds of personalty devolved upon the Crown as *ultimus haeres*.

200 The analysis of the relevant Queensland legislation in *Re Bonner* applies equally to Victoria, as s 34 of the *Constitution Act 1867* (Qld) is mirrored by s 44 of the *Victorian Constitution Act 1855* (UK) applicable in Victoria.

201 As DBL submits, in Victoria the Imperial Crown's rights to casual and territorial revenues were surrendered to the Colony by s 44 of the *Victorian Constitution Act 1855* (UK).

202 Furthermore, the former Colony's ownership of such property was not disturbed by

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205 *Bonner* (n 152), 501–2.

any of the laws which affect the Federal compact and under s 89 of the *Constitution Act 1975* (Vic) all of those territorial and casual revenues now form part of the State's consolidated revenue.

203 In fact, and in contradistinction to the power to coin moneys and provide for the defence of the nation,[206] the general power to make laws with respect to companies was not a power conferred on the Commonwealth at federation. Prior to federation, each Australian colony had its own companies legislation based on the *Companies Act 1862* (UK).

204 Upon federation on 1 January 1901, the Australian colonies, now States sharing legislative power with the Australian Commonwealth, continued to be responsible for companies legislation as the *Constitution* did not include a plenary power for the Commonwealth to legislate with respect to corporations.

205 In 1961, a uniform companies legislation which applied across Australian States was first enacted, being administered by each State's regulatory bodies. In 1981, the Commonwealth parliament replaced the 1961 regime with the *Companies Act 1981.* In enacting that Act, Commonwealth Parliament relied on its plenary power under s 122 of the *Constitution* to make company law for the Australian Capital Territory, and participated with the other States and the Northern Territory to create a uniform companies legislation. Subsequently, each State passed a Companies Code which broadly followed the Commonwealth Act.

206 When the Commonwealth passed the *Corporations Act 1989* (Cth), it did so under the belief that it possessed the necessary constitutional power to legislate independently of the States to introduce a national scheme of regulation. The Commonwealth's belief in the width of its power proved to be unfounded and the High Court held that it lacked power to make laws about the incorporation of companies generally.[207] The failed *Corporations Act 1989* (Cth) then led to a further cooperative scheme in 1991 where the Commonwealth, the States and the Northern Territory enacted new

206 The *Constitution* ss 51(xii) and 51(iv) respectively.
207 See *NSW v Commonwealth* (1990) 169 CLR 482.

cooperative legislation which itself suffered various constitutional setbacks.

207 Ultimately, all States agreed to refer corporations and related matters to the Commonwealth which led to the enactment of the current *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth), both enacted under s 51(xxxvii) of the *Constitution.*[208]

208 Thus, there is no support in the constitutional framework for the suggestion that the distribution of powers post-Federation between the States and the Commonwealth operated in some way so as to provide for the prerogative right to property (real or personal) of companies to be a right of the Commonwealth. True it is that the laws with respect to companies are now laws of the Commonwealth and not the States (or the former colonies). But that fact does not speak to the circumstances by which prerogative rights (nor for that matter powers) were subsumed into the common law of the former colonies.

209 *Cadia* therefore is of no assistance. The correct analysis is to ask whether there is now a relevant inconsistency between the laws of Commonwealth and the laws of the State. It was the possibility of such inconsistency which Rares J adverted to *National Australia Bank.*[209]

210 However, for the reasons set out above, in my opinion the *Corporations Act* provisions that are relevant in the case of disclaimer are not inconsistent with the continued operation of the prerogative right to *bona vacantia*, and therefore the question does not arise.

211 In relation to the submission as to the obligation to file the notice of disclaimer with ASIC under s 568A(1)(a) of the *Corporations Act*, this administrative requirement cannot be elevated to the point where that the royal prerogative of *bona vacantia*, which passed into Australian law as part of the common law, is now a part of the executive power of the Commonwealth. It cannot be sensibly suggested that such gives rise to

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208 See, generally, R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford, Austin and Ramsay's Principles of Corporations Law* (online at 13 December 2021) [2.170]–[2.320].

209 *National Australia Bank* (n 154), [23].

the necessary inconsistency such as to give rise to statutory abrogation.

212 The State also relied upon *Re Usines*[210] which case concerned a patent. In that case, Fullagar J held that 'a patent granted to a corporation which is subsequently dissolved without any disposition of the patent having been effected, will, if the matter is governed by the law of the Commonwealth, vest as *bona vacantia* in the Commonwealth.[211] This case is authority for the proposition that property of a dissolved corporation vests as *bona vacantia*. It is otherwise clearly distinguishable as the relevant property in question, the patent, was a property right created by the Commonwealth. Fullagar J considered that in such a circumstance it could not be regarded as locally situate in any State or Territory and as such vested in the Commonwealth.

213 In the present case, having regard to the structure of the *Constitution*, the case law pointing to property (albeit real) vesting in the relevant state in which it is located, and where the IBCs have been, and presently are, situate in Victoria, the prerogative right is one which vests in the Crown in the right of Victoria, not the Commonwealth.

Conclusion – the *bona vacantia* claim

214 Accordingly, by reason of the IBC disclaimer, the IBCs and their contents became ownerless and vest in the State by reason of the operation of the doctrine of *bona vacantia*.

The s 568F(1)(b) claim

215 Having regard to my conclusion in relation to the *bona vacantia* claim, it is not strictly necessary for me to consider the alternative s 568F(1)(b) claim. However, as the claim was fully argued and in case I am later held to be in error in relation to the *bona vacantia* claim I have done so.

216 DBL submits that s 568F(1)(b) of the *Corporations Act* confers a wide discretion on a Court to make an order ameliorating the adverse effect of a disclaimer as is 'appropriate' and that such provision can extend to the Court making an order vesting

210 *Re Usines* (n 17).
211 Ibid, 49.

the disclaimed property on an unwilling recipient (here, the State).

217 Putting aside for present purposes the question as to whether the Court can have regard to the acts or omissions of the EPA and WorkSafe in making an order against the State, the essence of DBL's submissions is that the 2019 IBCs that were delivered to DBL between 5 March 2019 and 29 March 2019 pursuant to the second storage contract ('the second delivery') consisted of PIW within the meaning of the *Environment Protection Act 1970* . DBL submits that the acts or omissions of EPA and WorkSafe in not disclosing to DBL that the 2019 IBCs contained PIW, and instead permitting the second delivery, resulted in those IBCs being delivered to a non-licensed recipient of such product.

218 The State submits that upon proper analysis, s 568F(1)(b) of the *Corporations Act* does not permit the making of an order to vest the property on an unwilling recipient and that in any event it is not appropriate to impose upon the State such consequences as might otherwise follow from the acts or omissions of the EPA or WorkSafe.

219 Further, the State takes issue with DBL's submission that the acts or omissions of WorkSafe and the EPA were causative of the removal of the 2019 IBCs from Bradbury's premises to DBL, which was unauthorised to accept PIW. On the State's case, even if WorkSafe or the EPA knew of the character of the goods in the 2019 IBCs, neither body knew that the 2019 IBCs had been transported to DBL until after such time as the second delivery had occurred. Nor does the State accept that DBL has established that the 2019 IBCs were filled with PIW.

220 Resolution of this controversy requires consideration of the relevant facts and circumstances at a granular level as well as a determination as to the appropriate remit of s 568F(1)(b) of the *Corporations Act*. However, before turning to both those questions, it is important to analyse the relevant statutory regime pursuant to which WorkSafe and the EPA operated, as well as the regulatory requirements in place at the time with respect to the storage and transport of dangerous goods and PIW and the relevant regime for disposing of the latter.

The statutory regime

221 At the time of the delivery of the 2019 IBCs to DBL, the following legislation and regulations were relevant:

(a) the *Environment Protection Act 1970*;

(b) the *Environment Protection Act 2017* (Vic) (*'Environment Protection Act 2017'*);

(c) the *Dangerous Goods Act* ;

(d) the *National Environment Protection Council (Victoria) Act 1995* (Vic);

(e) the *DGS & H Regulations*;

(f) the *Dangerous Goods (Transport by Road or Rail) Regulations 2018*;

(g) the *Dangerous Goods (HCDG) Regulations 2016*;

(h) the *Dangerous Goods (Explosive) Regulations 2011*; and

(i) the *Environment Protection (Industrial Waste Resource) Regulations 2009* (*'Industrial Waste Regulations'*).

The EPA

222 The EPA has no corporators; it was incorporated by s 5(a) of the *Environment Protection Act 1970* and at the relevant time (between January to March 2019) was continued in force as a body corporate by s 5 of the *Environment Protection Act 2017.* It has a governing board, appointed by the Governor in Council on the recommendation of the Minister.[212] Its staff are employed under the *Public Administration Act 2004* (Vic).

223 The objective of the EPA is to 'protect human health and the environment by reducing the harmful effects of pollution and waste'.[213]

224 The authorities, powers, duties and functions of the EPA are prescribed by s 13(1) of the *Environment Protection Act 1970* and include:

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212 *Environment Protection Act 1970*, s 17.

213 *Environment Protection Act 2017*, s 6.

(a) to administer the *Environment Protection Act 1970* and its regulations and orders;[214]

(b) to be responsible for and to coordinate activities relating to the discharge of waste, the prevention and control of pollution and the protection and improvement of the quality of the environment;[215]

(c) to recommend policies to the Governor in Council;[216]

(d) to issue licences;[217]

(e) to control the use of certain chemicals;[218]

(f) to specify standards and criteria;[219]

(g) to undertake investigations and inspections to ensure compliance with the *Environment Protection Act 1970*;[220]

(h) to establish and maintain liaison and cooperation with other States in the Commonwealth with respect to environment protection, pollution control and waste management;[221]

(i) to impose and collect an environment protection levy;[222] and

(j) to report to the Minister upon matters concerning the protection of the environment including 'upon any amendments it thinks desirable in the law relating to pollution and upon any matters referred to it by the Minister'.[223]

225 Further, 'authorised officers' appointed under the *Environment Protection Act 1970* are

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214 *Environment Protection Act 1970*, s 13(1)(a).
215 Ibid, s 13(1)(b).
216 Ibid, ss 13(1)(c), 13(1)(ca), 13(1)(ga).
217 Ibid, s 13(1)(d).
218 Ibid, s 13(1)(da).
219 Ibid, s 13(1)(ga).
220 Ibid, s 13(1)(k).
221 Ibid, s 13(1)(m).
222 Ibid, s 13(1)(nb).
223 Ibid, s 13(1)(o).

given significant powers to enter premises and to take property for certain purposes.[224]

WorkSafe

226 WorkSafe has no corporators: it was established under s 18 of the *Accident Compensation Act 1985* (Vic) and is continued as a body corporate by ss 491(1)-(2) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('*WIRCA*').

227 The objectives of WorkSafe include managing the Victorian Accident Compensation Scheme; ensuring that appropriate compensation is paid to injured workers; and administering the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('*WIRCA*') and other related legislation.[225] Its functions include dealing with compensation claims; assisting employers and workers to achieve healthy and safe working environments; promoting rehabilitation; providing accident insurance; ensuring that the scheme is funded, including by determining, collecting and recovering premiums; regulating and making recommendations to the Minister in respect of self-insuring employers; conducting litigation; collaborating with other bodies; and providing funds to develop harmonised arrangements and national policies regarding workplace health and safety and compensation.[226]

228 In performing its functions, WorkSafe is obliged to promote the prevention of workplace injury and disease; ensure the efficient, effective and equitable occupational rehabilitation and compensation of persons injured at work; ensure the financial viability and efficient operation of the Accident Compensation Scheme; and provide advice to the Minister in relation to certain matters.[227]

229 WorkSafe is subject to 'the general direction and control of' and 'any specific directions given by' the Minister.[228]

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224 Ibid, s 55.
225 *WIRCA*, s 492.
226 Ibid, s 493(1).
227 Ibid, s 493(2).
228 Ibid, s 495.

230 WorkSafe is managed by a board of management whose directors are specified by the Governor in Council and the nomination of the Minister.[229] The Governor in Council is able to remove a director from office.[230]

231 WorkSafe is obliged to pay dividends to the State at a time and in a manner determined by the Treasurer in consultation with the Authority and the Minister.[231]

What are dangerous goods?

232 In 2013, WorkSafe issued a Code of Practice for the storage and handling of dangerous goods ('the DG Code'). The DG Code as updated in July 2019 describes dangerous goods as:[232]

> Dangerous goods are substances capable of causing harm to people and property because of their hazardous properties. They may be corrosive, flammable, combustible, explosive, oxidising or water active or have other hazardous properties.

233 It is accepted that the 2019 IBCs contained 'dangerous goods' falling within Class 3 (flammable liquids) or Class 9 (miscellaneous) and that the burner fuel was a Class 3 dangerous good.

Storage of dangerous goods in Victoria

234 Occupiers of sites where dangerous goods are stored and handled in quantities exceeding the manifest quantity in schedule 2 of the *DGS & H Regulations*, must notify WorkSafe of those dangerous goods.[233]

235 Upon receiving a notification under r 66 of the *DGS & H Regulations*, WorkSafe is required to send the occupier an acknowledgement of the notification.[234]

Labelling and identification of dangerous goods in Victoria

236 The DG Code makes it clear that it is the manufacturers and first suppliers who are responsible for the labelling and identification of dangerous goods. A 'first supplier'

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229 Ibid, ss 502–3.
230 Ibid, s 508(3).
231 Ibid, s 516.
232 DG Code, 4.
233 *DGS & H Regulations 2012*, r 66(1).
234 Ibid, r 67.

is defined in the DG Code as 'a person who has not manufactured goods in Victoria and is, or intends to be, the first person to supply the goods in Victoria to another person (eg a person who imports the goods into Victoria from overseas or interstate)'.[235]

237 The duties and obligations of manufacturers and first suppliers in this respect are described at page 7 of the DG Code as follows:

> If you manufacture or are the first supplier of dangerous goods, you are required to make a determination that the goods are dangerous goods, and assign the dangerous goods either an [Australian Code for the Transport of Dangerous Goods by Road and Rail] classification or a [Globally Harmonized System of Classification and Labelling of Chemicals] classification.
>
> You are also required to prepare either a material safety data sheet (MSDS) or a safety data sheet (SDS) for dangerous goods …
>
> … if you are a supplier (but not a first supplier) your duties are limited to ensuring the packaging and labelling is correct.
>
> (emphasis in original)

238 The duties of manufacturers and first suppliers in respect of Material Safety Data Sheets ('MSDS') and Safety Data Sheets ('SDS') labels are set out at page 10 of the DG Code:

> Reviewing and revising an MSDS/SDS
>
> You [manufacturers and first suppliers] must review an MSDS/SDS as often as necessary to ensure the information in it remains accurate and current. For example, an MSDS/SDS would need to be reviewed if there was a change in the formulations of a dangerous good, or if new information on the health effect of a dangerous good or its ingredients became available.

239 The duties of manufacturers and first suppliers in respect of the supply of dangerous goods are explained at page 11 of the DG Code:

> A person must not supply dangerous goods if the person suspects or has reasonable grounds for suspecting the:
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> - Condition of the dangerous goods or the packages of the dangerous goods do not comply with the packaging requirements in… this Code
> - Package marking or labelling for the dangerous goods does not comply

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235 DG Code, 3.

with the marking and labelling requirements in … this Code, or

- Container the dangerous goods are to be supplied in is leaking or is likely to leak.

240 The duties of occupiers who store and handle dangerous goods in respect of MSDS/SDS labels are set out at page 15 of the DG Code. Those obligations differ from the obligations imposed on manufacturers and suppliers. Specifically, occupiers:

> … are required to keep a register for dangerous goods stored and handled at [their] premises. A register is a list of the product names of all dangerous goods [occupiers] store and handle, accompanied where required by the current MSDS/SDS for each of [those] dangerous goods.
>
> …
>
> … manufacturers and first suppliers are require to review, and where necessary, revise MSDS/SDS at least every five years.

241 Thus, under the DG Code, it is the manufacturer or first supplier that is required to provide an MSDS or SDS. The only obligation imposed on recipient/occupiers is to obtain it:[236]

> Obtaining material safety data sheets/safety data sheets
>
> You must obtain the current version of the material safety data sheets (MSDS)/safety data sheet (SDS) for dangerous goods stored and handled at your premises on or before the first time the dangerous goods are supplied to the premises, …
>
> Manufacturers and first suppliers have an obligation to provide you with an MSDS/SDS on request …

Transport of dangerous goods in Victoria

242 WorkSafe has issued two publications regarding the licensing for transport and storage of dangerous goods in Victoria:

(a) one concerning 'dangerous goods licences' updated 6 December 2019; and

(b) one concerning 'dangerous goods vehicle licences' updated 10 December 2019.

Waste, industrial waste and prescribed industrial waste in Victoria

243 'Waste' is defined in s 4(1) of the *Environment Protection Act 1970* as including:

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236 DG Code, 13.

> Any matter, whether solid, liquid, gaseous or radioactive, which is discharged, omitted or deposited in the environment in such volume, constituency or manner as to cause an alteration of the environment.

244 'Industrial waste' is defined under s 4(1) of the *Environment Protection Act 1970* as:

> (i) any waste arising from commercial, industrial or trade activities or from laboratories; or
>
> (ii) any waste containing substances or materials which are potentially harmful to human beings or equipment.

245 Regulation 11 of the *Industrial Waste Regulations* empowers the EPA to classify any industrial waste as PIW or non-prescribed industrial waste, and further classify any industrial waste or PIW. Wastes generated from commercial industrial sources that are potentially hazardous to humans or the environment, require a high level of control and are called PIW as opposed to 'general industrial waste'.

Storage and transport of prescribed industrial waste

246 The *Environment Protection Act 1970* and the *Industrial Waste Regulations* contain the legislative requirements for transporting PIW in Victoria.

247 Section 53A(1) of the *Environment Protection Act 1970* provides that a person must not commence or conduct any business, the purpose or operation of which includes the transport of PIW unless they hold a permit.

248 Pursuant to reg 33(1) of the *Industrial Waste Regulations*, an industrial waste producer is required to complete a transport certificate for each consignment of PIW transported from its premises. There are no specific regulations or exemptions for situations where industrial waste is transported from one location to another premise owned or occupied by the same person.

249 Regulation 33(2) of the *Industrial Waste Regulations* requires the certificate to be provided to the waste receiver at the time of delivery of the waste.

250 Waste transport certificates enable information about the PIW to be passed along the waste management chain, including information about the categorisation of the waste and who has control of it.

251 Regulation 13 of the *Industrial Waste Regulations* requires PIW to be transported using a vehicle which meets certain prescribed requirements. Where a permit to transport PIW has been obtained pursuant to s 53F of the *Environment Protection Act 1970* and reg 12 of the *Industrial Waste Regulations* requires it to be displayed on the vehicle.

252 The *Industrial Waste Regulations* do not impose specific requirements in relation to storage of PIW.

Clean-up notices pursuant to the Environment Protection Act 1970

253 Pursuant to s 62A of the *Environment Protection Act 1970*, the EPA is entitled to issue notices to take clean-up and ongoing management measures.

Relationship between dangerous goods and waste

254 It is common ground that materials can be both dangerous goods and PIW at the same time, and that the classification of goods as waste or otherwise, could change over time depending on the circumstances.

255 Where both the *Dangerous Goods Act* and other legislation make provision regarding dangerous goods, both provisions apply to the extent of any inconsistency.[237]

The State Government Taskforces

256 In July 2017 a fire occurred at a recycling plant in Coolaroo in Melbourne's north west. The fire took some 20 days to extinguish. As a result, the State Government established the 'Resource Recovery Facilities Audit Taskforce' ('RRFAT') comprising the EPA, WorkSafe, the Melbourne Fire Brigade ('MFB'), the Country Fire Authority ('CFA') and the Department of Environment, Local Government, Water and Planning.

257 The purpose of the RRFAT was to identify stockpiling and materials that posed a fire risk and ensure environment protection and community safety. Facilities storing combustible waste had been identified and those facilities considered high risk had been made a priority.

258 The RRFAT undertook joint inspections to ensure that combustible recyclable and

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237 *Dangerous Goods Act*, s 8(1).

waste materials were stored and managed appropriately and action taken when required.

259 An interim report of the RRFAT was delivered to the Minister for Energy, Environment and Climate Change in December 2017. The report stated:

> Metropolitan Waste and Resource Recovery Group and Local Government Victoria and other further organisations will continue to work closely together to identify, audit and regulate sites.

The Tottenham Fire

260 On about 20 August 2018 a fire ignited at a warehouse ('the Tottenham Fire'). containing waste at 420 Somerville Road, Tottenham ('the Tottenham Site'). The warehouse was apparently connected to Mr Graham White ('Mr White').

261 A ministerial brief delivered to the Minister for Workplace Safety dated 2 December 2018[238] contained a report on the Tottenham Fire. The ministerial brief records that the sole director of the occupier of the Tottenham Site was Mr White who was associated with nine of the illegal chemicals stockpile sites then being cleaned up by WorkSafe, which had at that time cleared five of those sites. The brief noted the challenges that would be involved in the clean-up of the Tottenham Site such as waste streams that would have to be treated or disposed of at an accredited facility. The brief records, among other things, that WorkSafe had established an interagency taskforce to oversee the clean-up activities involving the EPA, the MFB, Maribyrnong City Council and Melbourne Water. The estimated cost to clean up the Tottenham Site was $15-25 million with a further $10 million contingency for security and other services. The recommendation in the Brief was that the Minister note WorkSafe's response to the Tottenham Fire.

262 Following the Tottenham Fire, WorkSafe initiated a blitz on industrial premises in Melbourne's inner-west and city suburbs to ensure that potentially dangerous chemicals were being stored correctly. In a press release issued by WorkSafe, it outlined a strategy that included inspectors physically visiting premises to ensure

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238 The ministerial brief in evidence noted a comment by the Minister for Workplace Safety dated 13 January 2019.

compliance with regulations around the labelling, storage and handling of waste, and of each site's emergency protocols and safety equipment.

263 The press release noted that the WorkSafe inspectors would be joined by inspectors from the EPA, and supported by WorkSafe technical specialists and the MFB. The press release advised that the inspections would commence in the vicinity of the Tottenham Fire and work through the surrounding industrial areas and suburbs, including West Footscray and Braybrook.

264 Among the sites visited were the Thornycroft Premises, as well as other premises occupied by Bradbury at 9-11 Brooklyn Court, Campbellfield ('the Brooklyn Court Premises').

Inspection of Bradbury's sites

29 January 2019 visit

265 On 29 January 2019 following the Tottenham Fire and as part of the State Government's response, representatives from the EPA and WorkSafe attended the Thornycroft Premises. It seems that the purpose of the visit was to review arrangements for the receiving and management of waste from a project involving the removal of dangerous goods from eight sites in Epping and Campbellfield also associated with Mr White ('the White sites'). The White sites were sites connected with Mr White in addition to that of the Tottenham Site, the existence of which had been ascertained by the RRFAT. It is clear enough that the purpose of the visit to the Thornycroft Premises was to assess Bradbury's suitability to assist in the clean-up of the White sites.

266 A report by the EPA on the inspection at the Thornycroft Premises records discussions with Bradbury representatives to the effect that it was contemplated that Bradbury would receive some of the industrial waste as a result of the removal of dangerous goods from the White sites.

267 In the course of those discussions, the EPA was told that there was limited storage capacity at the Thornycroft Premises for receipt of additional incoming material from

the White sites.

268 The report completed by the WorkSafe inspectors at that visit similarly records the inspectors reviewing the waste treatment facility at the Thornycroft Premises for its utilisation as part of the clean-up of the White sites. It also recorded discussions with Bradbury's national sales manager Mr John Keramidas ('Mr Keramidas') and with Bradbury's then general manager.

269 The WorkSafe report records Mr Keramidas as advising that the Thornycroft Premises had capacity to process 46,000 tonnes per annum of goods, and that it received predominantly Class 3 wastes, which were usually paint or ink-related.

270 According to the WorkSafe report, Mr Keramidas advised the WorkSafe inspectors that there were two streams for waste, distillation and recovery for products; those products included gun wash and burner fuel residue from sludges and other viscous wastes. Mr Keramidas informed the WorkSafe inspectors that the waste was ultimately sent to Geocycle cement kilns located in Tasmania.

31 January 2019 visit

271 On 31 January 2019 the EPA and WorkSafe representatives returned to the Thornycroft Premises apparently in response to a pollution report. The EPA inspection report from that day records that they were informed by Mr Keramidas and Mr Paul Bristow ('Mr Bristow'), a director of Bradbury, that liquid waste had been removed from the Thornycroft Premises to the Brooklyn Court Premises where it was now stored; that there was no tracking of the liquid waste moved from the Thornycroft Premises to the Brooklyn Court Premises; that the liquid waste at the Brooklyn Court Premises was likely to consist of burner fuel that was stored for a potential future project involving the use of the burner fuel as fuel for a concrete kiln;[239] and that the waste was a Class 3 flammable liquid stored in IBCs.

272 The report also records that the burner fuel was a residue from the distillation of waste

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239 Presumably the Geocycle facility in Ralston, Tasmania.

paints and solvents processed by Bradbury at the Thornycroft Premises; that there were no other premises leased by Bradbury[240] and that usually the 'liquid waste' would go to Geocycle's Dandenong premises for treatment and disposal.

273 Unlike the Thornycroft Premises, there was no relevant licence in place which allowed for the storage of liquid waste at the Brooklyn Court Premises, nor the storage of dangerous goods. The storage of such product at the Brooklyn Court Premises was unknown to Mr Keramidis and to Mr Bristow. Both had understood that the Brooklyn Court Premises were used to store empty IBCs. Mr Bristow's discovery of the use of the Brooklyn Court Premises for the unauthorised storage of liquid waste resulted in his dismissal of Bradbury's general manager. It was the general manager who had authorised the use of the Brooklyn Court Premises in this way.

274 Following this discovery, the EPA and WorkSafe representatives attended at the Brooklyn Court Premises. As a result of that attendance, WorkSafe issued an improvement notice to Bradbury pursuant to s 17C of the *Dangerous Goods Act (*'the WorkSafe 29 January 2019 Improvement Notice'). The WorkSafe 29 January Improvement notice recorded the belief that Bradbury was acting in contravention of reg 27 of the *DGS & H Regulations* and that there was a risk to the health and safety of persons and damage due to the inappropriate storage of that type of waste.

275 The WorkSafe 29 January Improvement Notice records the observations of the inspector that the Brooklyn Court Premises contained approximately 2134 IBCs, stacked three high and that in the course of the inspection it was established via the MSDS that the contents of the IBCs were 'Dangerous Goods flammable liquid Class 3 PG III Burner Fuel' of an estimated quantity greater than 2 million litres.

276 The WorkSafe 29 January Improvement Notice directed that Bradbury take steps to remedy the contravention by 28 March 2019. The direction given to remedy the contravention read in part as follows:

> BRADBURY INDUSTRIAL SERVICES PTY LTD must, as an occupier of premises where dangerous goods are stored and handled, ensure that any

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240 Aside from the Brooklyn Court Premises and the Thornycroft Premises.

hazard associated with the storage and handling of Dangerous Goods Class 3 Flammable Liquid stored at the premises is eliminated, or if it is not reasonably practicable to eliminate the risk, is reduced so far as is reasonably practicable.

Compliance may be achieved by, but is not limited to, ensuring that:

* Removal of the dangerous goods (IBCs) from current site to that of an approved storage facility compliant with AS1940.

1 February 2019 visit

277 WorkSafe returned to the Brooklyn Court Premises on 1 February 2019 and issued Mr Keramidas and Bradbury with nine improvement notices relating to the Brooklyn Court Premises ('the WorkSafe February Notices'). The WorkSafe February Notices were the subject of a further entry report which detailed a lack of placarding; the absence of a fire protection system; the lack of an emergency management plan; and the absence of a manifest required by law.

278 According to WorkSafe's solicitor, Mr Steven D'Arcy ('Mr D'Arcy'), WorkSafe attended the Brooklyn Court Premises on nearly a daily basis between late January 2019 and 2 April 2019.

Arrangements for the relocation of the IBCs and notices

279 After the inspection on 31 January 2019, a meeting occurred at WorkSafe's Essendon Fields offices on 1 February 2019. It was attended by representatives of WorkSafe, the EPA, the CFA, the MFB and Mr Keramidas, with Mr Bristow participating by telephone.

280 Following the meeting, Mr Keramidas emailed Mr Bristow and another member of Bradbury's management team on 2 February 2019 summarising both the events of 31 January 2019 and those at the meeting on 1 February 2019. Mr Keramidas' email records that on 31 January 2019 WorkSafe and the EPA were advised that the utilisation of the Brooklyn Court Premises for the storage of IBCs containing dangerous goods was unknown to Mr Bristow and Mr Keramidas. Mr Bristow had advised that the Brooklyn Court Premises was to his knowledge only used for the storage of empty IBCs, but that its general manager had used the property for storage purposes without his knowledge. The general manager's employment had been

terminated as a result.

281 Mr Keramidas' email further records that at the inspection of the Brooklyn Court Premises on 31 January 2019, both WorkSafe and the EPA were advised that it was expected that the material contained in the IBCs was burner fuel. Mr Keramidas confirmed this upon inspection of the contents of the IBCs and assisted with the drawing of 21 samples from seven randomly chosen IBCs. Mr Keramidas' email records that he provided an MSDS for burner fuel that describes the product as a Class 3 flammable liquid. His email records that 'it was agreed and noted by WorkSafe that we are dealing with DG (dangerous goods) flammable liquid, not waste' (underline added).

282 Insofar as the email records the events of 1 February 2019, the email references discussions with Mr Peter Vitali ('Mr Vitali') from ChemVit Consulting. Mr Vitali was a consultant with particular expertise in the handling of dangerous goods. The email records that Mr Vitali provided Mr Keramidas with a signed copy of the *Dangerous Goods Act*[241] and had expressed the opinion that the Brooklyn Court Premises was in good condition and could be renovated in such a way as to make it compliant as a dangerous goods storage facility as an estimated expenditure of between $80,000 to $100,000.

283 In relation to the 1 February 2019 meeting, the list of attendees include Mr Richard Mason and Mr Nickos Likouresis from WorkSafe, and Mr Chris Peska ('Mr Peska') and Mr Sam Leray from the EPA (the latter attending by telephone). Mr Keramidas' email recounts that he commenced the meeting by explaining that Bradbury had multiple strategies in place to deal with the problem (ie, that IBCs containing dangerous goods were stored at the non-licensed Brooklyn Court Premises). These included the use of external dangerous goods facilities at Stolt Haven and Toll; returning material back to the Thornycroft Premises for 'bulking up to Geo';[242] as well

241 This seems to have been something in the nature of an autograph; Mr Vitali's expertise was such that he had been heavily involved in the drafting of the Act.

242 Presumably a reference to Geocycle.

as the possibility of making the Brooklyn Court Premises dangerous goods compliant.

284 Mr Keramidas' email records evident scepticism on the part of the EPA, noting that Mr Peska expressed doubt as to whether the EPA would give Bradbury a further licence for the Brooklyn Court Premises in circumstances where they had not yet decided what steps to take and where it was unclear whether Bradbury's existing EPA licence at the Thornycroft Premises would be suspended or cancelled.

285 The email records Mr Keramidas as informing Mr Peska that Bradbury would not be seeking an EPA licence for the Brooklyn Court Premises, but a dangerous goods licence[243] as the material was a product, not waste. Mr Peska said that this was a matter which was yet to be determined. The email also referenced an enquiry made by the Country Fire Authority representative in attendance as to how what had occurred would impact on the 'Veolia clean up'.[244]

286 Mr Keramidas' response is recorded in the email as being to the effect that whilst purely short term financial considerations would require Bradbury's focus on the Brooklyn Court Premises and the withdrawal of their offer to assist with the Veolia clean up, he and Mr Bristow had discussed the matter prior to the meeting and considered that the Veolia was for the benefit of everyone; and if Bradbury was to exit from the contemplated clean-up process, the eight to 12 months clean-up could extend to six years.

287 On 18 February 2019 following an inspection of the Brooklyn Court Premises, WorkSafe provided Bradbury with an acknowledgement of notification of storage and handling of dangerous goods for Class 3 flammable liquids at the Brooklyn Court

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243 Both DBL's managing director and Mr Keramadis referred to premises having a dangerous goods licence. It seems that this description may be something of a colloquialism. In order to store dangerous goods, facilities have to meet certain standards such that they are dangerous goods compliant but it does not seem that they are issued a licence as such. Those who store dangerous goods must notify WorkSafe. In contrast, the EPA licenses waste facilities.

244 The Veolia clean-up was not further explained in the evidence, but it seems relatively clear that it is a reference to the clean-up of other sites which included the White Sites and a proposal that had been made by Bradbury prior to that stage to assist with such a clean-up.

Premises.

288 As it happened, Bradbury's contemplated upgrade of the Brooklyn Court Premises to be dangerous goods compliant did not proceed due to the costs associated, including because the premises were not owned by Bradbury, but instead leased. Around February 2019, Mr Keramidas arranged for Stolt Haven to take delivery of approximately 1000 of the IBCs stored at the Brooklyn Court Premises.[245]

289 In an effort to remove the remaining IBCs, on 22 February 2019, Mr Keramidas contacted Ms Sonya Constantine ('Ms Constantine'), managing director at DBL, and asked her whether DBL was able to store additional IBCs for Bradbury. Mr Keramidas informed her that WorkSafe had conducted an inspection of Bradbury's Brooklyn Court Premises and determined that Bradbury was holding dangerous goods in excess of its permissible limits, and therefore Bradbury needed to store some products at external premises.

290 In an email from Ms Constantine to Mr Keramidas dated 22 February 2019, DBL agreed to store 750 IBCs for a period of 6-12 months. Among other conditions; Mr Keramidas responded that he would 'ensure [Bradbury] follow the instructions'.

291 In the result, the 2019 IBCs, which numbered 638 IBCs in total labelled as Class 3 flammable products, were delivered to DBL between 5 March 2019 and 29 March 2019 as part of the second delivery.

292 During the period of the second delivery, on 7 March 2019 the EPA issued Bradbury with a draft clean up notice in relation to the Brooklyn Court Premises ('the EPA Draft Notice').

293 Section 62A of the *Environment Protection Act 1970* provides for the service of notices directing the performance of clean-up and ongoing management measures. The EPA Draft Notice records the EPA's earlier attendance at the Brooklyn Court Premises on

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245 Ultimately Toll did not take any IBCs.

31 January 2019 and outlines that the EPA representatives:

> 1.1.7 Were informed by the General Manager[246] that the contents of all IBCs contains Class 3 flammable liquid waste referred to as burner fuel.
>
> 1.1.8 Were informed by the General Manager that the burner fuel is a residue from the distillation of waste paints and solvents processed at the Campbellfield premises of Bradbury located at 16-18 Thornycroft Street. This site is licenced by EPA to receive prescribed industrial waste.
>
> 1.1.9 Were informed by the General Manager that there was approximately 1850 to 2000 IBCs stored in the warehouse holding approximately 2 million litres of liquid.
>
> 1.1.10 Were informed by the site representative that the liquid waste would usually be transported to the Dandenong premises of Geocycle for treatment and waste. The Officer noted that Geocycle also hold an EPA licence to receive prescribed industrial waste.
>
> (underline added)

294 The EPA Draft Notice further records:

> Bradbury Industrial Services has a licensed waste treatment facility at 16-18 Thornycroft St, Campbellfield. As part of their treatment process, a liquid waste product is created which is dangerous good class 3. This waste has been named burner fuel.
>
> Approximately 2 million litres of that is being stored at 9-11 Brooklyn Court, Campbellfield (the premises) which is an unlicensed facility. Section 27A(2)(a) prevents the deposit of industrial waste at sites not licensed to accept it.
>
> The storage at the premises includes IBCs stacked three high, with one IBC at the base observed to be bulging, and previous leaking observed. This storage is likely to cause an environmental hazard as the liquid is flammable with toxic characteristics.
>
> On this basis, and considering the observations previously stated, I have formed a view and am satisfied that industrial waste or a potentially hazardous substance is being handled in a manner likely to cause an environmental hazard as per s 62A(1)(d) of the *Environment Protection Act*.
>
> (underline added)

295 The EPA Draft Notice then directed the immediate cessation of the deposit of industrial waste at the Brooklyn Court Premises and required that by 28 March 2019 all industrial waste stored at the premises must be removed and taken to a waste

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246 Referring to Mr Keramidas, who was the national sales manager of Bradbury until February 2019, when he became the general manager until June 2019.

treatment facility licenced to accept that type of waste.

296 The EPA Draft Notice had been sent to Bradbury under cover of an email that requested comment. The covering email recorded that Bradbury's comments were only sought as to whether the requirements were clear and easy to understand; whether the compliance dates were reasonable and achievable; and whether the compliance example assisted in understanding what needed to be done. The email advised that if no written response was received by the close of business on 14 March 2019, the notice would be issued.

297 By way of response, Mr Keramidas emailed the EPA and informed them that Bradbury was acting under instructions of the WorkSafe 29 January 2019 Improvement Notice and was unable to comply with the conflicting notices. Mr Keramidas offered to provide the EPA with a copy of the WorkSafe 29 January 2019 Improvement Notice. Although Mr Keramidas did not spell out the nature of the conflict, it is apparent that what he was referring to was the conflict between the advice as to the authorised receiver of the IBCs then being stored at the Brooklyn Court Premises. Both required removal of the IBCs from the Brooklyn Court Premises but the WorkSafe 29 January 2019 Improvement Notice treated the contents of the IBCs as dangerous goods and permitted removal to an approved (dangerous goods) storage facility compliant with AS1940, whereas the EPA Draft Notice treated the contents of the IBCs as industrial waste and required removal to a facility licensed to receive industrial waste. As noted above, it is accepted that product can be industrial waste at the same time as it is a dangerous good, but if it is the former as well as the latter it can only be deposited at an EPA licensed facility.

298 In response to Mr Keramidas' email, the EPA responded that it would provide further advice shortly and requested that Mr Keramidas notify it when the works had been completed in accordance with the 29 January 2019 Improvement Notice.[247] The email advised that the EPA would conduct an inspection at that time. Mr Keramidas replied

247 Clearly a reference to the 29 January 2019 WorkSafe Improvement Notice.

in short order advising that completion was expected before 28 March 2019.

299 On 8 March 2019, Mr Keramidas received a call from WorkSafe regarding three further Bradbury warehouses at Yellowbox Drive ('the Yellowbox Premises') in Craigieburn. WorkSafe and EPA had conducted inspections of the Yellowbox Premises that day. Mr Keramidas gave unchallenged evidence that prior to this call, he was unaware of the Yellowbox Premises. Entry and inspection reports completed by both WorkSafe and the EPA following their inspection of the Yellowbox Premises recorded observations sharply critical of the manner in which the IBCs were stored, including the absence of an appropriate fire safety system. The EPA report noted that the Yellowbox Premises were not listed 'on the licence as a premises licensed to receive waste'.

300 On 14 March 2019 Bradbury delivered a further 58 IBCs to DBL having made earlier deliveries totalling 126 IBCs on 4, 5, and 6 March 2019. A sixth tranche of 26 IBCs was delivered on 15 March 2019.

301 On that same day, EPA issued a show cause notice to Bradbury as to why its EPA licence at the Thornycroft Premise should not be withdrawn. The show cause notice was issued on the basis that:

> Between 30 January 2019 and 15 March 2019 the following five locations were inspected and found to contain waste products in breach of the requirement that those premises be licensed under section 20(1) of the *Environment Protection Act*:
>
> - 9-11 Brooklyn Court, Campbellfield
> - 20A Yellowbox Drive, Craigieburn
> - 20B Yellowbox Drive, Craigieburn
> - 12 Yellowbox Drive, Craigieburn
> - 15/1745 Sydney Road, Campbellfield
>
> The [EPA] has obtained information that Bradbury is responsible for the storage of waste products at the above unlicensed premises. An estimate of the quantity of waste products required to be removed from those premises and taken to premises licensed for its reprocessing, treatment, storage,

containment, disposal or handling is approximately 14 million litres.[248]

(underline added)

302 On 18, 19, and 20 March 2019 respectively deliveries were made of a further 32, 84, and 58 IBCs to DBL.

303 On 20 March 2019, the EPA suspended Bradbury's licence for the Thornycroft Premises. The suspension was based on asserted contraventions of the provisions of Bradbury's waste licence (which existed in respect of the Thornycroft Premises) by reason of the activities at the Brooklyn Court Premises and the Yellowbox Premises. On the same day, the EPA issued a pollution abatement notice to Bradbury in relation to the Thornycroft Premises and clean-up notices in respect of the Yellowbox Premises and a truck depot operated by Bradbury on Sydney Road, Campbellfield.

304 On 21 March 2019, Bradbury delivered a further 42 IBCs to DBL.

305 On 26 March 2019, the EPA issued Bradbury with a 'notice to produce' requiring the production of documents relating to the transfer and/or movement of waste, industrial waste and PIW between the Bradbury's various premises including invoices, financing records, contracts and customer lists.

306 On 27 March 2019, the EPA again attended the Brooklyn Court Premises to conduct sampling of the remaining IBCs. The inspection report for the 27 March 2019 visit was later prepared on 5 April 2019. The EPA's inspection report in respect of its attendance at the Brooklyn Court Premises on 27 March 2019 records that the premises were largely empty and held approximately 60 IBCs. The inspector's report records him being advised that all the remaining IBCs and equipment would be removed that day for storage at appropriate alternative premises and that most of the remaining IBCs contained solvent wastes which were classified as 'Hazchem 3WE flammable liquids' and would be labelled as such before removal from the premises.

307 On 28 March 2019, 42 IBCs were delivered to DBL, and on 29 March 2019 a final

248 Section 20(1) of the *Environment Protection Act 1970* only requires 'scheduled premises' to be licensed. Scheduled premises is defined in s 4 as premises prescribed by regulation. The relevant regulation stipulates a facility storing prescribed industrial waste not generated at the premises.

delivery of 28 IBCs was made.

308 On 1 and 2 April 2019, respectively, the EPA and WorkSafe conducted further inspections at the Brooklyn Court Premises. The EPA inspection report records the EPA as having been informed by Mr Keramidas that 'waste had been removed and transported to Stolt Haven terminals in Altona and [DBL] for storage', and that the inspector observed no waste in the warehouse.

309 The WorkSafe inspection report records the inspector as having been informed by Mr Keramidas that out of 2134 IBCs, 1007 had been relocated to Stolt Haven Altona and 800 to DBL (with the remaining 327 damaged IBCs being returned to Bradbury's Thornycroft Premises).

310 Meanwhile on 6 March 2019, the Minister for Workplace Safety received a ministerial brief 'Review of Legislative and Regulatory Framework for Dangerous Goods under the Dangerous Goods Act' ('the 6 March 2019 ministerial brief'). The recommendation sought from the Minister was that the Minister approve the legislative proposals to review the *Dangerous Goods Act;* increase the penalties in terms of imprisonment specified for offences under that Act; and that the Minister note the suggested steps for a proposed broader review of the legislative regime. The 6 March 2019 ministerial brief referenced the Tottenham fire and noted that 'a significant proportion of the liquid chemical wastes at these sites met the definition of dangerous goods under the *Dangerous Goods Act* which is administered by WorkSafe' and that WorkSafe had contracted a specialist waste disposal company to manage the urgent planning, removal, transportation and safe disposal of the liquid chemical waste.

311 The proposed review of the legislative regime was to extend to, among other things, whether the current legislative and regulatory framework was fit for purpose, and the roles and responsibilities of the government departments and agencies involved in the regulation of dangerous goods.

312 The further ministerial brief dated 12 March 2019 updated the Minister on the removal

of high risk dangerous goods from the eight White sites.[249] The Brief noted that WorkSafe was leading an interagency task force responsible for securing the sites, clean up, testing, monitoring and bringing of enforcement proceedings and that WorkSafe had engaged suppliers including Veolia (for waste removal and transport for testing and processing) and Geocycle (for Class 3 flammable dangerous goods disposal). The estimated costs associated with the work were between $5-10 million. The ministerial brief noted that Veolia and WorkSafe had commenced removal of waste at two of the White sites in Epping on 6 and 22 February and one in Campbellfield on 12 March.

313 Paragraphs 14 to 17 of the brief reads:

> Removal of one contractor (Bradbury) from the supply chain has also been factored into this revised cost estimate.[250] As a result of WorkSafe undertaking due diligence into Bradbury's operations, a matter involving this contractor has now been referred for comprehensive investigation.
>
> The alternative contractor's (Geocycle) cost estimates for disposal of Class 3 flammable dangerous goods are significant higher due to interstate transport costs. Testing has revealed that 50-60% of the waste thus far removed from the Epping sites has been categorised as Class 3 flammable dangerous goods.
>
> WorkSafe and the EPA are continuing to conduct enquiries and new sites at which dangerous goods may be stored are emerging. This includes three sites at 20A, 20B and 12A Yellowbox Drive, Craigieburn[251] and a further site in Kaniva (close to the South Australian border).
>
> Current cost estimates do not include the potential need for rectification of these emerging sites or the work underway at 420 Somerville Road, Tottenham where a large warehouse fire occurred on 30 August 2018. The site in Tottenham (which is occupied by the same duty holder as the eight sites in Epping and Campbellfield) is currently undergoing testing in order to determine the extent and nature of any residual dangerous goods and subsequent removal plan.
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> (underline added)

314 A follow-up ministerial brief was delivered on 15 April 2019. Insofar as it relates to matters relevant to this case, the brief records the discovery of four additional chemical waste storage sites occupied by Bradbury which were uncovered by the EPA,

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249 Evidently the White warehouses.

250 The brief noted that the cost estimate could be as high as $50 million.

251 These were Bradbury sites but there is no reference in the brief to them being Bradbury sites or this being related to 'the removal of Bradbury from the supply chain'.

WorkSafe and the MFB on 8 and 15 March 2019. Those three sites were identified as being the Yellowbox Premises and the truck depot in Sydney Road, Campbellfield.

315 Of course, the delivery of this brief occurred after a fire had occurred at Bradbury's Thornycroft Premises on 5 April 2019 destroying those premises.

316 Mr Keramidas gave unchallenged evidence that at the time of delivery of the IBCs to DBL, he believed the IBCs contained dangerous goods only and not PIW. He took steps to ensure that the relevant SDS were labelled as such and accordingly made transport and storage arrangements. As Mr Keramidas said:

> If I had thought that the IBCs were both dangerous goods as well as prescribed industrial waste, I would have had to arrange for Bradbury to issue waste transport certificates because the classification of goods as prescribed industrial waste takes precedence over a dangerous goods classification.
>
> If I had ever considered the product was prescribed industrial waste (which I did not), I would not have made arrangements with either Stolt or DBL as I was also aware at the time that only certain companies were licensed to store prescribed industrial waste and I knew that neither of Stolt nor DBL held such a licence.
>
> I witnessed the Brooklyn Court IBCs being loaded on to trucks for transport to DBL. The dangerous goods licensed contractor (PJ Transport Logistics Pty Ltd) complied with the WorkSafe Improvement Notices in moving the Brooklyn Court IBCs onto the truck. Each of the requirements in the WorkSafe Notices was ticked off as the process took place. At points in time (per the relevant entry reports) a representative of WorkSafe and/or the EPA was present observing the process, including the labelling of the Brooklyn Court IBCs, the labelling of the trucks for transportation, completion of the manifests and the loading of the trucks for delivery to Stolt and DBL.

317 DBL submits that it is appropriate that the Court make an order pursuant to s 568F(1)(b) of the *Corporations Act* that the 2019 IBCs be vested in the State because of the circumstances in which the 2019 IBCs were delivered to DBL. In particular, DBL point to the following:

(a) the State through legislation including the *Environment Protection Act 1970* and the *Dangerous Goods Act*, has the responsibility for protecting Victorians from environmental hazards such as that posed by the 2019 IBCs;

(b) at the time in question, the State through various emanations including

WorkSafe and the EPA and combinations of those emanations working together, was working to overcome the significant problem of unauthorised storage of dangerous goods and PIW in Victoria (and particularly the White sites) for purposes including protecting Victorians from the adverse consequences of contraventions of environmental laws by Bradbury and others;

(c) the WorkSafe 29 January 2019 Improvement Notice was issued as a part of the work of the 'taskforce' and caused Bradbury to make the second delivery to DBL; and

(d) despite the fact that WorkSafe and the EPA knew or ought to have known that the 2019 IBCs:

(i) contained PIW; and

(ii) may be delivered to premises not licensed to accept them, without proper documentation and without compliant transport arrangements,

both WorkSafe and the EPA failed to take steps to ensure that Bradbury disposed of the IBCs in a manner which was not harmful to others including DBL. Those steps were:

(i) ensuring the correct removal and disposal of the IBCs in accordance with law;

(ii) ensuring the IBCs were delivered only to recipients who were equipped and licensed to receive them; and

(iii) ensuring the recipients of the IBCs were properly informed of what they contained, in particular, ensuring that the recipients were aware that the IBCs contained or were likely to contain PIW; and

(e) the State, unlike DBL, has sufficient resources to dispose of the second delivery IBCs and has a regulatory role in disposing of such goods.

318 It is plain that DBL's s 568F(1)(b) claim proceeds upon the basis of alleged failures on the part of WorkSafe and the EPA. First, DBL contends that from 31 January 2019, the EPA knew, and WorkSafe ought to have known that the content of the 2019 IBCs was PIW. Accordingly, they submit that the SDS for the burner fuel ought to have made that clear.

319 DBL submits that the EPA was the organisation responsible for the authorisations and classifications and it would have been a simple matter for WorkSafe to make the enquiry of the EPA necessary to determine whether any authorisation or classification existed. DBL relies on the fact that the EPA referred to the contents of the 2019 IBCs as waste in the EPA's entry report of 31 January 2019; and in particular that the EPA Draft Clean Up Notice made it clear that the product was waste. Accordingly, DBL argue that the only lawful means of disposal from the Brooklyn Court Premises was to an EPA licensed waste facility, which DBL was not.

320 Second, DBL argue that it should have been clear to both the EPA and WorkSafe that Mr Keramidas, Bradbury's representative who took charge of Bradbury's attempts to comply with the improvement notices, considered that the IBCs only contained dangerous goods and therefore was not likely to take the steps necessary to transport and store them as PIW.

321 Third, DBL submits that both the EPA and WorkSafe were aware of information that suggested that Bradbury would not dispose of the 2019 IBCs appropriately and that there was a corollary risk that the product might be dumped on a recipient that was not licensed to take it. DBL points to observations made by the EPA and WorkSafe at the 31 January 2019 inspections including the removal of waste from the Thornycroft Premises to the unlicensed Brooklyn Court Premises; the absence of tracking of the waste move from the Thornycroft Premises to the Brooklyn Court Premises; the inappropriate storing and location and quality of the IBCs at the Brooklyn Court Premises; the discovery of a further four unlicensed Bradbury locations; the three Yellowbox Premises and the Sydney Road, Campbellfield location; and that the EPA suspected that Bradbury's records would not account for the stockpiled waste stored

at the Brooklyn Court Premises as it was part of a fraudulent criminal enterprise engaged in by the now dismissed general manager. DBL also points to observations made 'sometime in mid-March 2019' and recorded in a brief from WorkSafe to the Minister for Workplace Safety on 15 April 2019:

> Since issuing the directions in March, WorkSafe has communicated repeatedly with Bradbury and its legal representatives. On the basis of correspondence and material provided WorkSafe has formed the belief that Bradbury will not undertake clean-up of the four sites safely or at all.
>
> (underline added)

322 Fourthly, DBL submits that both the EPA and WorkSafe knew that the burner fuel was being shipped to DBL and that the EPA knew and WorkSafe ought to have known that DBL did not have a licence to receive or store PIW.

323 Fifthly, DBL assert that representatives of WorkSafe and possibly also the EPA witnessed the 2019 IBCs being prepared for shipping to DBL and that in those circumstances they must have observed that the IBCs were not being prepared for shipping in conformance with the more onerous requirements that attend to the transportation of PIW (as opposed to dangerous goods).

324 Sixthly, DBL asserts that from early to mid-March 2019, both WorkSafe and the EPA must have realised that Bradbury would be unable (whether for compliance or financial reasons) to take any of the 2019 IBCs back if they were shipped to a recipient who was (or became) unlicensed or unwilling to take them.

325 Having regard to all of the above, DBL submits that the 'danger to DBL was manifest and the reaction of the EPA and WorkSafe to that danger was nothing short of negligent'.

326 The State disputes many of the factual premises which form the basis of the DBL submission. These matters in particular are controversial – whether the content of the 2019 IBCs in fact comprised PIW and whether either or both of the EPA and WorkSafe knew this; whether either of both knew that the 2019 IBCs had been delivered to the DBL Facility and whether either or both knew that the DBL Facility was not licensed

to receive PIW; and finally, whether either or both of the EPA and WorkSafe should have realised that Bradbury would be unable to take the 2019 IBCs back if they were shipped to an unlicensed recipient such as DBL.

327 In my view, for the reasons set out below, a substantial number of the matters identified by DBL are established on the evidence. Nevertheless, and whilst it is impossible to not feel considerable sympathy for DBL, given the unfortunate confluence of events which have resulted in it being lumbered with the PIW, I also consider that DBL's characterisation of some matters is affected by hindsight and the understandable sense of grievance that it has about its predicament. Its sense of grievance has also been added to by the regular issuance of improvement notices from the EPA following DBL's receipt of the 2019 IBCs.

328 Whilst it is understandable that DBL attributes its unfortunate predicament to the actions of the EPA and WorkSafe, in my opinion a dispassionate analysis of the facts as they existed at the time the relevant events occurred points to conduct on the part of the EPA and WorkSafe of a different and less egregious nature than that contended for by DBL.

329 At the outset, I accept DBL's submissions that the 2019 IBCs contained PIW at the time of the second delivery. The State disputes this and submits that DBL has not discharged the evidentiary burden borne by it because it has not adduced evidence of the test results carried out on the content of the IBCs and, secondly, because DBL has not adduced sufficient evidence so as to properly track which IBCs were removed from Bradbury's premises and deposited at the DBL facility. For reasons explained below, neither of those submissions have merit.

330 However, the overlap between dangerous goods and PIW is more nuanced than the DBL case allows for; whilst the burner fuel the subject of the 2019 IBCs did constitute PIW, both the circumstances which attend to that conclusion and its simultaneous characterisation as a dangerous good are important in the context of considering the allegations made by DBL against the EPA and WorkSafe in their proper context.

331 First, both DBL and the State accept that the contents of the 2019 IBCs were properly classified as a 'Class 3 dangerous good' and comprised burner fuel; where they differ is whether that description was incomplete. The State points to the content of the SDS for burner fuel which discloses that in addition to being a 'Class 3 dangerous good', burner fuel is considered PIW *on disposal.*

332 Secondly, both DBL and the State accept that Bradbury's Mr Keramidas was of the belief that the content of the IBCs constitute a product, namely a dangerous good and did not constitute PIW.

333 Thirdly, both DBL and the State accept that a product can be both a dangerous good and PIW at the same time.

334 Mr Keramidas gave evidence, which was not relevantly challenged, that the burner fuel the subject of the second delivery was produced as a result of blending other companies' waste products which was undertaken by Bradbury at its Thornycroft Premises pursuant to its EPA licence. The State accepts that the definition of 'waste' is wide enough to encompass the burner fuel produced by the blending process carried out at the Thornycroft Premises. Mr Keramidas' knew this and also knew that it was considered PIW on disposal.

335 Notwithstanding his knowledge of these matters, Mr Keramidas' belief that the product so stored in the 2019 IBCs was not PIW but rather constituted 'dangerous goods' was because of his belief that the burner fuel could be reused as an alternative fuel and as a raw material in the production of cement. Mr Keramidas gave evidence that there are several sites around Australia where burner fuel is used for that purpose, including one site in Tasmania and another in Queensland. Thus, Mr Keramidas' characterisation of the content of the IBCs was based upon his belief that the product owned by Bradbury was reusable and hence would not have to be the subject of disposal.

336 However that may be, DBL points to the definition of PIW set out in reg 5 of the *Industrial Waste Regulations*. Under reg 5, the burner fuel is classified as PIW unless it

satisfies one of the following four conditions:

(a) it was 'Schedule 1 waste' as defined in Sch 1 of those regulations;

(b) it had a 'direct beneficial reuse' being a use as an input in a commercial industrial, trade or laboratory activity without prior treatment or reprocessing and had been consigned for reuse;

(c) it was 'exempt material', defined as:

(i) material for which a 'secondary beneficial reuse' had been 'established' under pt 5 of the *Industrial Waste Regulations*; or

(ii) material 'classified' as 'non-prescribed industrial waste' by the EPA in accordance with pt 2 of the *Industrial Waste Regulations*; or

(d) it was a material other than a 'Category A, Category B or Category C waste'.

337 First, there is no suggestion that burner fuel satisfied any of the criteria in Schedule 1. Secondly, whether or not the 'prior treatment or reprocessing' criteria was applied before or after the material was processed by Bradbury, there is no evidence that the burner fuel had been consigned for reuse at the relevant time when it was first stocked at Bradbury then trucked to DBL for storage. That said, it is clear that it was the belief that it would be used for this purpose and would be consigned for reuse which clearly informed Mr Keramidas' characterisation of the product.

338 Third, a 'secondary beneficial reuse' is defined in the same terms as 'primary beneficial reuse' save that it applies 'following any form of treatment or reprocessing'. In order for a secondary beneficial reuse to be 'established', the EPA must 'authorise, the reuse, either of its own motion or in response to a notification from a waste producer or waste receiver: reg 39 of the *Industrial Waste Regulations*. Material can be reclassified as a non-prescribed industrial waste by the EPA under reg 11.1(b) of the *Industrial Waste Regulations* but there is no evidence that such authorisation was provided at any time.

339 Lastly, Category A waste includes liquid waste other than 'trade waste' or industrial

waste water managed in accordance with specifications acceptable to the EPA. 'Trade waste' is defined in reg 5 of the *Industrial Waste Regulations* by reference to the *Water Industry Regulations 2006*. Before those regulations were repealed by the *Water Industry Revocation Regulations 2014*, they provided a definition of 'trade waste' which clearly did not include industrial solvents (referring principally to contaminated waste water and effluent). While the regulations did not define industrial waste water, the burner fuel was by definition not water (as it contained at most 25% water and was otherwise comprised of hydrocarbon).

340 In the result, the burner fuel was at all times between 31 January 2019 and 29 March 2019 not a Schedule 1 waste; it was not a waste with a direct beneficial reuse that had been consigned for reuse, nor was it exempt material. It was Category A waste; it had not been consigned (although Mr Keramidas believed that it would be) and accordingly it was PIW at all material times.

341 It is not a matter of testing; the burner fuel was both a dangerous good and a PIW. It would cease to be a PIW if among other things, it had been consigned for re-use; in which case it would likely not have to be disposed of because it would be re-used. Mr Keramidas' characterisation anticipated the consignment but it had not yet occurred; in any event, his characterisation overlooked the requirement under the *Industrial Waste Regulations* that the absence of consignment for reuse meant that it remained PIW. Until consignment for the secondary re-use occurs, it is PIW.

342 Mr Keramidas no doubt believed that if the burner fuel could be reused in the manner in which he anticipated, it would not have to be disposed of and as such did not constitute PIW. He was not challenged on his belief. Assuming as I do that his belief as to the prospect of re-use was both genuine and reasonable,[252] his mistake was as to the significance of the timing of consignment in light of his lack of knowledge of the *Industrial Waste Regulations*. His lack of knowledge as to the fine points of when a dangerous good ceased to both a dangerous good and PIW seemed to be shared by

[252] As events transpired and notwithstanding DBLs valiant efforts no taker for the burner fuel has in fact emerged and accordingly no consignment for secondary reuse has occurred.

the WorkSafe representatives and the dangerous goods expert Mr Vitali. WorkSafe had of course issued the DG Code and it is common ground that the burner fuel was a Class 3 dangerous good within the definition of the DG Code. WorkSafe had been assured by the Bradbury representatives on 31 January 2019 that the burner fuel could be reused and was a Class 3 dangerous good, not a liquid waste, and it accepted that assurance without demur.

343 The EPA representatives plainly and perhaps unsurprisingly were more familiar with the content of the *Environment Protection Act 1970* and the regulations made thereunder, which included the *Industrial Waste Regulations*. The EPA's inspection report which contained references to the contents of the 2019 IBCs as constituting liquid waste (albeit not PIW) was more accurate. So too was the EPA Draft Clean Up Notice which referred to the contents of the IBCs as constituting 'liquid waste' (albeit again not PIW).

344 On the basis of that belief, and as noted above the EPA Draft Clean Up Notice directed the removal of the 2019 IBCs from the Brooklyn Court Premises 'to a waste treatment facility licensed to accept that type of waste' (ie, a facility licensed to received PIW which it is common ground that DBL was not). There is no direct evidence as to why the EPA acquiesced in the removal of the 2019 IBCs from the Brooklyn Court Premises to 'an approved storage facility (which) complied with AS1940' (which DBL was) as opposed to insisting upon removal to a facility licensed to receive PIW. There is no direct evidence as to why the EPA stood back and allowed the removal to occur by reason of the WorkSafe January 2019 Improvement Notice as opposed to the EPA Draft Clean Up Notice. It is that acquiescence and standing back which lies at the heart of DBL's grievances.

345 However, I do not accept that either WorkSafe or the EPA must have realised from 'early to mid-March 2019' that Bradbury would be unable (whether for compliance or financial reasons) to take any of the IBCs back if they were shipped to a storage facility that was or became unlicensed or unwilling to take them. That submission by DBL proceeds upon a premise that both WorkSafe and the EPA should have realised,

indeed 'must have realised', that once Bradbury delivered the goods to DBL, Bradbury would not be able to take the PIW back and that DBL would be stuck with them and forced to dispose of them at substantial cost given that it was not licensed to store them. The submission is one to the effect that WorkSafe and the EPA knew that Bradbury would collapse and that DBL would be stuck with the PIW, which it was not licensed to hold and as such would have to bear the cost of disposal. Among the problems with the attribution of such a state of mind to WorkSafe and the EPA is that it ignores the fire which destroyed the Thornycroft Premises and its impact on Bradbury's business, which did not occur until 5 April 2019, some six days after the final delivery of the 2019 IBCs.

346 Whilst it is accepted that the Brooklyn Court Premises facility and the subsequently discovered Yellowbox Premises and the Campbellfield truck depot were being used for unlicensed storage, the only evidence before me suggests that the conduct of those facilities was part of a rogue operation authorised by Bradbury's now dismissed general manager. Whilst Bradbury's licence which permitted storage and use at the Thornycroft Premises had been suspended on 20 March 2019, there was a capacity for the licence to be reinstated.

347 Certainly, the Liquidator's report squarely puts the collapse of Bradbury down to the fire. As the Liquidator's report dated 26 February 2020 stated:

> My investigations and analysis as Liquidator of the Company's historical financial position and performance indicate that the Company was solvent until the date of the fire being 5 April 2019. The fire had an adverse effect of [sic] the Company's ability to trade as its production capability and recycling capability were destroyed, leading to a significant interruption to its business and accordingly its [sic] is my view that the Company was insolvent from 6 April 2019 for the following reasons:
>
> - The Company's inability to provide waste recycling services, which led to a loss of revenue;
> - Prior to the fire the Company appeared to be meeting creditor liabilities within terms. After the fire the Company's cash flow was disrupted;
> - Delayed payment from multiple insurance claims arising from the fire had a detrimental impact on the Company's cash flow as they had insufficient funds to meet creditor obligations;

- The Company was financed by a number of finance companies in respect of specific plant and equipment during the last three years. The creditor obligations with the financiers had been met up to the event of the fire on 5 April 2019, when most of the encumbered assets were destroyed.

348 Mr Keramidas gave evidence consistent with the Liquidator's report to the effect that Bradbury effectively lost its ability to conduct its business as a result of the fire.

349 Thus, as at the point at which the EPA, for whatever reason determined not to insist upon compliance with the EPA Draft Notice and instead allowed for Bradbury to remove the goods from the Brooklyn Court Premises to an authorised dangerous good storage facility, there was every possibility that DBL would not be required to do anything other than store the product until such time as Bradbury could make appropriate arrangements to collect the goods.[253] If that occurred, then it is possible that Mr Keramidas' confidence in the ability to sell the PIW would be fulfilled. Certainly, such an inference is more than open.

350 If the EPA and WorkSafe believed, as did Mr Keramidis, that the 2019 IBCs would be stored by DBL for 6-12 months and then collected by Bradbury then the decision not to insist upon removal as per the EPA Draft Notice at that time assumes a different hue. The product would not have to be disposed of; it would simply be stored at the DBL Facility for a period of time, before it was returned to Bradbury who would either dispose of it via a licenced facility or sell it for reuse.

351 Nor is there any evidence before me that establishes the difference between the storage sections at an EPA licensed waste facility and a dangerous goods compliant storage facility. It may or may not be the case that there is a meaningful difference between the storage section of such facilities The difference between the two may relate to that part of the facility which disposes of the waste product. If that is so, a short term storage pending return or transfer to a licensed EPA facility or collection by Bradbury and delivery to a consignee who would reuse the product, might well be acceptable, particularly if there were no other storage facilities at hand and the existing situation

253 Mr Keramidis asked DBL to store the 2019 IBCs for 6-12 months; see above.

at the Brooklyn Court Premises was unsuitable.

352 I am unable to make any findings as to why the EPA did not enforce the storage regime contemplated by the EPA Draft Notice as opposed to standing back and allowing for the removal of the goods in accordance with the WorkSafe 29 January 2019 Improvement Notice. However, I am not prepared to conclude that the EPA, much less WorkSafe, was aware of information that suggested that the waste would not be disposed of regularly if and when it needed to be, nor that Bradbury would be unable to take any of the IBCs back if they were shipped to a recipient who was unlicensed or unwilling to take them.

353 DBL argued that the 'removal of Bradbury' from the supply chain noted in the ministerial brief of 12 March 2019 is consistent with knowledge of Bradbury's impending collapse. I disagree; it plausibly refers to Bradbury's exit from its mooted role as one of those who would assist in the clean-up of the White sites, which was hardly surprising given Bradbury's own difficulties. Additionally, there is nothing to link such knowledge to the EPA and Worksafe officers who were in fact attending to the removal of the 2019 IBCs from Bradbury.

354 This is the key plank in the DBL submission that it is 'appropriate' to make an order vesting the 2019 IBCs in the State. For this reason alone, I do not consider that is appropriate to make such an order, even assuming in DBL's favour that a proper exercise of power under s 568F of the *Corporations Act* permits the making of such an order in the circumstances submitted, and that the actions of the EPA and WorkSafe can be taken into account in the making of an order against the State.

355 For completeness, I do not accept the State's submissions that the service of the WorkSafe 29 January 2019 Improvement Notice did not cause the delivery of the 2019 IBCs to the DBL Facility. Whilst it is true that the WorkSafe 29 January 2019 Improvement Notice postulated alternatives beyond the delivery of the 2019 IBCs to an approved storage facility as only one of the alternatives, the fact that one of the alternatives contemplated removal is enough to establish the asserted cause and effect.

Moreover and in any event, the other contemplated alternatives involved the upgrade of the Brooklyn Court Premises to be dangerous goods compliant, but it soon became apparent that Bradbury did not intend to implement this option and the WorkSafe entry reports of 1 February 2019 and 18 February 2019 confirmed that the manner of compliance with the improvement notice was removal to an authorised storage facility.

356 Nor do I accept the State's submission that DBL has not established the contents of the IBCs delivered to it, the dates on which they were accepted, the location from which they came, and the identity of the party who transported them. There is a wealth of uncontradicted evidence that establishes the dates on which the IBCs were delivered; the form of delivery dockets prepared by Bradbury or PJ Freight Pty Ltd for each of the relevant deliveries from Bradbury to DBL; copies of the DBL visitor logs; various receipt dockets prepared by DBL; as well as Mr Keramidas' evidence that Bradbury sent around 600 IBCs from the Brooklyn Court Premises to DBL.

357 Mr Keramidas also gave evidence that on certain occasions representatives of WorkSafe or the EPA or both were present at the Brooklyn Court Premises and observed when the IBCs were labelled and loaded onto trucks for transport to DBL and when the MSDS for the delivery of the IBCs to DBL and Stolt Haven were being completed. Whilst this evidence is somewhat vague, its generality does not detract in my view from the conclusion that both the EPA and WorkSafe knew that the 2019 IBCs had been delivered by Bradbury to an authorised dangerous goods storage facility and not to an authorised recipient of PIW. It does not necessarily matter that they may not have known at all relevant times that the particular recipient was DBL.

358 In conclusion I accept that WorkSafe knew that the contents of the 2019 IBCs were dangerous goods; I accept that the EPA believed, as was in fact the case, that the contents were dangerous goods and additionally PIW. I also accept that both knew that the 2019 IBCs were removed to a dangerous goods compliant facility. I accept that the EPA knew or ought to have known that DBL was not an EPA licensed facility.

359 I accept that WorkSafe knew and the EPA probably knew that they went to DBL. But I am unable to conclude that either knew or ought to have known much more than that. I do not accept that either or both sat back knowing that DBL was receiving product that it was not licensed to receive and with which it would be stuck. I do not therefore accept all of the critical premises upon which the s 568F(1)(b) claim rests.

360 The consideration above proceeds on accepting DBL's submission that such matters are in any event relevant to and supportive of the proper exercise of power under s 568F(1)(b) of the *Corporations Act* to make an order vesting the 2019 IBCs in the State because it is appropriate to do so. Because that point was fully argued, it is convenient now to turn to this question.

The scope of s 568F(1)(b) of the *Corporations Act*

361 DBL's submits that the conduct of the EPA and WorkSafe was 'nothing short of negligent'. Rather than pressing this characteristic in the context of a claim in negligence brought against a statutory authority where economic loss has been suffered, DBL submits this as part of its argument that it is appropriate for the Court to make an order vesting the 2019 IBCs in the State.

362 DBL submits that the wording of s 568F(1)(b) of the *Corporations Act* confers upon the Court a wide-ranging discretion to be exercised in light of what it contends to be the purpose of div 7A of the *Corporations Act*, which is to ameliorate the consequences of disclaimer on third parties. It argues that the discretion is unfettered by orthodox principles for determining who bears the responsibility for acts or omissions that give rise to economic loss suffered by another, but one that rather is to be exercised in the broadest sense by what is appropriate.

363 The submission does, however, require me to accept that the proper exercise of the power conferred upon a court by s 568F(1)(b) of the *Corporations Act,* which permits the Court to make an order vesting onerous property in any person 'to whom it seems to the Court appropriate that the property be vested or delivered', permits regard to be had to considerations that might ordinarily be relevant to a negligence claim.

364 There is an absence of authority to support the use of s 568F(1)(b) of the *Corporations Act* in this way. Whilst this of itself does not prevent the operation of s 568F(1)(b) in this way, an analysis of the origins and historical development of the section and its predecessor provisions in both Australia and the United Kingdom sheds some light on the purpose and scope of the provision.

Historical development of the vesting power in English and Australian companies law

Common origins

365 The earliest 'vesting order' provisions were found in English bankruptcy laws of the nineteenth century. For example, under s 23 of the *Bankruptcy Act 1869* (UK), a trustee in bankruptcy was authorised to disclaim property of various descriptions which burdened the possessor of onerous acts or liabilities, including unprofitable contracts, unsaleable property, or land subject to onerous covenants. The same provision authorised the Court, on the application of any person 'interested in the disclaimed property,' to order that 'possession of the disclaimed property … be delivered up to him.'[254] Successive bankruptcy statutes enacted in both England and Australia contained provisions of a similar nature, with the scope and content of the vesting power becoming more precisely defined with each iteration.[255]

366 The extrapolation of this power to enable a liquidator to disclaim onerous property, and the Court to make a vesting order in respect of company property that is disclaimed by a liquidator, can be traced back to the enactment of the *Companies Act 1929* (UK). This Act was the product of two parliamentary committee reports geared towards companies law reform in the United Kingdom (the 'UK'),[256] the second of which contained the following recommendation:[257]

> The liquidator in any winding up should be given power to disclaim onerous

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254 *Bankruptcy Act 1869* (32 & 33 Vict, Ch 71), s 23.

255 See, eg, *Bankruptcy Act 1883* (UK), s 55; *Bankruptcy Act 1890* (UK), s 13; *Bankruptcy Act 1914* (UK), s 54; *Bankruptcy Act 1924* (Cth), s 104(6). For a further overview of the development of these provisions under English law, and their integration into companies law in respect of a liquidator's power to disclaim, see *Warnford Investments Ltd v Duckworth* [1978] 2 WLR 741, 743-744 (Megarry VC).

256 Report of the Company Law Amendment Committee (Parliament of Great Britain, 1918) ('Wrenbury Committee Report'); Report of the Company Law Amendment Committee (Parliament of Great Britain, 1926) ('Greene Committee Report').

257 Greene Committee Report (n 254), 41.

> property corresponding to the power given to a trustee in bankruptcy under section 54 of the *Bankruptcy Act* … but it should be necessary to obtain the leave of the Court in every case.

367 As a result, when the Companies *Act 1929* (UK) was enacted, the following powers were outlined under s 267:

> **267 Disclaimer of onerous property in case of company wound up in England.**
>
> (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company… may, with the leave of the court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the court, disclaim the property …
>
> (2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.
>
> …
>
> (6) The court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose…[258]

368 Substantially equivalent provisions, allowing for the making of an order vesting disclaimed property in 'any persons entitled… or to whom it may seem *just* that the property should be delivered *by way of compensation* for [a] liability,' found their way into subsequent iterations of the *Companies Act* in the UK (emphasis added).[259] Near

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258 *Companies Act 1929* (UK), s 267.

259 See, eg, *Companies Act 1948* (UK), s 323(6); *Companies Act 1985* (UK), s 619(5). These provisions were almost identical in wording to s 267(6) of the *Companies Act 1929* (UK).

identical provisions were also adopted in each Australian jurisdiction in the late 1930s, following the introduction of companies legislation which was based largely on the *Companies Act 1929* (UK).[260] The same provision was included as s 296(6) of the Uniform Companies Acts that were introduced in each Australian state in 1961.[261] However, in spite of their common origins, the trajectories of the vesting power provisions under UK and Australian law have diverged since the early 1980s.

The current English scheme under the Insolvency Act

369 In the UK, since 1986, the disclaimer of onerous property by a liquidator has been regulated by the *Insolvency Act 1986* (UK) (the '*Insolvency Act*'). The catalyst for the segregation of the disclaimer regime, and the creation of a specialised legislative scheme for insolvency more broadly, was a 1982 report geared towards the modernisation and reform of insolvency law in the UK, known as the Cork Report.[262] The Cork Report was followed by a parliamentary white paper in 1984,[263] and ultimately culminated in the introduction of the *Insolvency Act*. By its enactment, the *Insolvency Act* repealed the provisions of the *Companies Act 1985* (UK) which had previously regulated the winding up of companies.

370 A liquidator's power to disclaim is thus now found in s 178 of the *Insolvency Act*,[264] and is in the following terms:

> **178 Power to disclaim onerous property**
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> …

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260 See, eg, *Companies Act 1938* (Vic), s 268(6), which is in substantially the same terms as s 267(6) of the *Companies Act 1929* (UK).

261 See, eg, *Companies Act 1961* (Vic), s 296(6). Subsections (1) and (2) of the same provision, which set out a liquidator's power to disclaim, are also in substantially the same terms as ss 267(1) and (2) of the *Companies Act 1929* (UK).

262 *Report of the Review Committee on Insolvency Law and Practice* (Command Paper 8558, 1982). The central theme of the report was that insolvency laws should operate to facilitate a 'rescue culture' for companies, reviving or saving them where possible, or bringing them to a close in an orderly and just way where rescue was not possible. A dedicated and modernised legislative scheme for insolvency was championed as the best mechanism for achieving this objective.

263 *A Revised Framework for Insolvency Law* (Command Paper 9175, 1984).

264 A comparable scheme for the disclaimer of onerous property by a trustee in bankruptcy is set out in ss 315–321 of the *Insolvency Act*, including the Court's power to make a vesting order, which is found in s 320. These provisions are largely analogous to those relating to a liquidator's disclaimer of onerous property in their terms and application.

(2) Subject as follows, the liquidator may, by the giving of the prescribed notice, disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavoured to sell it, or otherwise exercised rights of ownership in relation to it.

(3) The following is onerous property for the purposes of this section—

(a) any unprofitable contract, and

(b) any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.

(4) A disclaimer under this section—

(a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed; but

(b) does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person.[265]

371 The powers of the Court to make a vesting order in respect of disclaimed property are outlined under s 181 of the *Insolvency Act*, which relevantly provides:

181 Powers of court (general)

(1) This section and the next[266] apply where the liquidator has disclaimed property under section 178.

(2) An application under this section may be made to the court by—

(a) any person who claims an interest in the disclaimed property, or

(b) any person who is under any liability in respect of the disclaimed property, not being a liability discharged by the disclaimer.

(3) Subject as follows, the court may on the application make an order, on such terms as it thinks fit, for the vesting of the disclaimed property in, or for its delivery to—

(a) a person entitled to it or a trustee for such a person, or

(b) a person subject to such a liability as is mentioned in subsection (2)(b) or a trustee for such a person.

(4) The court shall not make an order under subsection (3)(b) except where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the

265 *Insolvency Act 1986* (UK), s 178.

266 The next, s 182, outlines specific powers of the Court in relation to disclaimed leasehold property.

disclaimer.[267]

(underline added)

372 Though couched in different terms, the scope and content of this provision appears to be substantially the same as those found in earlier companies legislation.[268] Most notably, s 181 adopts the same limitations on potential recipients who the Court can order the vesting of disclaimed property in. More specifically, much like early UK and Australian *Companies Acts*,[269] the *Insolvency Act* expressly stipulates that the Court is only empowered to make a vesting order in respect of 'a person entitled to' the disclaimed property, or a person 'subject to a liability in respect of' such property, for the purposes of compensating that person, where the Court considers that it would be just to do so. Arguably, the practical application of s 181 would thus be much the same as that of the provisions found under earlier UK *Companies Acts*.

Developments under Australian companies law

373 In contrast, the vesting order provision as it exists under Australian companies law has undergone a number of changes over the last few decades. The word 'just', the limitations on categories of potential recipients, and the reference to a compensatory purpose were all omitted from s 454(11) of the *Companies Act 1981* (Cth), which instead provided that:

> (11) The Court may, on application by a person either claiming an interest in, or being under a liability not discharged by this Act in respect of, disclaimed property, and after hearing such persons as it thinks proper, make an order for the vesting of the property in, or delivery of the property to, a person entitled to it or a person in whom, or to whom, it seems to the Court to be proper that it should be vested or delivered, or a trustee for that person.[270]

(underline added)

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267 *Insolvency Act 1986* (UK), s 181.

268 As a matter of interest, a vesting power is provided in substantially the same terms under s 1017 of the *Companies Act 2006* (UK), which empowers the Court to make an order in respect of property of a dissolved company that is disclaimed by the Crown pursuant to s 1013 (the effect of such a disclaimer being to prevent the company's property vesting in the Crown as *bona vacantia* under s 1012).

269 See further, *Companies Act 1929* (UK), s 267(6); *Companies Act 1938* (Vic) s 268(6); *Companies Act 1948* (UK), s 323(6); *Companies Act 1961* (Vic), s 296(6); *Companies Act 1985* (UK), s 619(5).

270 *Companies Act 1981* (Cth), s 454(11).

374 Identical wording was adopted in the vesting power provision that was contained in s 568(11) of the *Corporations Act 1989* (Cth).[271] The present provision, s 568F of the *Corporations Act* makes reference to neither what the Court considers to be 'just' nor 'proper' in the circumstances. Instead, it empowers the Court to make a vesting order in favour of any person 'entitled to the property, or a person in or to whom it seems to the Court *appropriate* that the property be vested or delivered' (emphasis added).[272]

375 Besides the change in language from 'just', to 'proper', to 'appropriate', the most notable distinction between more recent vesting order provisions under Australian law and those currently found in the *Insolvency Act* (and under earlier English and Australian *Companies Acts*) is that, while English courts are restricted to making a vesting order in favour of a person 'entitled' to, or 'subject to a liability' in respect of disclaimed property,[273] on the fact of the section, s 568F of the *Corporations Act* appears to give Australian courts a broader discretion to vest disclaimed property in any 'appropriate' recipient. Moreover, while the *Insolvency Act* provides the additional caveat that a vesting order can only be made in favour of a person subject to a liability in respect of disclaimed property where it is 'just to do so for the purpose of compensating the person,'[274] no such limitation is contemplated by the *Corporations Act*.

376 Though significant on its face, it is difficult to ascertain the precise impact of the changes that the vesting power provision has undergone in successive instruments of Australian companies law in a practical sense. The explanatory memoranda for the *Companies Act 1981* (Cth) and the *Corporations Act 1989* (Cth) offer little guidance, both simply stating that each provision is 'based generally' on its predecessor.[275] No reference was made to the provision in the explanatory materials that accompanied the bill for the *Corporations Act 2001* (Cth).[276] Furthermore, vesting order provisions

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271 *Corporations Act 1989* (Cth) s 568(11).
272 *Corporations Act 2001* (Cth) s 568F(1).
273 *Insolvency Act 1986* (UK), s 181(3).
274 Ibid, s 181(4).
275 See, respectively, Explanatory Memorandum, Companies Bill 1981 (Cth) 444, [1019]-[1020]; Explanatory Memorandum, Corporations Bill 1988 (Cth) 449, [1788]-[1789].
276 Explanatory Memorandum, Corporations Bill 2001 (Cth).

have received very little judicial consideration throughout their existence, meaning that scarce guidance is available as to their proper interpretation and application, and the import of their particular language and terms.

377 It is, however, at the very least arguable that the changes in language have brought about an expansion of the Court's discretion in making a vesting order, such that the scope of the power under Australian law is now broader than that provided by s 181 of the UK *Insolvency Act*. On its face, s 568F of the *Corporations Act* endows Australian courts with a wider latitude to vest disclaimed property in any person they deem 'appropriate' – regardless of whether the recipient is willing or unwilling for the property to so vest.

378 In spite of the broader wording of s 568F, it must be noted that there are no Australian cases where a vesting order been made under this provision (or its predecessors) in 'favour' of an unwilling recipient.

379 Moreover, any argument for a broader construction must be balanced with the following observation made by Young CJ in *Sullivan* as to the meaning of 'appropriate' in the context of s 568F: [277]

> I do not consider that as a general rule it is open to the plaintiff to select some passer-by who might be a dealer in the property in question, add that person as a party and then suggest that the property might vest in that person… It seems to me that it is only appropriate to make a vesting order in order to give effect to the general policy of the law of disclaimer which still comes out in sections such as 568D(2), that whilst the liquidator is to be relieved of the problems caused by the property, the disclaimer is to cause as little prejudice as possible to all other interested persons.

380 In *Sullivan*,[278] the plaintiff operated a storage facility in which the first defendant, a company in liquidation, was storing industrial waste. By virtue of the liquidation, the liquidator issued a notice of disclaimer of onerous property in relation to the waste. The plaintiff sought an order under s 568B of the *Corporations Act* setting aside the

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277 *Sullivan* (n 139), 185-6 [42]. As to the function of the law of disclaimer, see also *Re Carter & Ellis; Ex parte Savill Brothers* [1905] 1 KB 735, 742 ('*Re Carter*'); *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, 86.

278 *Sullivan*(n 139).

notice of disclaimer. In the alternative, the plaintiff sought an order pursuant to s 568F of the *Corporations Act* vesting the waste in the third defendant which had entered into an agreement with the first defendant to purchase its business.

381 In the result, Young CJ in Equity set aside the disclaimer. His Honour noted that 'the whole exercise has been one of the [first defendant] to rid itself of its obligations … by foisting them on the plaintiff'. The waste remained owned by the company in liquidation. There was a surplus of funds in the liquidation in any event.

382 Section 568F of the *Corporations Act* had no application as the section dealt solely with the Court's powers over disclaimed property and by reason of the setting aside of the disclaimer, there was no disclaimed property. Nevertheless, his Honour dealt with the submission by the plaintiff that in the circumstances it would be appropriate for an order under 568F of the *Corporations Act* be made so that the goods vest in the third defendant. The plaintiff argued that the third defendant was aware of the problem of the industrial waste when it bought the business. Further, the plaintiff claimed that on a proper construction of the contract, the third defendant bought the whole business subject to an indemnity by the company in liquidation for any liability arising because of the contamination problem. The third defendant argued that it did not purchase the contaminated material given that it was not mentioned in the schedule of assets attached to the contract.

383 The plaintiff also argued that another reason why it was appropriate to make such an order vesting the waste in the third defendant was because the third defendant had capacity to take the property in question and indeed had a processing facility in New Zealand which could take and treat the material. For its part, the third defendant conceded that it was quite happy to take the material but only on its own terms and submitted that it should not be forced to take the material without compensation.

384 Had it been necessary to decide, the Young CJ said that he would not have made such an order under s 568F(1)(b) of the *Corporations Act*. Young CJ considered it would have been inappropriate to vest the property in 'some passer-by who might be a dealer

in the property in question'; while his Honour found that that was not the case on those facts, it was 'close to it'.[279]

385 As his Honour noted:[280]

> Section 568F is the successor of legislation which has been in force since the 1929 English Act. The classical section was such as s 323 of the English Companies Act 1948 (UK) which continued to find its place in NSW Companies Acts up to s 296 of the 1961 Act. Section 296(6) of the 1961 Act empowered the court to "make an order for the vesting of the property in or the delivery of the property to any person entitled thereto, or to whom it seems just that the property should be delivered by way of compensation for such liability as aforesaid". The purpose of that provision was to enable effect to the given to the intention of the legislature that the disclaimer should cause as little disturbance to the rights and liabilities of third parties as possible. [281]

386 In *Re Tulloch*,[282] Needham J said of the subsection:[283]

> It may be that there could be circumstances where a vesting order could be made in "favour" of an unwilling recipient. I cannot, for the moment conceive of such a case as being "just" but I do not have to decide, in this case whether such an order could ever be made.

In *Re Tulloch,* the section provided that the Court could make a vesting order 'of such terms as the Court thinks just'. The present section (s 568F of the *Corporations Act*) has dropped all reference to what is just or proper and has substituted the power to vest property in a person to whom it seems to the Court appropriate that the property be vested. For my part, I doubt whether much turns on the change in wording from 'just' or 'proper' to 'appropriate'.

387 Whilst DBL argues rightly that its putative vestee, the State, is neither 'some passer-by' or a dealer in the property in question who might therefore as a consequence be well placed to facilitate its disposal, like Needham J and Young CJ in Equity, I have reservations about whether it is appropriate to utilise s 568F(1)(b) of the *Corporations Act* as some sort of freestanding power on the Court to be exercised in reference to broad notions of appropriateness, enabling it to vest the property on an unwilling

279 Ibid [42].
280 Ibid [37]
281 Ibid, 185 [37].
282 (1978) 3 ACLR 808.
283 Ibid, 815.

vestee, even one whose allegedly negligent acts or omissions have contributed to the prejudice that would attach to a party such as DBL in the present case.

388 Under the common law, the making of another party liable to compensate another for loss and damage caused by the former has been the preserve of recognised private rights of action. Statutory causes of action entitling a party to compensation from another by reason of the acts or omissions of another also play a role.

389 It would be a somewhat strange result if a general provision like s 568F(1)(b) could be used to outflank traditional causes of action which have developed over the years or specific statutory causes of action which apply to certain conduct.

390 I agree that the scope of s 568F(1)(b) should be construed so as to give effect to the purpose of div 7A of the *Corporations Act* that being to ensure that the disclaimer causes as little disturbance as possible on all interested parties.

391 However, legislation is also presumed not to alter common law doctrine. In *Potter v Minahan*,[284] O'Connor J quoted from a passage in *Maxwell on the Interpretation of Statutes*,[285] which read as follows:[286]

> 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.

392 Similarly, in *Balog v Independent Commission Against Corruption*,[287] the High Court observed that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred.

393 Although there are circumstances in which this presumption could be displaced by implication,[288] such a case would arise only where such an implication was necessary

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284 (1908) 7 CLR 277 ('*Potter*').
285 JA Theobold, *Maxwell on the Interpretation of Statutes* 4th ed, Sweet & Maxwell London, 1905, 121.
286 *Potter* (n 284), 304.
287 (1990) 169 CLR 625, 635-636.
288 *Coco v R* (1994) 179 CLR 427.

to prevent the statutory provision becoming inoperative or meaningless. This is not such a case.

394 Section 568F(1)(b) of the *Corporations Act* still retains substantial scope for its operation in the more customary sense in which it or its predecessor provisions have been employed, such as to permit the vesting of property in a mortgagee.

395 Moreover, in my view it is somewhat of an overstatement (if not inaccurate) to assert as DBL does that the prejudice which has arisen to it by being stuck with the PIW is as a result of the disclaimer. It is instructive to compare the position that DBL would have been in had Bradbury gone into liquidation and refused to collect the 2019 IBCs but the Liquidator had not disclaimed the 2019 IBCs. In such a case, the 2019 IBCs would still be at the DBL Facility; Bradbury would be in liquidation; there would be insufficient funds for the Liquidator to arrange for the removal of the IBCs and the Liquidator could not be compelled to incur the expense personally.[289] In short, DBL would be in largely the same position. It is Bradbury's liquidation and its associated failure to collect the 2019 IBCs which has caused the problem for DBL; not the IBC disclaimer.

Conclusion on the s 568F(1)(b) claim

396 Accordingly, I would not have made an order under s 568F(1)(b) of the *Corporations Act* that the 2019 IBCs vest in the State. I do not consider that it is the IBC disclaimer (as opposed to the fact of Bradbury's liquidation) that has caused the disturbance to DBL. Nor do I accept on the evidence before me that the conduct of EPA or WorkSafe was negligent. If I did, the consequence of conduct being of that nature falls properly to the law of negligence, not s 568F(1)(b) of the *Corporations Act*. I therefore do not consider that it is appropriate to make an order under s 568F(1)(b) that the 2019 IBCs vest in the State.

Ancillary matters

397 For completeness, I shall make brief mention of a number of other matters raised by the parties in the context of the s 568F(1)(b) claim. The first issue is whether and to

289 *Corporations Act*, s 545.

what extent it is appropriate to have regard to the acts or omissions of the EPA and WorkSafe in determining whether it is appropriate to make an order that the 2019 IBCs vest in the State. The State appropriately points to s 23(3) of the *Crown Proceedings Act 1958* (Vic) which expressly provides to the contrary in the context of claims in tort or contract.

398 It is somewhat anomalous that it is the negligent acts or omissions of the EPA and WorkSafe that form a substantial part of the matters relied upon by DBL in its s 568F(1)(b) claim, and yet if it brought such a claim in a more orthodox manner, such as via a negligence claim, it could not bring the claim against the State.

399 Further, DBL additionally submits that the State has a responsibility to protect Victorians from environmental hazards such as those which are posed by the IBCs; that the State has sufficient resources to dispose of the relevant IBCs; and that the movement of the 2019 IBCs from the Brooklyn Court Premises to the DBL Facility arose as a consequence of the establishment of one or more multi-agency taskforces by the State.

400 The submission that the State has a responsibility for protecting Victorians from environmental hazards such as those which are posed by the 2019 IBCs is somewhat of an overreach. The provisions of the *Environment Protection Act 1970* and the *Environment Protection Act 2017*, the *Dangerous Goods Act* and the relevant regulations made under the *Dangerous Goods Act* reveal consistent public policy that the occupier of premises on which dangerous goods or industrial waste are stored is to be responsible for those substances. The various Acts and regulations do not support a conclusion that the State has primary responsibility to clean up or dispose of dangerous goods or industrial waste. To the extent that the EPA and WorkSafe have powers of that nature, the statutory provisions confirm that those powers are only to be exercised in cases of imminent danger to persons or the environment.

401 Part 1 of the *Environment Protection Act 1970* and pt 2.3 of the *Environment Protection Act 2017* set out 'principles of environmental protection, to which regard is given in

the administration of the Acts'. One of those principles is 'the principle of shared responsibility' which provides that protection of the environment 'is a responsibility shared by all levels of government and industry, business communities and the people of Victoria'. Consistent with that principle neither of the Acts impose primary responsibility for addressing environmental hazards on the State or the EPA. Instead, the duties imposed upon the Acts are imposed on occupiers of scheduled premises[290] and persons in possession or control of industrial wastes.[291] The duties imposed under the *Environment Protection Act 2017* are imposed on:

(a) persons who engage in activities that may give rise (or have given rise) to risks to human health or the environment;[292]

(b) persons in management or control of the contaminated land,[293] or of 'priority waste';[294] and

(c) persons who deposit or abandon industrial waste,[295] receive industrial waste,[296] or transport industrial waste.[297]

402 Many of the powers of the EPA under the *Environment Protection Act 1970* and the *Environment Protection Act 2017* are directed to ensuring that the persons on whom those duties are imposed comply with them or to the gathering of information relevant to the question of whether there has been a failure to comply with those duties.

403 In *TASCO*, Garde J observed that:[298]

> The day is long past when responsibility for environmental clean up of industrial waste or contamination was confined solely to persons who have dumped or abandoned industrial waste or other perpetrators of contamination. Under the scheme of the *Environment Protection Act 1970* , criminal and other liability for clean up of premises or clean up costs extends

290 *Environment Protection Act 1970*, ss 20, 27.
291 Ibid, ss 27A, 53B, 53D.
292 *Environment Protection Act 2017,* s 25.
293 Ibid, s 39.
294 Ibid, s 139.
295 Ibid, s 133.
296 Ibid, s 134.
297 Ibid, s 135.
298 *TASCO* (n 173), [89].

to:

(a) persons who fall within the definition of 'occupier' within s 4(1);

(b) financial institutions and receivers in the circumstances described in s 4(3); and

(c) to corporations, directors, partnerships, unincorporated associations and their managers in the circumstances described in s 66B of the *Environment Protection Act 1970* .

404 The position under the *Dangerous Goods Act* and regulations made under that Act is relevantly similar.

405 It is an overstatement to say that the State has the responsibility to clean up or fund the cleaning up of industrial waste (or dangerous goods) in Victoria.

406 Even if the proper exercise of the power to make an order under s 568F(1)(b) of the *Corporations Act* permitted the making of an order vesting the 2019 IBCs on the State as a consequence of the conduct of the EPA and WorkSafe, the making of such an order would have the effect that the ordinary processes under the *Environment Protection Act 1970* and the *Dangerous Goods Act* for clean-up and control would be put to one side and instead the State would bear the cost of doing so. Albeit in a slightly different context, in *TASCO*, Garde J further observed that:[299]

> The Court should be wary of disclaimers where environmental liabilities are to be passed onto taxpayers or innocent persons. The Court should discourage the use of voluntary liquidation as a device to avoid environmental responsibilities, or to impose unwanted or unexpected burdens on the taxpayer. Where there are opportunities open to recover the costs of environmental clean up, they should be taken unless outweighed by other factors.

407 The fact that the making of an order under s 568F(1)(b) vesting the goods on an unwilling recipient would outflank the existing statutory regimes set out in the *Environment Protection Act 1970* and the *Dangerous Goods Act* is another reason as to why it would not be appropriate to make such an order.

408 Notwithstanding the above, had I considered that it was otherwise appropriate to make an order under s 568F(1)(b) of the *Corporations Act* because of variously the acts

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299 *TASCO* (n 173), [201].

or omissions of the EPA and WorkSafe, and that it was appropriate to make an order vesting the goods in an unwilling recipient, I would not have refused to make the order simply because it was sought against the State (and not against the EPA or Worksafe).

409 It seems somewhat unreal to accept the submission of the State that in such circumstances the appropriate vestee was the EPA or WorkSafe, or a combination of the two as the case may be. EPA and WorkSafe were statutory corporations exercising public functions in the discharge of their respective statutory duties and the exercise of their statutory powers. The composition of their respective governing bodies was entirely within the control of the State and they contributed to and drew from public funds.

Conclusion

410 In the result, DBL has succeeded in its *bona vacantia* claim and will be entitled to declaratory and ancillary relief. I would otherwise dismiss the s 568F(1)(b) claim. I shall hear the parties as to the appropriate form of orders including as to costs.

CERTIFICATE

I certify that this and the 113 preceding pages are a true copy of the reasons for judgment of Justice M Osborne of the Supreme Court of Victoria delivered on 13 December 2021.

DATED this thirteenth day of December 2021.

SUPREME COURT OF VICTORIA

Associate