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## Introduction

A Shapeshifting Enigma: The Crown in Australia,  
Canada, New Zealand and the United Kingdom

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### From Colonial Aggressor to Postcolonial Apologist: The Many Faces of the Crown

On a cold afternoon on 22 August 2014 an event of major historic significance in relations between the New Zealand government and its indigenous people took place in the small town of Taneatua in the North Island Bay of Plenty region. Chris Finlayson, New Zealand's attorney-general and minister for Treaty of Waitangi negotiations, stood before a crowd of over three thousand people, mainly members of the Tūhoe *iwi* (tribe), but also including former prime minister Jim Bolger, Police Commissioner Mike Bush, members of Parliament from across the spectrum and descendants of Premier Richard Seddon to deliver a long-awaited apology on behalf of the government for historical grievances of the Māori people, reflecting what are often considered the most deplorable episodes in New Zealand's colonial history. This official apology followed a Treaty of Waitangi settlement between the *iwi* and the government agreed a month earlier which included a financial and commercial redress package totalling NZ\$170 million and formal acknowledgement of the mistreatment of Tūhoe carried out by successive New Zealand governments over 140 years. Speaking with calculated solemnity and humility from the rostrum under a large marquee, Mr Finlayson (2014) declared:

The Crown unreservedly apologises for not having honoured its obligations to Tūhoe under te Tiriti o Waitangi (the Treaty of Waitangi) and profoundly regrets its failure to appropriately acknowledge and respect *te mana motuhake o Tūhoe* [Tūhoe autonomy] for many generations.

The relationship between Tūhoe and the Crown, which should have been defined by honour and respect, was instead disgraced by many

injustices, including indiscriminate *raupatu* [confiscation], wrongful killings, and years of scorched earth warfare. The Crown apologises for its unjust and excessive behaviour and the burden carried by generations of Tūhoe who suffer greatly and carry the pain of their ancestors.

Tūhoe's leaders had, in Finlayson's words, acted 'honourably', whereas the Crown had 'subverted' the Urewera District Native Reserve Act of 1896 to purchase much of Te Urewera illegally and later excluded Tūhoe from the establishment of Te Urewera National Park. The Crown, he continued, was 'remorseful for the suffering it has caused' and 'deeply sorry' for its failure to make amends. It would never forget its unwarranted and gratuitous behaviour and now wished to compensate for its sins. The Crown would 'work hard to regain the trust of Tūhoe' and 'build afresh its relationship' with the *iwi*. Mr Finlayson then thanked Tūhoe for providing the Crown with this opportunity to do this, adding, 'We take responsibility for that suffering. Today, I seek your forgiveness. And I reiterate the Crown's commitment to your settlement' (Figure 1.1).



**Figure 1.1** The Honourable Christopher Finlayson delivers the Crown's formal apology to Tūhoe for breaches of the Treaty of Waitangi as the Maungapōhātu flag is unfurled; 23 August 2014

(© Auckland War Memorial Museum – Tāmaki Paenga Hira)

As he finished speaking, with head bowed, the assembled delegation on the stage stood up and gathered around Finlayson to sing a mournful *waiata* (song), thus bringing this official part of the ceremony to a close.

What is striking about Finlayson's speech was not its candour in acknowledging the full extent of wrongs perpetrated against generations of Tūhoe by successive New Zealand governments but its personification of the body responsible for those violations. Nowhere in the attorney-general's 3,300-word apology did he use the term the 'state'; nor was there any mention of 'government' (except for two references to Tūhoe 'self-government'); nor was the apology given on behalf of the people of New Zealand. By contrast, 'the Crown' was named no less than 64 times as the guilty party. Equally striking is the extraordinary range of different emotions and dispositions attributed to the Crown. It is, by turn, 'disgraced', 'dishonoured' and 'deeply sorrowful' for its behaviour; it confesses to having acted illegally and immorally, yet is eager to 'atone' for its duplicity; it 'regrets' its failures; it is 'humbled' and profoundly 'remorseful' yet 'grateful' for this opportunity to make amends; above all, it 'hopes' to build afresh its relationship with the Tūhoe people, a relationship that will endure for future generations. The narrative was reminiscent of a court trial in which a lawyer, speaking on behalf of the offending party, expresses the client's contrition and desire for forgiveness.

Events of this kind have become regular features of the postcolonial political landscape and settlement process in New Zealand and highlight important issues about the process of historical reconciliation and the recognition of indigenous rights. But they also raise some fundamental philosophical, legal and anthropological questions about governance, the state and the nature of sovereignty in those countries whose political systems are based on the Westminster model of constitutional monarchy. In these highly ritualised deeds-of-settlement ceremonies, past wrongdoings are acknowledged and forgiveness sought for the suffering these have caused, but the wrongdoing is always attributed to the Crown, never to the government or its officials or to any named individuals. The incantation accompanying each public deed-of-settlement agreement generally follows a prescribed format that must be read aloud without deviating from the script. Notwithstanding the choreographed manner of their delivery, these apologies are deeply felt and highly significant, often evoking raw emotions

among those present.<sup>1</sup> Some participants say the apology is of equal if not greater significance than the financial compensation. In these orations, the Crown ‘unreservedly’ apologises to members of the *iwi* and their ancestors for the many failures to ‘honour its obligations’ and proclaims its desire to restore its ‘reputation’ and ‘honour’.<sup>2</sup> ‘Honour’ in this context is very different from the more diffuse cultural concept of honour that featured so prominently in early anthropological studies of peasant societies and the Mediterranean (Schneider 1971; Davis 1977). The complex meanings of the term ‘honour of the Crown’, and the problems associated with that category, are addressed later in this book. But as these and other public events show, the Crown often occupies a central place in the national imaginary of postcolonial settler societies. Like Thomas Hobbes’s *Leviathan*, it is often understood as a reified, distant, powerful and overarching sovereign that straddles the whole of government and operates at a level of reality above, and separate from, everyday life. The nature of these realities and the work that the idea of the Crown performs in New Zealand and other Commonwealth countries is the subject of this book.

While New Zealand represents perhaps an extreme case of reification, the concept of the Crown plays no less an important role in the constitutional orders of Australia, Canada and the United Kingdom (UK). However, there are often wide discrepancies between constitutional orders and how everyday political life is understood and enacted. One of the most important findings of our study, in fact, was just how differently the Crown features in the national imaginaries, cultural understandings and contemporary usages of these four countries. For example, in Australia the Crown was absent from the political discourses and imaginaries of most Australians. Anne Twomey (2006) has shown how central the Crown remains as a legal entity in Australia and how it continues to discreetly underpin Australia’s state institutions. Yet almost all of our Australian interviewees did not see, did not understand or did not want to be reminded of that fact because the Crown is seen as a

<sup>1</sup> A good example of this was the recent Crown apology and reconciliation package offered to the people of Parihaka, a Taranaki-region settlement which, in the late 1800s, became a focus of non-violent Māori resistance to settler land confiscations and was brutally sacked by government troops while its leaders were imprisoned and deported to the South Island. As one Radio New Zealand journalist observed, ‘people openly wept as the apology was read out by Treaty Negotiations Minister Chris Finlayson’ (Haunui-Thompson 2017).

<sup>2</sup> See Hickey 2012. The attorney-general used almost exactly the same formula of words in an earlier oral apology given to Ngai Tāmanuhiri (McLean 2015: 193).

colonial relic that has limited legitimacy in Australia. Even some Australian monarchists prefer 'Crown Republic' to 'the Crown'. In Canada, we found that the Crown appears to play almost no role at all in the political imaginary of the state. The metonym for the federal state is 'Ottawa'; for Ontario it is 'Queen's Park', which is the location in Toronto of the executive and legislative branches of the provincial government; and so forth for each province. The Crown in Canada is a concept largely linked to the entrenched position of the monarchy in the patriated Constitution Act, 1982. Canadian monarchists have made huge efforts to imagine a Canadianised sovereign, the 'Maple Crown' (MacLeod 2008; Lagassé 2014). And in Canada too the judiciary has in recent years coined 'the honour of the Crown' as crucial to relationships between governments and the various aboriginal peoples (First Nations, Métis and Inuit). As in New Zealand – but not Australia – the indigenous peoples of Canada have put the Crown at the forefront of many issues. But there is nothing in Canada that compares with the usage of the Crown in New Zealand, or the complex set of relationships and responsibilities that Chris Finlayson's speech invokes. The UK is different again, although the non-federal Westminster constitutional order is very similar to that of New Zealand. The actual person of the reigning monarch is much more important than the constitutional framework within which the Crown sits for almost everyone we spoke to there.

It is not so much the constitutional similarities of the Crown as the differences in the Crown's meanings and manifestations in each of these four countries that interest us and which constitute the problem we seek to address. As we will illustrate in subsequent chapters, the historical, genealogical and cultural character of the Crown and its unstable and competing meanings are issues rich in anthropological, legal and political importance.

### **Legal Fiction or Social Fact: The Crown as Metonym for the State**

Since 1840 the Crown has stood at the heart of New Zealand's constitutional order as the embodiment of state authority and power and key signatory to the Treaty of Waitangi. That treaty, agreed to in 1840 between a British consul and some 540 leaders of indigenous Māori tribes, has come to be the basis of bicultural public policy objectives, and it is often considered to be practically, if not legally, the country's founding document. Yet, as former New Zealand attorney-general

Margaret Wilson (2011: 1) notes, the Crown is also ‘a useful fiction that enables government to distance themselves from direct responsibility for obligations under the Treaty’. The implications of this contradiction are profound and yet have rarely been explored. How can the Crown, as the constitutional heart of the political system, be a ‘useful fiction’ and enable governments to distance themselves from their legal obligations? Perhaps before trying to analyse the Crown’s contribution to the art of government and the machinery of state power, we must first pose the question, what exactly *is* the Crown, as an imagined entity and as a subject for political and anthropological study? If it is a ‘legal fiction’, how is that fiction made real and how is it put to use, by whom and in whose interests? These questions are relevant to all those countries that share the system of constitutional monarchy and Her Majesty Queen Elizabeth as their head of state,<sup>3</sup> but nowhere more so than in the UK and three of its former dominions, Australia, Canada and New Zealand.

Legal theorising on the nature of the Crown generally sees it as a metonym for government and the state. According to Stephen Sedley (2011: 270), ‘[t]he Crown, for good historical reasons, is simply the visible icon which stands for that intangible but very real entity, the State’. However, the individual who wears the crown ‘is a separate person, recognised by law, who is divorced . . . from all but the formalities of state power’ (270). While this idea of the separation of the ‘King’s two bodies’ has become deeply institutionalised and axiomatic in British legal thought, Sedley suggests that lawyers find the Crown ‘a source of continuing and unnecessary puzzlement’ (270). For Janet McLean (2012: 2), writing on the state in British legal thought, the Crown is ‘common law’s closest approximation to the state’. This suggests that the concept of the Crown is the nearest equivalent to the State in public law, but just how overlapping and interchangeable are these concepts? As we show in Chapter 3, this question has important practical as well as theoretical implications for understanding postcolonial states, the construction of political authority and the challenges for constitutional reform in Westminster-style political systems. Martin Loughlin (1999: 33), another leading constitutional historian, argues that ‘the Crown has, in practice, provided a poor substitute for the idea of the State’. Both he and Sedley

<sup>3</sup> These are, in alphabetical order Antigua and Barbuda, Australia, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, Saint Kitts, Saint Lucia, Saint Vincent and the Grenadines, Solomon Islands, The Bahamas, Tuvalu and the United Kingdom.

note that ‘English law does not recognise a concept of the State’ (Sedley 2015: 210). While this is not entirely accurate,<sup>4</sup> it nonetheless highlights the conceptual and legal complexities – and obscurity – of constitutional monarchy. In the chapters that follow, we examine these assumptions by questioning not only the extent to which Crown and State are equivalent, but also what the ‘realities’ of the Crown entail from an ethnographic as well as an analytical perspective. Indeed, the concept of the State is just as ambiguous and problematic as that of the Crown. As the legal historian F. W. Maitland wrote over a century ago, ‘the Crown is a convenient cover for ignorance: it saves us from asking difficult questions, questions which can only be answered by study of the statute book’ (Maitland [1908] 1965: 418). Maitland was wrong in proposing that the statute book provided answers to the mystery and meaning of the Crown. He was also wrong about the Crown being simply a cover for ignorance. As Philippe Lagassé (2014: 271) remarks, what the Crown covers is not ‘ignorance’ so much as ‘complexity’, as it is inherently obscure and multifaceted. Yet Maitland’s observations about the powers of the Crown, the uncertainties surrounding the uses of the royal prerogative and the need for scepticism towards things claimed in the *name* of the Crown are as relevant today as they were in 1908. One of those particularly ‘difficult questions’ concerns the meaning and ontology of the Crown itself and what that concept makes possible in the spheres of politics and law. That is, the Crown not only opens up novel ways of conceptualising authority and power and endowing personhood on the institutions of governance but it also forecloses other ways of knowing the state. As academic and prominent Māori leader Sir Tipene O’Regan described, the Crown is ‘the decent face of Leviathan’ (Patel 2016: 168).

Maitland’s observation was made in a time when there was but a single Crown, the British Crown, which encompassed the dominions of empire. His bemusement may have increased by the invention of the Crown’s divisibility after various British dominions adopted the Statute of Westminster 1931 during the 1930s and 1940s. This statute codified the divisibility of the Crown, for previously semi-independent states known as dominions to become independent nation-states with their own Crowns. The Queen is now the head of state of 16 realms, each with its own Crown. However, some realms have even divided their own

<sup>4</sup> As Anthony Bradley noted (Interviews, 2016), there are a few instances in English public law where the State is referred to, such as State secrets and the pensions of civil servants of the State (see Bradley, Ewing and Knight 2015).



Crowns. For instance, as we discovered in the course of our investigations, the number of Crowns in Australia is still a matter of some dispute. Each state has its own Crown, and state governors are appointed by the Queen on the advice of individual state premiers (Stokes 1998; Twomey 2008). The Northern Territory and Australian Capital Territory (ACT) are not states but have their own separate body politics, and Norfolk Island has its own executive, so Australia arguably has at least nine Crowns including its federal one (Twomey 2008: 7). In Canada's federal arrangements, by way of contrast, there are separate Crowns for each province, but it is only the governor-general who is appointed by the Queen on the advice of the federal prime minister. Lieutenant governors of each province are viceregal representatives appointed by the governor-general on the advice of the prime minister without the involvement of the Queen. The commissioners of Canada's three territories represent the federal government, not the sovereign.

In New Zealand, as in other former British colonies, the Crown appears as an abstract, polysemous entity which, like the state, is positioned both 'above' society yet within it. Like other 'key symbols' (Ortner 1973) it has a spectrum of meanings that are fluid, condensed, polyvalent and ambiguous. Historically, the Crown embodied the British Empire; today it serves more as a compendious cloak for aligning contemporary governmental authority with the trappings of archaic ceremonies, rules and meanings (Boyce 2008; McLean 2008). Cox (2008a) calls it the 'conceptual placeholder' or proxy for the state and highlights its shifting connotations. But if the Crown is a proxy for state authority with fluid and shifting meanings, what is the nature of that authority? How and when do those meanings shift? Who 'speaks' for the Crown, and where does it begin and end? For example, does it refer to the executive branch of government, or does it include the courts, Parliament, local government, provinces and states? How does this ambiguity affect those who have to deal with the Crown in its different guises? And what remains of the doctrine of the 'indivisibility' of the Crown, or the idea of 'Crown immunity', the historic doctrine that the 'Crown can do no wrong'?

### Hidden in Plain Sight

Despite major interest in the history of the Crown and its legal status (Sunkin and Payne 1999; Twomey 2006; Boyce 2008; Cox 2008b; McLean 2012), there have been few comprehensive accounts of the Crown as a socio-political institution and cultural entity. This is an important



omission, for while the Crown is a familiar icon and commonly used idiom in many Commonwealth countries, particularly New Zealand, Australia, Canada and the UK, it is also a constitutional enigma with confusing and often contradictory meanings. In New Zealand, for example, most people assume that they know what the Crown is and therefore seldom bother to think about it. It is treated as a given: it is the ultimate source of legal authority; it is the head of state; it is an institution with a history that connects the country all the way back to the Westminster model of government, to British colonialism, to Queen Victoria and the British Empire, and ultimately back to the divinely anointed kings of medieval England. It is a fundamental organising principle of New Zealand society (and Canadian, Australian and British society for that matter), and a major actor in the nation's political life. In New Zealand, the media refer to the Crown almost daily. It is mentioned in the context of the courts and criminal prosecutions, state finances, trade deals, land and resource use, oceans, rivers, lakes and seabed, as well as relations with indigenous peoples. In each of these instances, the Crown acts, negotiates, thinks, agrees, arbitrates, argues and articulates particular dispositions. In short, it is an actor as well as an *actant* in the actor-network theory sense of that term, i.e., an object in a network which, although 'silent and invisible', nevertheless 'acts or shifts actions' and performs tasks (Callon 2002: 63).

Yet the Crown is also inherently ambiguous and chameleon-like (Twomey 2006). Despite its high public visibility and its seeming omnipresence, it typically passes unnoticed or misrecognised. As we found repeatedly in the course of our fieldwork<sup>5</sup> in New Zealand, Australia, Canada and the UK, most people when asked struggled to define the institutions of the Crown beyond simple associations with Queen Elizabeth and the monarchy. Those that did tended to regard the Crown as obsolete, residual and largely irrelevant to contemporary life. At the same time, the symbols of the Crown are everywhere present (see Figures 1.2–1.6). It is the first thing a visitor sees when arriving at the airport in these four countries: it is there on the uniforms of border security officials and customs control officers; on the gateways through which returning citizens or visitors enter the country; on the face of coins and on banknotes in their wallets. The Crown features on the coat of arms; it is on the logos and lapels of the country's police, armed forces and courts.

<sup>5</sup> Details of our methodology and research methods for this study are outlined later in this chapter.

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**Figure 1.2** Crown on the badge of Australian police uniform, Sydney, Anzac Day, 25 April 2015  
(Sally Raudon)