*Leslie Zines**

THE NATURE OF THE COMMONWEALTH

THREE recent cases concern the nature of the federal union created by the Constitution. They are *Kruger v Commonwealth*,[1] *Newcrest Mining (WA) Ltd v Commonwealth*[2] and *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority*.[3] The first two deal (for present purposes) with the relationship of the Territories to the rest of the Commonwealth. The third case involves the relationship of State legislative power to the Commonwealth Government. In a sense, to talk of a relationship begs the question because there are arguments that in each case there is little or no relationship, but rather a barrier, between them.

THE TERRITORIES

Cases on the Territories power reveal two polar views. Early cases applied a "disparate power" theory under which s55 and s80 of the Constitution were held inapplicable to laws under s122.[4] This led later courts to hold that s72 (providing for the tenure of federal judges) did not apply to Territory judges[5] and that the Supreme Court of the ACT was not a court exercising federal jurisdiction, which meant that no appeal lay to the High Court under s73 of the Constitution.[6] In *Teori Tau v Commonwealth*[7] a unanimous Court held that s51(xxxi) did not operate in the Territories so as to require "just terms" for an acquisition of property by the Commonwealth.

The reasoning in these cases is totally at odds with that of Dixon CJ and Kitto J in *Lamshed v Lake*.[8] That case upheld the power of the Commonwealth to make laws under s122 which operated in the States. Those judgments emphasised the integration of the Territories with the Commonwealth and of s122 with the rest of the Constitution.

These different approaches were mirrored in the various judgments in both *Kruger* and *Newcrest*. The disparate power theory is clearly set out by Dawson J with substantial support from Brennan CJ and McHugh J.[9] It is most trenchantly assailed by Gummow J,

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1 (1997) 190 CLR 1.
2 (1997) 147 ALR 42.
3 (1997) 146 ALR 495.
4 *Buchanan v Commonwealth* (1913) 16 CLR 315; *R v Bernasconi* (1915) 19 CLR 629.
5 *Spratt v Hermes* (1965) 114 CLR 226.
6 *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.
7 (1969) 119 CLR 564.
8 (1958) 99 CLR 132.
9 Brennan J, however, did not express any view on the relationship of s122 to s116.

and generally supported by Toohey, Gaudron and Kirby JJ.[10] The issue was discussed in *Kruger* in respect of the application to the Territories of, inter alia, implied freedoms, s116 and Chapter III, and in *Newcrest* in respect of the acquisition power. Because a number of judges in *Kruger* did not feel obliged to determine all of these issues, the only positive holding for present purposes is that in *Newcrest.* That case stands for the proposition that s51(xxxi) applies to a law of the Commonwealth for the acquisition of property for a purpose included in s51, whether or not it is also authorised by the Territories power.

As was the position in the infamous case of *Dennis Hotels Pty Ltd v Victoria,*[11] the reasoning of only one judge conforms in its entirety to the ratio in *Newcrest*, namely that of Toohey J. The other six judges were evenly divided. Gaudron, Gummow and Kirby JJ held that s51(xxxi) applied to all Commonwealth acquisition laws made under s122. Brennan CJ, Dawson and McHugh JJ held to the contrary and followed *Teori Tau.*

One big hurdle in regarding s122 as isolated from s51(xxxi) and other constitutional limitations is the decision in *Lamshed v Lake*, followed in the *Western Australian Airlines Case,*[12] holding that s122 laws may operate in the States and are "laws of the Commonwealth" for purposes of s109. If *Lamshed* is applied, a law authorising the acquisition of property in a State for Territory purposes, such as a tourist or trade office, would be ordinarily characterised as a law for the government of the Territory. If s122 is not restricted by s51(xxxi) it would follow that persons in a State, or a State government, could be deprived of property without just terms. Similar objections could be made in respect of s122 laws operating in States that would otherwise be in breach of s80, s116 or Chapter III.[13] If the reasoning in *Lamshed v Lake* is accepted, therefore, it becomes difficult to argue that s122 is a disparate non-federal power or that constitutional limitations and guarantees do not apply.

In both *Kruger* and *Newcrest* Dawson J argued strongly that s122 was not subject to express or implied limitations in the Constitution. He expressed disagreement with the reasoning in *Lamshed v Lake* and showed dislike for the *Western Australian Airlines Case.*[14] He did add, however, that he did not have to decide the issue and it remained open. Just as the constitutional power of a State does not extend to making laws operating in other States, so, Dawson J said, s122 was similarly confined. It followed that s109 was irrelevant to s122, as were various restrictions on federal power such as s116. The Commonwealth could not therefore acquire property in the States under s122.

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10 Kirby J was not a member of the court in *Kruger*, but he was in *Newcrest.*

11 (1960) 104 CLR 529.

12 *Attorney-General (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492.

13 Zines, "Laws for the Government of any Territory: Section 122 of the Constitution" (1966) 2 *Fed L Rev* 72.

14 *Kruger v Commonwealth* (1997) 190 CLR 1 at 55-58, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 67-70.

On the issue of the extra-territorial operation of s122 laws, Brennan CJ and McHugh J were rather ambiguous. McHugh J accepted *Lamshed v Lake* and *WA Airlines* and Brennan CJ said he agreed with Dixon CJ, except that the scope of s122 "needs to be stated in more restricted terms".[15] Yet their reasons for holding that s122 did not authorise the acquisition of property in a State were diametrically opposed to Dixon CJ's concept of a national legislature exercising power to make laws "binding ... wherever territorially the authority of the Commonwealth runs".[16] They both relied on the analogy of the principle of non-recognition of a country's extra-territorial acquisition laws in other sovereign countries or, as it was put, "in another jurisdiction".[17] However, Dixon CJ had said that the Territory was not governed as a "quasi-foreign country".[18] The "jurisdiction" of the Commonwealth Parliament was all of Australia.

The views of Brennan CJ, Dawson and McHugh JJ were also bolstered by inconclusive textual arguments emphasising the presence in s51 of the phrases "peace order and good government of the Commonwealth" and "subject to this Constitution" and their absence in s122. That line of reasoning did not, of course, prevent s96 being subject to s116[19] or s122 being subject to s90.[20]

Having regard to both *Kruger* and *Newcrest*, it is clear that a majority of the court favoured the "integrationist" view of Dixon CJ over the "disparate power" theory.

The most powerful judgment expressing this view is, in my opinion, that of Gummow J in *Kruger*, developed further in *Newcrest.* In *Kruger* there was, perhaps, no need for him to discuss this issue as he found that the legislation did not breach s116, Chapter III, or the implied freedoms derived from representative government, even if they were applicable in the Territories. Nevertheless he fully set out his view as to the place of s122 in the framework of the Constitution. His reasoning is similar to that of Dixon CJ but is more developed.

The power is conferred on the Commonwealth as the national legislature. This is made clear by clause 5, which renders the Constitution binding on the courts, judges and people not merely of every State, but also "of every part of the Commonwealth".[21] The Constitution is therefore one coherent and integrated instrument for the government of the Commonwealth. Any Commonwealth laws, including those made under s122, may operate throughout Australia, and s109 renders inconsistent State laws inoperative.

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15 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 58, 91.
16 *Lamshed v Lake* (1958) 99 CLR 132 at 141.
17 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 91-92.
18 (1958) 99 CLR 132 at 143-144.
19 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559.
20 *Capital Duplicators Pty Ltd v ACT* (1992) 177 CLR 248.
21 *Kruger v Commonwealth* (1997) 190 CLR 1 at 163.

When s111 provides that territory surrendered by a State shall become "subject to the exclusive jurisdiction of the Commonwealth", it refers to the legislative, executive and judicial powers of the Commonwealth under the Constitution. It should follow that Chapters II and III determine the executive and judicial powers. It also follows that limitations on federal legislative powers should apply.

Nevertheless, as mentioned earlier, there are cases of long standing based on the disparate power theory which distinguish between federal and Territory courts and jurisdiction. It followed, as was held, that there was no constitutional provision for appeal to the High Court from Territory courts. Gummow J deplored this result and regarded it as inconsistent with the object of Chapter III.

Gaudron J's view was generally similar in respect of constitutional guarantees and Chapter III, but she suggested that a distinction might be made between laws of the Parliament or its delegate and those made by the legislature of a self-governing Territory.[22]

Toohey and Kirby JJ also regarded s122 as subject to constitutional guarantees and were of the view that the cases on the relationship of s122 and Chapter III were probably wrong[23] or required reconsideration.[24]

It was said in *Lamshed v Lake* that not only does s122 operate in the States, but many powers in s51 operate in the Territories. That was accepted by the majority. Indeed, Gummow and Gaudron JJ suggested that some laws operating in the Territories could only be supported under s51. Gummow J said that "[a] law providing for the recruitment in the Territory of personnel for the defence forces would not be a law for the government of the Territory. It would be a law for the defence of the Commonwealth and be supported by s51(vi)."[25] He did not deny however that the law in *Newcrest*, although supported by the external affairs power, was also within s122. Gaudron J went further and said that it was "unlikely that an Act of general application throughout the Commonwealth will also be a law passed pursuant to s122. And so it is in this case."[26] She went on, however, to deal with the case on the basis that it was also a law within s122. In doing so she interpreted s51(xxxi) in a manner that was accepted by the other three majority judges.

Gaudron J said that if a law is supportable by a purpose under s51, s51(xxxi) operates to require just terms. The fact that the law may also have another purpose, not included in

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22 At 108-109. Gaudron J accepted a distinction between Territories and States, but it had a result opposite to that of Dawson J. As the Territories were not guaranteed representative government, the argument in the *Engineers' Case* (1920) 28 CLR 129 that one should rely on the political process to correct abuse was not applicable. Therefore, she saw more reason to enforce guarantees in the Territories than elsewhere (at 107).

23 At 83.

24 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 147.

25 At 106.

26 At 76. See also *Kruger v Commonwealth* (1997) 190 CLR 1 at 103.

s51(xxxi), is irrelevant. While Gaudron, Gummow and Kirby JJ all went further and held that s122, itself, was restricted by s51(xxxi), Toohey J did not take that step. He rested his decision on the more restricted principle formulated by Gaudron J, which he thought consistent with *Teori Tau*. The Act as a whole was supported by the external affairs power; therefore, just terms was a necessary requirement for an acquisition, whether or not it was also for the government of the Territory.[27] This is, therefore, the ratio of the case.

Toohey J went on to say that it was unlikely, in view of Northern Territory self-government, that any acquisition by the Commonwealth would fall outside s51. Therefore, as a practical matter, overruling *Teori Tau* would not be likely to have any future consequences. This somewhat cryptic remark seems to suggest that acquisitions by the government of the Territory would not be protected by s51(xxxi). It is, however, difficult to see why at least some acquisitions by the Territory should not be for purposes within s51, such as a department of external trade, a statistics office, a territory bank or radio station, or housing for immigrants or Aborigines.

It may be, however, that Toohey J is supporting a view, alluded to by Gaudron J as a possibility, that a law of the Territory legislature is not a law of the Commonwealth for the purposes of s51(xxxi), s116 or Chapter III. This view obtains some support from *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)*.[28] But that decision was based on the proposition that to treat ACT laws as an exercise of federal legislative power would destroy a central objective of the federal compact and defeat the express requirements of s51(iii).[29] That result, however, would hardly follow if Territory laws were made subject to constitutional restraints on the Commonwealth.[30] On the other hand, to distinguish a law made by a Territory legislature from one made by the Commonwealth Parliament or its delegate would defeat the whole object of the argument that Chapter III provides for a national judicial system. It would mean that the courts of self-governing Territories (but not other Territories) would remain outside Chapter III and matters relating to laws of a Territory legislature would not arise "under any laws made by the Parliament" within s76(ii). There would be no appeal to the High Court under s73. The reasoning in *Kable v Director of Public Prosecutions (NSW)*[31] would remain inapplicable to Territory Supreme Courts. In *Kruger,* Toohey and Gummow JJ, in referring to s122 and Chapter III, made no distinction between laws of the parliament or its delegate and laws of a Territory legislature; nor did Kirby J in *Newcrest.*

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27 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 71-72.

28 (1992) 177 CLR 248. It was held that an excise duty levied by a law of the Australian Capital Territory was inconsistent with s90, which renders the power of the Commonwealth Parliament to impose such duties "exclusive".

29 At 279.

30 Cf *Svikart v Stewart* (1994) 181 CLR 548.

31 (1996) 189 CLR 51.

To adopt the distinction would destroy much of the significance of the reasoning of the majority in favour of an "integrational" approach. It would certainly impair the force of the reasoning of Gummow J (and of him and McHugh J in *Kable*) that Chapter III, and s73 in particular, is designed in part to ensure that the High Court has superintendence of the whole of the Australian judicial structure and is the ultimate interpreter of a national common law.[32] If Chapter III applied only to the courts and laws created or made under s122 directly by parliament, or by its delegate such as the Governor-General in Council, the overruling of the earlier cases would have only minor significance.

While some judges, such as McHugh J, were concerned to equate self-governing Territories with States,[33] they can never be in the same position for present purposes. The people of the States are protected from Commonwealth action by a number of constitutional provisions. They do not have the same protection from State action. No possible interpretation of s122 is going to produce the same result as far as the people of the Territories are concerned. A full integration theory applies the restrictions to all legislative action. The "disparate power" theory results in their application to no legislative action.

Drawing a distinction between the Parliament and Territory legislatures produces similar results for the States in respect of some provisions, eg s116 and s51(xxxi), but not when it comes to Chapter III. It is in relation to Chapter III that the case law, based on the disparate power theory, has produced what I have referred to elsewhere as "baroque complexities and many difficulties",[34] all to no useful social end.

STATE LAWS AND THE COMMONWEALTH

Commonwealth v Cigamatic Pty Ltd[35] was decided more than 35 years ago. Until 1997 it does not seem to have been applied in any High Court case (although it has from time to time in other courts). All attempts to have it reconsidered, explained or overruled were avoided, partly by the High Court giving a broad and substantive interpretation to s64 of the *Judiciary Act* 1903 (Cth), which provides, inter alia, that in any suit in which the Commonwealth is a party, "the rights of the parties shall, as nearly as possible, be the same ... as in a suit between subject and subject."[36]

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32 *Kruger v Commonwealth* (1997) 190 CLR 1 at 175.

33 McHugh J said that if the self-governing Territories were subject to s51(xxxi) they would "be in an inferior position to the States" which are not so restricted: *Newcrest* (1997) 147 ALR 42 at 83. It could be argued that the residents of those Territories would be in a superior position to State residents so far as their rights are concerned

34 Cowen & Zines, *Federal Jurisdiction in Australia* (Oxford University Press, Melbourne, 2nd ed 1978) p172.

35 (1962) 108 CLR 372.

36 *Maquire v Simpson* (1977) 139 CLR 362; *Commonwealth v Evans Deakin Industries* (1986) 161 CLR 254.

That, however, did not prevent the issue spawning a large academic following. The very first academic paper I presented and the first constitutional law article I wrote, in 1964, were on that subject. In 1968 it took up a large part of Colin Howard's book. It occupied many pages in all editions of works by Lane, Hanks and myself. In the meantime it provided the subject of many hefty articles and chapters by Geoffrey Sawer, Roderick Meagher, Bill Gummow, Gareth Evans, Colin Howard, Dennis O'Brien, John Doyle, and others[37] (and no doubt many student essays and research papers). If High Court cases were any guide, it could be argued that the amount of intellectual effort exerted was disproportionate to its practical significance. However, the possibility of a statutory repeal or amendment of s64 and the case of *Pirrie v McFarlane*[38] were constant reminders that the matter might again become of great importance. The issue also had considerable theoretical appeal concerning, as it did, the concept of a federation or, at least, the nature of our federation.

In *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority*[39] the Court was faced with an issue of the binding effect of a State law on a Commonwealth body in circumstances where, it was argued, s64 was inapplicable. A federal statutory body, the Defence Housing Authority, which under its Act had taken leases of property for the use of defence personnel, was the subject of an application for an order by the Residential Tenancies Tribunal of NSW to allow the owners to inspect the premises and give them a key for that purpose. The Authority argued that it was not subject to the Tribunal's orders because of, inter alia, the principle in *Cigamatic*. It was held or assumed by the various judges that the proceedings before the Tribunal did not constitute a "suit" under s64 because it was not a judicial body. The Authority was held subject to the power of the Tribunal, with Kirby J dissenting on other grounds. McHugh and Gummow JJ decided the case on the ground that the Authority was not entitled to the privileges and immunities of the Commonwealth and, therefore, *Cigamatic* had no application, but they did go on to discuss it. A majority of the Court held that the application of the State Act to the Commonwealth did not contravene the principle in *Cigamatic* as interpreted by them.

The main judgment was a joint one of Dawson, Toohey and Gaudron JJ. Brennan CJ's judgment was substantially to the same effect, with some variations. In the upshot, only Kirby J would have overruled *Cigamatic*.

In *Cigamatic* it was held that the Commonwealth was not bound by State companies legislation which purported to alter the Commonwealth's prerogative right to priority on the winding up of a company. A majority of the Court followed an earlier dissenting

37 A bibliography is contained in Blackshield, Williams & Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, Sydney 1996) pp602-603.

38 (1925) 36 CLR 170. It was held that a member of the air force was subject to State law relating to driving licences while driving a vehicle in the course of his duty.

39 (1997) 146 ALR 495.

judgment of Dixon J in *Uther v Federal Commissioner of Taxation.*[40] In *Cigamatic* Sir Owen Dixon had said that a State could not derogate from the rights of the Commonwealth with respect to "its people" or "its subjects".[41]

Nine years earlier in *Bogle v Commonwealth*[42] Fullagar J, in a judgment with which Dixon CJ, Webb and Kitto JJ agreed, said in a passage that was obiter that a State parliament had no power to bind the Commonwealth.

In these and other cases, Dixon CJ and Fullagar J gave examples where the Commonwealth, although not bound by State law, could be affected by it if it chose to enter into a transaction. The examples consisted of Acts relating to the general law of contracts, sale of goods, and companies.[43] These provisions were regarded as only incidentally affecting Commonwealth administrative action, contrasting with those that purported to control its governmental rights and powers. Over the decades there was much discussion of the distinction between laws that purported to bind the Commonwealth and those that merely affected it.

The joint judgment in *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* purported to follow *Cigamatic*, while declaring that the dicta in *Bogle* was wrong, inconsistent with *Cigamatic* and that Dixon CJ and Kitto J could not possibly have agreed to the broad proposition asserted by Fullagar J.[44] This is a rather extraordinary statement. Fullagar J's comments were clear and sweeping and attracted attention. Dixon CJ's expressed agreement was unqualified, and in *Brown v Federal Commissioner of Taxation*[45] in 1959 he seemed to make it clear that those comments were consistent with his dissenting judgment in *Uther*.

However that may be, a majority of judges rejected the distinction between "binding" and "affected" and substituted a distinction between "the capacities of the Crown on the one hand, by which we mean its rights, powers, privileges and immunities, and the exercise of those capacities on the other".[46] The former were immune from State control; the latter were not.

The supposed nature of a federal state played a part in the reasoning of most of the judges. The joint judgment and that of McHugh J accepted the proposition expounded by Dixon J

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40 (1947) 74 CLR 508.
41 (1962) 108 CLR 372 at 377, 378.
42 (1953) 89 CLR 229 at 259-60.
43 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 308; *Commonwealth v Bogle* (1953) 89 CLR 229 at 260; *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 528.
44 (1997) 146 ALR 495 at 513.
45 (1959) 100 CLR 32 at 41.
46 (1997) 146 ALR 495 at 508.

in *Melbourne Corporation v Commonwealth*[47] and in *Uther*[48] that in a federal system one government can make laws affecting the executive capacity of the other federal partner only if power is clearly conferred to enable that to be done. As the States are not given express powers the initial federal assumption of immunity is preserved.[49]

The joint judgment takes Dixon CJ's statement that the States cannot define or regulate the rights etc of the Commonwealth in relation to its subjects, and interprets it in the following way. If the relationship with its subject is one of privilege or immunity, that is it is based on prerogative, the States cannot alter it. If the relationship is one of equality (eg the power to contract) the States may not put the Commonwealth in a less favourable position than others. Otherwise the States may pass general laws which bind the Commonwealth and subjects alike. The conclusion that the Crown and its agents enjoy no special immunity from the operation of general State or federal laws was said to be required by the rule of law (a proposition denied by McHugh J). *Pirrie v McFarlane*[50] and *A v Hayden*[51] were seen as affirmations of that principle. The joint judgment agreed with Fullagar J in *Bogle* that a State could not have made the Commonwealth liable in tort, but gave as a reason that the immunity was a prerogative of the Crown analogous to the prerogative right in *Cigamatic*.[52]

This reasoning suggests that Commonwealth immunity is confined to State laws affecting the prerogative and those that discriminate against the Commonwealth. But the judgment makes it clear that the immunity extends to all Commonwealth *capacities* whether based on a prerogative power or not.[53]

Brennan CJ agreed with the capacity/exercise distinction. A State, he said, cannot "burden" the executive power of the Commonwealth; but that power, "exercised by its choice to enter the transaction, is not affected merely because the incidents of the transaction are prescribed by State law".[54]

The principle expounded in this case does nothing to remove uncertainty in this area of the law. The distinction between a law affecting "capacity" and one regulating the exercise of that capacity seems to raise difficulties at least as great as the binding/affecting dichotomy.

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47 (1947) 74 CLR 31 at 83.
48 (1947) 74 CLR 508 at 529-30.
49 (1997) 146 ALR 495 at 509, 518.
50 (1925) 36 CLR 170.
51 (1984) 156 CLR 532. In that case the court assumed that officers of the Australian Security Intelligence Service were subject to the criminal law of Victoria while carrying out an "exercise" at a Melbourne hotel.
52 (1997) 146 ALR 495 at 514-515.
53 At 510.
54 At 499.

So far as the prerogatives are concerned the position is reasonably clear. The problem arises with executive power which the Crown shares with other persons where the State law does not discriminate against the Commonwealth. It seems that a law can have general operation and yet deny or impair the executive capacity of the Commonwealth, eg to enter into a contract.

In referring to laws which may apply to the Commonwealth the joint judgment uses phrases such as "regulate" activities in which the Crown may choose to engage.[55] The judges said of the State Act in that case that it "neither alters nor denies" the capacity of the Commonwealth, but "regulates its exercise". Brennan CJ said that Commonwealth capacity was not burdened merely because State law prescribes the "incidents of the transaction" which the Commonwealth chooses to enter.[56]

This is slippery ground. For those who had to struggle with the case law on s92 before 1988, the distinction between a "regulation" and a "burden" and that between a law operating on a transaction and one merely affecting its incidents is familiar if not clear. The water became further muddied when it was said that a law which appeared to affect an incident of a transaction or to regulate the transaction might in fact burden or prevent the right to enter into the transaction itself because it was a circuitous device to that end.[57] The explanations given by the Court were not always satisfactory or even understandable. At times the conclusion seemed to be produced by intuition or ideological preference. Disagreement among the judges as to whether a law regulated a transaction or burdened the trader arose in respect of a multitude of laws.

Some of the same type of difficulty seems involved in the principle applied in this case. Matters of some doubt include town planning laws, landlord and tenant legislation, health and safety rules, building codes, and hire car legislation.

One major problem is the issue of administrative discretion. In the s92 cases broad administrative discretions were seen as usually outside the field of permitted regulation, particularly where the courts could not adequately ensure that the discretion was not used to discriminate or otherwise result in a breach of the Constitution.[58] A similar issue could arise in respect of discretions under State law that could be used to discriminate against the Commonwealth or impair its executive capacity.

It is difficult to see how the matter can be resolved in many cases without some balancing of the interests of the Commonwealth, on the one hand, and the social interest which constitutes the object of the State law (such as health or safety) on the other. Whether the

55 At 508, 515.
56 At 499.
57 Zines, *The High Court and the Constitution* (Butterworths, Sydney, 4th ed 1997) Chapter 7.
58 For example, *Hughes and Vale Pty Ltd v NSW (No 2)* (1955) 93 CLR 127.

means adopted to achieve the object are suitable could also be relevant. As *Pirrie v McFarlane* has been upheld, it is likely that a law making it an offence to drive an unsafe vehicle could apply to a federal driver driving in the course of his or her duty.[59] But what if the use of a vehicle requires the approval of a State inspector?[60] Would that impair the capacity of the Commonwealth government to operate, say, a bus service from international airports to the city?

A further problem relates to statutory offences. The joint judgment does not discuss that, but presumably if the law is characterised as a regulation of a transaction that the Commonwealth can choose to enter into, the law will bind federal servants in the course of their duty, otherwise not. *Pirrie v McFarlane* is supported on this basis. The Commonwealth itself cannot be made liable. Indeed Brennan CJ described this as "meaningless"[61] and Gummow J said it "would be to enter into another dimension".[62] Clearly, as in the case of tort, the special position of the Crown would be affected by such a provision.[63]

It seems clear, however, that Brennan CJ would give broad power to the States. He said that "it may not be necessary to attribute a substantive operation to s64 if the full import of what Dixon CJ said in *Cigamatic* is appreciated".[64] Section 64 has been and could be applied to a large range of matters. It does not, unlike *Cigamatic*, raise, to the same degree, federal issues. Not all the applications of s64 would be described by everyone as a mere regulation of transactions that the Commonwealth has chosen to enter into, such as the State laws in *Strods v Commonwealth*[65] or in *Commonwealth v Evans Deakin Industries*[66] itself. It seems to me, however, from the tone of the joint judgment and the above remarks of Brennan CJ that the majority intended that, as a general rule, the Commonwealth would be subject to State laws that applied to it and others.

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59 This example is included in a number of unanswered questions asked by McHugh J, (1997) 146 ALR 495 at 521.

60 In discussing s64 of the *Judiciary Act*, Dennis Rose has suggested, for example, that it is inappropriate for Commonwealth contractual activities to be subject to the approval of State inspectors: Rose, "The Government and Contract" in Finn (ed), *Essays on Contract* (Law Book Co, Sydney 1987) p238.

61 (1997) 146 ALR 495 at 499.

62 At 534-535.

63 There is some difficulty in this respect in Brennan CJ's judgment. He said that Commonwealth servants were (in the absence of inconsistent federal legislation) bound by State criminal law because there was no prerogative to dispense the servant from liability (at 499). He was not distinguishing general criminal law from statutory offences because he concluded from the principle that *Pirrie v McFarlane* was rightly decided. Presumably, however, the law would not apply to Commonwealth servants if its capacity was thereby impaired.

64 At 500.

65 [1982] 2 NSWLR 182.

66 (1986) 161 CLR 254.

Kirby J rejected *Cigamatic* and *Bogle* and held that the Commonwealth's immunity from State law was the same as State immunity from Commonwealth law as developed in cases from *Melbourne Corporation v Commonwealth*[67] to *Re Australian Education Union; Ex parte Victoria.*[68] These principles prevent the Commonwealth from discriminating against the States (in the absence of an indication to the contrary) and from impairing the capacity of a State to function as an independent government. While those principles are not crystal clear, they are less opaque and less liable to manipulation than those propounded by the majority in this case.

I have elsewhere argued for an approach similar to that taken by Kirby J. At the root of all discussion of this issue is, of course, a clash of interests and their reconciliation. In *The High Court and the Constitution*[69] I emphasised that the Commonwealth Government was a large factor in many areas of economic and social activity. To exclude the Commonwealth from the operation of State legislation controlling those matters could seriously damage its effectiveness. I suggested therefore that the onus should be on the Commonwealth Parliament to decide when and in what respects countervailing federal interests should prevail. For many, however, other considerations are more important, such as the difficulty of parliament acting in time to deal with a threat to some important federal policy, the inconvenience of the government having to cope with a patchwork quilt of regulations and the fact that those regulations, or State officials exercising administrative powers, may have no regard to federal concerns. In weighing up these considerations it has always seemed to me that the powerful weapon of s109, which the Commonwealth possesses, should be a very important factor.

All that may now seem to be water under the bridge. But the criteria established by *Residential Tenancies* are sufficiently broad and vague for their interpretation to be affected by the same sort of policy preferences. The development of the principle in that case will no doubt be influenced by whether a judge leans towards mutuality and a concern for State statutory objects or whether the problems the Commonwealth faces are to be the predominant consideration. The distinction between "capacity" and "exercise" and "regulation" and "burden" provides much room for different policies and perceptions.

67 (1947) 74 CLR 31.
68 (1995) 184 CLR 188.
69 Zines, *The High Court and the Constitution* p364.