RETHINKING COMMONWEALTH IMMUNITY

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Mr Evans here makes an interesting contribution to the learning regarding Commonwealth immunity from State legislative action, a problem which has prompted many and varied theories to be expounded over the years since federation. This article takes the form primarily of a comment on and a reply to an article by Professor Colin Howard which will be published in the near future. The present article takes a searching look at the 'total immunity' theory and the problems which that theory raises, and proceeds to an exposition of an alternative theory preferred by the author—that of 'prerogative immunity', which holds that the Commonwealth enjoys no inherently superior position by virtue of any implications to be derived from the terms of the Constitution or the nature of the Australian federal system.

It is an unfortunate feature of Australian constitutional argument that the shortest answers are rarely the most acceptable. This has become particularly apparent in the context of State power to bind the Commonwealth. This paper argues the case for a simplified interpretation of the law in this area. It is a reaction in particular to Professor Howard's recent article on the subject.[1]

The problem is fundamental to Australian constitutional theory but for years it lay dormant, apparently resolved in favour of the States. The *Engineers'* case[2] was decided in the specific context of Commonwealth power to bind the States, but it seemed to establish clearly enough the general proposition that legislative powers exercised by any government in the federation were not to be limited by implications that they could not embrace any other government or its instrumentalities. *Pirrie v. McFarlane*[3] decided that State legislation could regulate the activities of the Commonwealth government's servants in the course of their employment. *Uther's* case[4] decided that State legislation could bind the Commonwealth in its capacity as a single right-claiming juristic entity. Provided the State law was directed to a subject matter within the State's own constitutional competence, and there was no inconsistent Commonwealth

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1 Howard, 'Some Problems of Commonwealth Immunity and Exclusive Legislative Powers' (1972) *Federal Law Review* (forthcoming). All references to Howard in this article are, unless otherwise stated, to this work.

2 *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

3 (1925) 36 C.L.R. 170.

4 *In re Richard Foreman & Sons Pty Ltd; Uther v. Federal Commissioner of Taxation* (1947) 74 C.L.R. 508.

legislation in point, the Commonwealth and its instrumentalities were bound.

Or so it seemed. Doubt had been foreshadowed in a series of cases.[5] Then came *Commonwealth v. Cigamatic Pty Ltd*,[6] which overruled *Uther's* case,[7] and held State legislation incompetent to destroy or modify the prerogative right of the Crown in right of the Commonwealth to claim priority for its debts in a company winding up.

On its facts, *Cigamatic*[8] was concerned only with the enjoyment by the Commonwealth of a particular prerogative right, and it is the argument of this paper that this is how it should be interpreted. However it seems now almost to be taken for granted, by academic[9] and judicial[10] commentators alike, that *Cigamatic*[11] re-established a doctrine of total immunity of the Commonwealth from State legislation. The Commonwealth cannot be bound by State laws: this follows as a matter of implication from the Constitution or at least from the circumstances in which it came into being. The problem, if any, tends now to be seen as lying not in the status or even the merits of the doctrine of Commonwealth immunity as such, but only in the working out of its implications: in particular accommodating the judicially stated 'qualification' that the Commonwealth may nonetheless be 'affected by' State laws.[12]

[5] See Dixon J.'s dissent in *Uther's* case *ibid.* 527, his earlier *dictum* in *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd* (1940) 63 C.L.R. 278, 308, and *dicta* in Fullagar J.'s judgment in *Commonwealth v. Bogle* (1953) 89 C.L.R. 229, 259-60 in which a majority of the court concurred. Other *dicta* in taxation cases indicate that (the effect of Constitution, s. 114 apart) the Commonwealth would be immune from State tax laws which singled out the Commonwealth or its servants in a discriminatory fashion; see *West v. Commissioner of Taxation (N.S.W.)* (1937) 56 C.L.R. 657, 668-9 (*per* Latham C.J.), 681-2 (*per* Dixon J.), 687-8 (*per* Evatt J.) and see further *infra* at nn. 60 and 138. The Commonwealth might be immune from any State tax law at all that was directed against it; see *Essendon Corporation v. Criterion Theatres* (1947) 74 C.L.R. I, 22-4 (*per* Dixon J.), 14 (less strongly, *per* Latham C.J.).

[6] (1962) 108 C.L.R. 372.

[7] (1947) 74 C.L.R. 508. In *Cigamatic,* Windeyer J. concurred in Dixon C.J.'s restatement of his *Uther* dissent; Owen J. agreed with Menzies J.'s separate judgment; Kitto J. had 'nothing to add' to the reasons of Dixon C.J. and Menzies J. Only McTiernan and Taylor JJ., dissenting, stood firmly behind *Uther.*

[8] (1962) 108 C.L.R. 372.

[9] See Howard, *op cit. passim* and *Australian Federal Constitutional Law* (1968) 87-99; Wynes, *Legislative, Executive and Judicial Powers in Australia* (4th ed., 1970) Ch. IX; Hogg, *Liability of the Crown* (1971) 227. Professor Sawer seems to remain an exception: his views are least cryptically expressed in the prescient article to which this paper owes much, 'State Statutes and the Commonwealth' (1962) I *University of Tasmania Law Review* 580. See also Sackville, 'The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis' (1969) 7 *M.U.L.R.* 15, 60-4 and Lane, *The Australian Federal System* (1972) 811-2 and note, (1971) 45 *Australian Law Journal* 425, 427-8.

[10] No case in point has in fact been litigated since *Cigamatic,* but note Barwick C.J.'s aside in the *Payroll Tax* case, *Victoria v. Commonwealth* (1971) 45 A.L.J.R. 251, 256, *infra* n. 19.

[11] (1962) 108 C.L.R. 372.

[12] *Infra,* n. 66.

This paper falls into three sections. In the first, three separate theoretical arguments for the total immunity view are identified and contested: the aim here is to show that the view, however formulated, rests on insecure foundations. In the second section, the analysis of difficulties in the total immunity view is taken a stage further: it is argued that the 'consequential problems' involved in accommodating with the total immunity view the doctrine that the Commonwealth may nonetheless be 'affected by' State law cannot satisfactorily be resolved. This section is basically in the form of a reply to Professor Howard's recent article,[13] simply because that article is the most lucid exposition to date of the consequential problems, and the most interesting attempt to resolve them within a systematic 'total immunity' theoretical framework. The thrust of the first two sections of the present paper is thus essentially negative, but in the course of the argument a number of propositions are developed for use as building blocks in the third and final section. This section is an attempt to present a theory of Commonwealth immunity in terms of the prerogative.[14]

It will be suggested that the only general immunity from State law which the Commonwealth enjoys by virtue of the Constitution is that which follows from its exclusive exercise of certain legislative powers. No other implied Constitutional immunities are enjoyed by the Commonwealth, be they derived from the terms of the Constitution, the circumstances of its enactment, or the nature of the federal system. The Crown in right of the Commonwealth does enjoy a degree of immunity in the exercise of certain prerogative rights, but this immunity is in principle enjoyed equally by the States, and is not founded on express or implied terms of the Constitution. State laws can apply of their own force to bind the Commonwealth, and those which purport to do so either expressly or by necessary implication and are within the States' own constitutional competence will have that effect. It will be submitted that *Cigamatic*[15] asserts no more than this, and that a reading of the law in terms of limited 'prerogative immunity' better accommodates the cases, and with less violence to hitherto received doctrine, than any 'total immunity' alternative.

This reading also achieves, it is submitted, a result that is sensible in practice. The Commonwealth is and should remain the dominant partner in the federal coalition. Its own legislative power, and constitutional ability to override inconsistent State law, ensures that it will not for long,

[13] Howard, *op. cit.*

[14] This is not claimed to be a new theory, rather a detailed working out of the suggestions of some previous writers to this effect. Sawer, *Cases on the Constitution* (3rd ed., 1964) 68, and Sackville, *op. cit.* 64 have both indicated that *Cigamatic* ought to be confined to the prerogative, but have not spelt out in any detail how in principle this might be achieved or what prerogative immunity might entail.

[15] (1962) 108 C.L.R. 372.

if at all, be inconvenienced by States seeking to hamper its activities. But at the same time there is no good reason why State law should not operate to govern its activities, rights and liabilities until it chooses to so act: this both avoids legislative vacuums[16] and encourages the rationalization of the law in situations where State laws conflict, are inadequate or inconclusive.[17]

The present writer confesses to a degree of impatience with the traditional analytic techniques he himself relies upon to produce these conclusions. But the Australian High Court has notoriously been insensitive, whatever the suppressed premises of its judgments, to considerations of practical political, social and economic utility. Brandeis briefs are inadmissible, and socio-politically oriented academic argument ignored. A constitutional lawyer who hopes to persuade must employ techniques which have a chance of so doing.

I THE 'TOTAL IMMUNITY' VIEW: THEORETICAL FOUNDATIONS

First Argument: Logico-Historical Impossibility

The best-known argument is that of Dixon J. in *Uther*,[18] that the States have no power at all, and never did have any power, to regulate the 'legal relations [of the Commonwealth] with its subjects'. Commonwealth immunity follows by logical implication from the historical circumstance that the Colonies did not have any such power at the moment prior to federation (the Commonwealth not then being in existence) and that the Constitution did not explicitly give it to the newborn States.[19]

Put so baldly, this argument has obvious weaknesses. Even assuming the Dixonian premise that the States and Commonwealth are distinct and independent juristic persons, which assumption runs counter in many respects to the doctrine of the indivisibility of the Crown[20] propounded in the *Engineers'* case,[21] it is not clear that this takes one very far. A State acquires power over *new* juristic entities every time a baby or company is born within its borders: the mere fact that the Commonwealth did not at one time exist does not in itself derogate from the States' capacity now to legislate with respect to it or its instrumentalities.

[16] *Cf.* the discussion of federal places law *infra*, at nn. 141-7.

[17] For a brief discussion of the implications of the majority decision in *Cigamatic* for debt priority law reform see Sawer, *Australian Federalism in the Courts* (1967) 203-4 and Sackville, *op. cit.* 63, n. 9, referring to the dissenting judgment of Taylor J. in that case, (1962) 108 C.L.R. 372, 388.

[18] (1947) 74 C.L.R. 508, 530.

[19] *Ibid.*, incorporated by reference in *Cigamatic* (1962) 108 C.L.R. 372, 378 *per* Dixon C.J. See also *Bogle* (1953) 89 C.L.R. 229, 259 *per* Fullagar J. Barwick C.J.'s *dictum* in the *Payroll Tax* case (1971) 45 A.L.J.R. 251, 256 may be construed as supporting this position: 'the inability of a State to make a law binding on the Commonwealth . . . derives from the fact that the Crown has not by the Constitution submitted itself to the legislatures of the States'.

[20] Discussed *infra*, pp. 528-9.

[21] (1920) 28 C.L.R. 129.

Further, the Constitution in terms[22] recognizes and preserves State constitutions, subject only to the provisions of the federal Constitution. The Commonwealth Constitution, though reserving some matters exclusively for the Commonwealth and providing that State laws may be overridden by inconsistent valid Commonwealth laws, is of course inexplicit on the question of general capacity to legislate with respect to the Commonwealth. The Constitution Acts of the various States grant to their legislatures quite general power to make laws, for example in New South Wales[23] 'for the peace, welfare and good government of New South Wales in all cases whatsover' and in Victoria[24] 'in and for Victoria in all cases whatsoever'. The plenary nature of State legislative power is modified only by the effect of the Colonial Laws Validity Act, not here in point, and the now much-refined[25] doctrine of extra-territorial legislative incompetence. But even giving full force to the extra-territorial limitation, as is probably still wise, it would seem that provided the Commonwealth activity in question is somehow 'locatable in space' within the area of a State, such that the State's legislation with respect to it may properly be characterized[26] as legislation for the good government of the State, there is no reason why the State law should not be validly applicable. Thus it might have been argued with respect to *Cigamatic*[27] itself that a State law regulating the priority of creditors (one of whom happens to be the Commonwealth) in the liquidation of companies within a State is perfectly capable of answering the description of a law for the peace, welfare and good government of the State, and accordingly ought to remain in force until displaced by an inconsistent Commonwealth law.[28] However it may be inappropriate to attempt to resolve every case in this way. What was in issue in *Cigamatic*[29] was not so much a Commonwealth 'activity', which might be notionally locatable in State territorial space, but rather a prerogative claim of right. Perhaps the nature of the Commonwealth claim in this case was such as to elevate it beyond State legislative competence. It is argued in Section III of this paper that the authority of *Cigamatic*[30] might be accepted by an explanation along these lines, which is by no means, as will be seen, a 'total immunity' explanation. But none of this derogates from the present submission, which is that a

[22] S. 106.
[23] Constitution Act 1902, s. 5.
[24] Constitution Act 1855, s. 1.
[25] There has been a progressive easing in the degree of connection with the territory of a State which a statute has been held to require to make it one for the peace, welfare and good government of the State concerned. See Lumb, *Constitutions of the Australian States* (3rd ed., 1972) 82ff. for a brief review of the cases. No case litigated in this context has concerned State legislation purporting to bind the Commonwealth.
[26] See further on this *infra* at n. 132ff.
[27] (1962) 108 C.L.R. 372.
[28] See Sawer, 'State Statutes and the Commonwealth' (1962) 1 *University of Tasmania Law Review* 586, and Sackville, *op. cit.* 62. This was the substance of the majority decision in *Uther* (1947) 74 C.L.R. 508: see especially *per* Latham C.J. at 521, *per* Starke J. at 525 and *per* Williams J. at 540.
[29] (1962) 108 C.L.R. 372.
[30] *Ibid.*

State can affect the Commonwealth by a law which does answer the description of one for the peace, welfare and good government of that State.

Second Argument: Federal Necessity

Another version of the total immunity view is possible. It may be that Dixon C.J.'s argument should not be put as baldly as hitherto. Perhaps the notion is that the relation between the States and the Commonwealth is of a different order from their relations with other juristic entities: the States are in a logically inferior position, not just by virtue of section 109 of the Constitution and certain Commonwealth legislative powers being exclusive, but because the Commonwealth was set up to govern the whole country and the States only to govern parts. Of necessity, the Commonwealth must be free to act in disregard of the States' legislation in all the classes of constitutional activity in which it, and its servants and agents, engage. Some tentative support for this reading may be found in Dixon J.'s remarks in *Uther*[31] to the effect that the Commonwealth has 'paramount' authority, but it must be regarded as a meaning which Dixon C.J. himself disavowed in *Cigamatic*:[32] 'It is not a question of making some implication in favour of the Commonwealth restraining some acknowledged legislative power of the State'. No doubt this was because such a reading conflicted too explicitly with the *Engineers'* case.[33] And the argument hardly stands well with the *State Banking* case[34] proposition that 'State governments . . . in respect of such powers as they possess under the Constitution, are not subordinate to the federal Parliament or Government'. It is reasonably clear, then, that whatever else was meant by the court in *Cigamatic*[35] there was no intention to revive the *D'Emden v. Pedder*[36] doctrine of Commonwealth immunity founded on implications from the nature of the federal relationship, *viz* the necessity of the Commonwealth government being able to exercise its powers without fetter, control or interference from the States.

Professor Howard, however, seems unwilling to let the matter rest there, finding this interpretation too superficial. He has said that 'the fundamental weakness in the original doctrine of implied immunity of instrumentalities was its being conceived of as reciprocal'[37] and now argues[38] that the necessity of the Commonwealth being free 'to perform its constitutional functions as gathered expressly or by implication from the Constitution' should be regarded as the rationale of the total immunity doctrine. This rationale, he

[31] (1947) 74 C.L.R. 508, 529-30. Possibly also in *West v. Commissioner of Taxation (N.S.W.)* (1937) 56 C.L.R. 657, but the context there was that of a hypothetical discriminatory State law, to which different considerations apply.

[32] (1962) 108 C.L.R. 372, 377.

[33] (1920) 28 C.L.R. 129.

[34] *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31, 50 *per* Latham C.J.

[35] (1962) 108 C.L.R. 372.

[36] (1904) 1 C.L.R. 91.

[37] Howard, *Australian Federal Constitutional Law* (1968) 99.

[38] Howard, *op. cit.* Part 2(1), 'Limit of Total Immunity'.

goes on, suggests a 'logically defensible limit' to that doctrine, *viz* that where the Commonwealth is acting beyond the scope of its constitutionally assigned functions, though still validly, it is no longer immune from State law. The example he gives is of the Commonwealth, supported constitutionally only by a section 81 appropriation, running an intra-state bus service for which State law demands a licence: because this activity is not a constitutionally assigned function, the Commonwealth will enjoy no immunity from the State licensing legislation—the scope of Commonwealth immunity depends on its rationale. Howard does not suggest that his argument is supported by authority, but it is doubtful that it could command acceptance in any event. No weight would seem to attach to a distinction between 'constitutionally assigned' functions and those which are merely, say, 'constitutionally permitted': Commonwealth activities are surely either constitutional or not. And it can make no difference (not that this is necessarily Howard's argument) that some functions are more obviously 'governmental' than others: the High Court has for long now discredited the distinction in other constitutional contexts.[39] More importantly, if there may be no *reason* for immunity and therefore no *immunity* when the Commonwealth is engaged in such fringe activities as running an intra-state bus service, why is there ever a reason for it to have such immunity as to its more central functions, given that it can nearly always move in to protect itself by enacting inconsistent legislation which will prevail under section 109? In much ordinary discourse there is a tendency to talk of 'logical necessity' when one is really just being emphatic about practicalities. Commonwealth immunity is not a logical necessity; still less is there a logically apparent limit to its extent. It may well be a practical necessity, but in that case it need only be repeated that the Commonwealth has the means, quite apart from reliance on any immunity doctrine, to achieve it.

Third Argument: Non-Assent

There is textual support for a third possible foundation for a 'total immunity' doctrine, assimilated to but not quite identical with Dixon J.'s 'logico-historical impossibility' argument discussed above. This is Fullagar J.'s *dictum* in *Bogle*.[40]

> If [a State statute] does purport to bind the Crown in right of the Commonwealth, then a constitutional question arises. The Crown in right of the State has assented to the statute, but the Crown in right of the Commonwealth has not, and the constitutional question, to my mind, is susceptible of only one answer, and that is that the State Parliament has no power over the Commonwealth.

The short answer to this is that the argument as stated surely works reciprocally, to protect the Crown in right of a State from Commonwealth

[39] Most recently in the *Payroll Tax* case (1971) 45 A.L.J.R. 251.
[40] (1953) 89 C.L.R. 229, 259. Dixon C.J., Webb and Kitto JJ. and on this point probably Taylor J. concurred in Fullagar J.'s judgment.

legislation to which it has not assented. 'What is sauce for the Commonwealth should be sauce for the States'.[41] But the States of course enjoy no such immunity.

A longer, and no doubt more controversial, answer may be founded on the doctrine of the indivisibility of the Crown: assent to statutes is notionally always that of 'the Crown', not just that of the particular 'unit' representative, be he Governor or Governor-General, and there is accordingly no *prima facie* reason why that assent should not be taken to extend over the whole area of the Crown's operations. One is by no means obliged to say that all State legislation necessarily has this extended effect. The Crown will not be bound in any of its capacities unless this is provided for expressly or by necessary implication.[42] And even if the statute does purport to bind the Crown, it may be either expressly or of its very nature strictly 'localized' in effect, in which case the assent of the Crown may be taken to extend only to the Crown in right of the State in question. This consideration has been formalized into the further well-established rule of construction that a reference to the Crown in a State statute shall be taken to mean the Crown in right of that State only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense.[43] But both these qualifications are of course perfectly consistent with the notion of indivisibility: the premise in each case is that the Crown's assent will be construed as extending to other governments when the legislation purports either expressly or by necessary implication to have this effect.

The doctrine of the indivisibility of the Crown was firmly established in the *Engineers'* case,[44] even if that case did recognise that '[t]hough the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different

[41] Sawer, 'State Statutes and the Commonwealth' (1962) 1 *University of Tasmania Law Review* 583.

[42] *Minister for Works (W.A.) v. Gulson* (1944) 69 C.L.R. 338, 356, (*per* Rich J.), 367 (*per* Williams J.). And see *Commonwealth v. Rhind* (1966) 40 A.L.J.R. 407, 412 (*per* Barwick C.J.). This may well be conceding more than is necessary. There is a strong counter-current of authority to the effect that this presumption exempts only the Crown in right of the legislating government, and that general words may *prima facie* bind the Crown in right of *other* governments. See *Gulson's* case (1944) 69 C.L.R. 338, 348-51 (*per* Latham C.J.), 359-62 (*per* McTiernan J.) and the views of those two judges in *Essendon Corporation v. Criterion Theatres Ltd.* (1947) 74 C.L.R. 1; also *Public Curator of Queensland v. Morris* (1951) 51 S.R. (N.S.W.) 402, 411 (*per* Owen J.) relying especially on *R. v. Sutton* (*The Wire Netting* case) (1908) 5 C.L.R. 789. The cases are discussed in Hogg, *op. cit.* 190-5. Certainly any narrower reading of the presumption helps rather than hinders the present writer's argument, which is that there are no *prima facie* limits on the capacity of any government in Australia to bind the Crown in right of any other. But let the argument proceed on the more accepted wider reading.

[43] *Essendon Corporation* (1947) 74 C.L.R. 1, 10 (*per* Latham C.J.), 26-7 (*per* Dixon J.), 29 (*per* McTiernan J.); *Bogle* (1953) 89 C.L.R. 229, 259 (*per* Fullagar J.). In *Johnson v. Lavender* [1952] S.A.S.R. 267, Reed J. went so far as to hold that a State statute *exempting* 'the Crown' (from insuring its vehicles) did not exempt the Crown in right of the Commonwealth.

[44] (1920) 28 C.L.R. 129.

localities'.[45] Although the notoriously poor organization of the majority's opinion tends to disguise the fact, the doctrine is very relevant (if not absolutely essential) to its reasoning. The fulcrum of the majority decision is the argument that the Constitution binds the Crown, and since the Crown is indivisible this means that the State as well as Commonwealth executive governments are subject to the Constitution—and can accordingly be made subject (unless a contrary intention is indicated) to Commonwealth laws authorized by the Constitution.[46] It is true that a degree of criticism both before[47] and since[48] the *Engineers'* case[49] has been directed at the doctrine. The most scathing expression of disgruntlement is Latham C.J.'s dismissal of indivisibility as 'verbally impressive mysticism'.[50] But the weight of authority undoubtedly goes the other way,[51] and Professor Sawer's summary statement is as apt today as when it was first written in 1952:

> [b]oth Latham C.J. and Dixon J. are heretical in their endeavour to stress the elements of juristic individuality in the personality of the seven Australian governments. Majority decisions tend to treat the dogma of Crown unity as the primary rule to be disregarded only where the operation of the Constitution Acts and of Australian Statutes necessarily requires that each government be treated as a separate juristic person; this empirical approach has so far been adequate to deal with such questions as the ability of the governments to sue each other, and to have 'separate property' notwithstanding their mystical legal unity within the Crown.[52]

The indivisibility of the Crown must yield on due occasions to practical realities. But it is a central theme of this paper that practicality does not demand that the Commonwealth be totally immune from the operation of State laws: the federal government has ample power to protect its activities and those of its instrumentalities by suitably framed law.

WHOSE IMMUNITY?

Not the least of the problems facing 'total immunity' theorists is that of specifying with precision the sense in which the Commonwealth is to be regarded as bound.

[45] *Ibid.* 152.
[46] *Ibid.* 152-4. See Sawer, *Australian Federalism in the Courts* (1967) 131 for a neat summary statement in these terms.
[47] *Municipal Council of Sydney v. Commonwealth* (1904) 1 C.L.R. 204, 231 (*per* Griffith C.J.); *Commonwealth v. N.S.W.* (1906) 3 C.L.R. 807, 813 (*per* Griffith C.J.); *R. v. Sutton* (1908) 5 C.L.R. 789, 796-7 (*per* Griffith C.J.), 806 (*per* O'Connor J.). The cases are collected by Cuppaidge, 'The Divisibility of the Crown' (1954) 27 *Australian Law Journal* 594.
[48] Confined judicially to Latham C.J. and Dixon J.: *Farley* (1940) 63 C.L.R. 278, 302 (*per* Dixon J.); *Gulson* (1944) 69 C.L.R. 338, 350-1 (*per* Latham C.J.); *State Banking* (1947) 74 C.L.R. 31, 82 (*per* Dixon J.); *Bank of N.S.W. v. Commonwealth* (1948) 76 C.L.R. 1, 363 (*per* Dixon J.). See also Hogg, *op. cit.* 198-9.
[49] (1920) 28 C.L.R. 129.
[50] *Gulson* (1944) 69 C.L.R. 338, 350.
[51] See, in addition to *Engineers, Williams v. Howarth* [1905] A.C. 551; *Pirrie* (1925) 36 C.L.R. 170, 219 (*per* Higgins J.); *In re Commonwealth Agricultural Service Engineers Ltd* [1928] S.A.S.R. 342, 358 (*per* Murray C.J.) and *Gulson* (1944) 69 C.L.R. 338, 356-7 (*per* Rich J., where he refers to the 'heresy of Crown schizophrenia'), 366 (*per* Williams J.).
[52] Paton (ed.), *The Commonwealth of Australia* (1952) 78.

One possible view is that the Commonwealth is immune in all its aspects, that State law is applicable neither to the Commonwealth as a juristic entity nor to the persons—servants, agents and corporations under the 'shield of the Crown'—through whom that entity acts. This view however confronts the authority of *Pirrie v. McFarlane*,[53] in which a majority held that a member of the Commonwealth armed forces was subject to general State driving licence legislation while driving a car in the performance of his duties.

The immunity theorist is then obliged to say either that *Pirrie v. McFarlane*[54] is wrong,[55] or that it can be accommodated by the suggested limitation on the total immunity doctrine to the effect that the Commonwealth may be 'affected by' State laws when it 'enters into a transaction' in such a way as to attract their operation: Sawer has rather faintly suggested that this might be so.[56]

Another view of Commonwealth total immunity is to say, sidestepping the *Pirrie v. McFarlane*[57] difficulty, that it is enjoyed only by the Commonwealth as a juristic entity and not by the persons or instrumentalities through whom it acts. This is now Professor Howard's view.[58] The distinction itself is a perfectly intelligible one, and one that may indeed be necessary in various contexts, particularly when liability is being apportioned. And a State seeking to legislatively interfere with the activities of the Commonwealth may purport either to bind the Commonwealth as a distinct legal person, or rather seek to regulate the activities of the government's servants—be they 'legal' or 'natural' persons—in the conduct of their employment.

Professor Howard argues that the only immunities which the Commonwealth possesses in respect of its servants are first, 'exclusive power immunity'—that immunity which it enjoys by virtue of its power to legislate to the exclusion of the States for its own public servants,[59] and second, its implied immunity from State law which adversely discriminates against Commonwealth employees, instrumentalities or payments.[60] 'Total im-

[53] (1925) 36 C.L.R. 170. [54] *Ibid.*

[55] Howard's view in *Australian Federal Constitutional Law*, (1968) 97, n. 50. He now acknowledges having changed his mind: see n. 58. *infra.*

[56] Sawer, *Australian Federalism in the Courts* (1967) 138. The 'affected by' doctrine is discussed *infra*, Section II. Whatever the other inadequacies of that doctrine, it seems unlikely, in the light of the contractual examples used by the judges propounding it, that it was meant to encompass Commonwealth 'transactions' as vague and unspecific as that in question in *Pirrie*.

[57] (1925) 36 C.L.R. 170.

[58] Howard, *op. cit.* T.A.N. 49 and Part 3(d), '*Pirrie v. McFarlane*'.

[59] Discussed *infra*, p. 539ff.

[60] This principle, amounting to a suggested reciprocal application of the *State Banking* case (1947) 74 C.L.R. 31, is founded on remarks in *West* v. *Commissioner of Taxation* (*N.S.W.*) (1937) 56 C.L.R. 657, 669 (*per* Latham C.J.), 681 (*per* Dixon J.). The former regards it as merely a restatement of the principle that States can only legislate for their own peace, welfare and good government, a view which the present writer prefers. See further *infra*, T.A.N. 137.

munity' does not extend to Commonwealth servants. *Pirrie v. McFarlane*[61] is good law because it concerned an application of non-discriminatory State law to a Commonwealth servant, not to the Commonwealth as an entity, and no inconsistent Commonwealth law overrode the State Act. Why Leading Aircraftsman McFarlane was not protected by the Commonwealth's *exclusive* power immunity we are not told.[62]

The present writer submits, however, that if the total immunity doctrine is to retain any substantive content, it must be regarded as extending to Commonwealth servants. While the distinction between 'Commonwealth as entity' and 'Commonwealth as aggregate of persons through whom it acts' may be clear in principle, the reason for confining total immunity to the former is not at all so in theory or practice. All three versions of the foundation of that doctrine discussed above are unaffected by a reading of 'Commonwealth' as including its servants. And this makes perfectly good practical sense, for it is clear that State law could hamstring Commonwealth activities equally efficiently (at least until inconsistent legislation is passed) by operating on the Commonwealth's servants or on the Commonwealth itself.Take *Pirrie v. McFarlane*[63] itself: would a State law purporting to impose a duty on the Commonwealth to ensure that all its military drivers held Victorian licences be any *more* effective than the actual statute applied in that case in reducing the authority of the Commonwealth in its choice of persons to perform federal functions? Again, in the context of contract: only Commonwealth servants can physically make Commonwealth contracts, but only the Commonwealth as an entity is bound by them. Is a State law to be construed quite differently, as a matter of constitutional law, depending on whether it purports to restrict the authority of the maker or rather goes directly to nullify the contract itself? In practice the activities of the Commonwealth and the activities of its servants are inextricably intertwined. Just as on the one hand many immunities which the Commonwealth enjoys will filter down to protect its servants (for example, no Crown servant can be personally liable for an otherwise tortious act authorized by statute or the prerogative), so will very many interferences with the activities of servants in effect reach up to interfere with the activities of the Commonwealth.

A final small terminological point. The cases and commentary refer for the most part quite generally to the question of whether State law can 'bind the Commonwealth'. Quite a proliferation of State laws fit, in legal usage, this description, for example those purporting to remove some hitherto enjoyed immunity from suit, to impose some statutory duty on the Commonwealth or particular Commonwealth servants, or both, giving

[61] (1925) 36 C.L.R. 170.
[62] The defence power may be regarded as exclusive to the extent that it concerns military personnel. See further *infra*, T.A.N. 119-23.
[63] (1925) 36 C.L.R. 170.

rise to criminal or civil sanctions or both,[64] to tax some transaction or some payment made, to specify the order of priority for debts in a winding up. It would seem rather arbitrary to confine the phrase to situations where only the Commonwealth as an entity is bound.

It may well be that some Commonwealth activities are of a qualitatively different character than others, and some kind of immunity does apply in respect of them. It may even be that these are of an 'entity' rather than 'individual' character. This question will be taken up again in Section III below. But for the moment let it be noted that for the purposes of the total immunity theory, neither theory nor practice demand that a sharp line be drawn between State laws purporting to bind the Commonwealth 'itself' and those purporting to bind only its servants.

II THE TOTAL IMMUNITY VIEW: CONSEQUENTIAL PROBLEMS

The general conclusion so far is that no credence can be given to any of the justifications advanced for a 'total immunity' reading of *Cigamatic*.[65] This may be because the total immunity view was not in fact that of the High Court, that the Court was rather espousing a more limited position than has been thought. This argument will be taken up in Section III below.

But first it is appropriate to examine in some detail the consequential problems associated with the total immunity view, the problems that arise even if one assumes that the basic doctrine of across-the-board Commonwealth immunity from State laws is well founded. It may be that an appreciation of the many difficulties involved in convincingly resolving these consequential problems will serve to hammer the last nails into the coffin of the doctrine itself.

The central problem is how the judicially attested limitations on the operation of the total immunity doctrine are to be accommodated. The most common terminology is that the Commonwealth may become 'affected by' State laws.[66] It has been said by Dixon J. that '[g]eneral laws made by a State may affix legal consequences to given descriptions of transaction and the Commonwealth, it it enters into the transaction may be bound by the rule laid down'.[67] Fullagar J. in *Bogle*[68] gives a specific example: if the

[64] It will be noted that if the Commonwealth should lose its immunity from suit in a given area, this does not of itself imply that State laws determining the incidents of liability in that area are necessary applicable. The converse does not hold: liability under particular State duty-imposing laws can hardly subsist alongside immunity from suit in that area.

[65] (1962) 108 C.L.R. 372.

[66] *Per* Dixon J. in *Farley* (1940) 63 C.L.R. 278, 308; and also *per* Fullagar J. in *Bogle* (1953) 89 C.L.R. 229, 260. The passages are quoted in full in Howard, *op. cit.*, T.A.N. 8 and 10.

[67] *Uther* (1947) 74 C.L.R. 508, 528, again quoted by Howard, *op. cit.* T.A.N. 13, and to similar effect in *Cigamatic* (1962) 108 C.L.R. 372, 378.

[68] (1953) 89 C.L.R. 229, 260.

Commonwealth 'makes a contract in Victoria, the terms and effect of that contract may have to be sought in the Goods Act 1928 (Vict.)'.

All this raises questions of the following kind: under what circumstances can the Commonwealth become 'affected by' State laws? To what extent does this derogate from the doctrine of total immunity? Can the Commonwealth in all circumstances constitutionally waive its immunity, if this is what becoming affected by State laws amounts to? What sense can be made of legislation purporting to protect the Commonwealth from being affected by State laws if the Commonwealth enjoys immunity anyway? It is convenient to consider these problems in two separate contexts: first, where there is no *prima facie* ground for the constitutional invalidity of the State legislation in question (*i.e.* where it is for the 'peace, welfare and good government' of the State, and not in an area where legislative competence is exclusive to the Commonwealth), and second, where the Commonwealth exercises exclusive legislative power over the subject matter in question, and the States accordingly may not be *prima facie* competent to legislate at all.[69]

(a) *State Laws on Matters not Exclusive to the Commonwealth*

Professor Howard[70] argues that the Commonwealth may be 'affected by' State laws here by virtue of sections 79 and 80 of the Judiciary Act 1903-69 (Cth), operating in conjunction with such other enactments as the Commonwealth has made actually waiving its immunity with respect to particular subject matters: most notably sections 56 and 57 of the Judiciary Act, exposing the Commonwealth to liability, at the suit of private persons and States respectively, in contract and tort. Specific Commonwealth enactments of this latter kind merely determine whether the Commonwealth *can* be made liable in particular kinds of matters; sections 79 and 80 fill out the incidents of that liability by obliging courts hearing matters in which the Commonwealth is a party to apply the relevant rules of State law. This State law does not apply of its own force, but only in so far as it is incorporated (by reference in the Judiciary Act, sections 79 and 80) into the *corpus* of federal law. The Commonwealth is not subject to State law as such, but it may thus be 'affected by' it. Howard's theory is suggested by two brief references to sections 79 and 80 by Dixon J.,[71] and

[69] This in fact follows Howard's order of treatment, though his formal division is between legislation affecting the Commonwealth as an entity and legislation affecting Commonwealth servants, a distinction which has been argued *supra* to be not here to the point.

[70] Howard, *op. cit.* T.A.N. 15.

[71] *Farley* (1940) 63 C.L.R. 278, 308: 'Where there is no Federal statute affecting the matter, an exercise of the legislative power of the State over the general law of contract might incidentally apply in the case of the Commonwealth alike with the citizen. In the practical administration of the law, the decision of questions of that sort depends less upon constitutional analysis than on sec. 80 and perhaps sec. 79 of the *Judiciary Act*'; *Uther* (1947) 74 C.L.R. 508, 528: 'State law is made applicable to matters in which the Commonwealth is a party by s. 79 of the *Judiciary Act*'.

the latter's statement in *Uther*[72] to the effect that no State could have made the Commonwealth liable in tort before the Commonwealth itself did so by statute.

Howard proceeds to examine in what circumstances and to what extent the Commonwealth is affected by State law in this way. Taking first the area of tort and contract, in which the Commonwealth seems clearly to have made itself substantively liable in general terms (by the Judiciary Act, sections 56 and 57, no doubt themselves made pursuant to section 78 of the Constitution), he argues that cases like *Bogle*[73] which do not on the surface fit the above analysis, can indeed be accommodated. Then looking to other areas of liability, in particular to State criminal and quasi-criminal regulatory laws, he argues that the Commonwealth[74] cannot be directly subject to such laws because it has never waived its immunity with respect to them, but that it can be indirectly affected by certain of them. The object of the whole exercise is to show that the 'affected by' doctrine is internally consistent, and, more importantly, consistent with the basic 'total immunity' doctrine.

Now to clear the ground for discussion. It will have been noticed that Howard's argument rests on two foundations: first, that no State law can possibly bind the Commonwealth without there having first been a statutory waiver of immunity;[75] second, given that there has been such a waiver, it is sections 79 and 80 of the Judiciary Act that make the relevant State laws applicable. The first point will be accepted for the purposes of the present discussion, but is contested elsewhere in this paper.[76]

The second point is suspect in the large role it ascribes to sections 79 and 80. It is not at all clear that they can do the job which Howard says they can. They seem to be no more than choice-of-law rules,[77] which merely direct courts exercising federal jurisdiction to the whole system of domestic law of one State and which pick up the particular applicable rules of that State as they stand, without changing their meaning. So that if particular State laws do not apply to the Commonweath of their own force (because they do not purport to do so, or because—on the assumptions with which we are proceeding—they are incapable of so applying as a matter of constitutional law) they will not do so by virtue of

[72] (1947) 74 C.L.R. 508, 529, repeated by Fullagar J. in *Bogle* (1953) 89 C.L.R. 229, 260.
[73] (1953) 89 C.L.R. 229.
[74] To the extent that it is exercising 'constitutionally assigned functions'—but it has been suggested *supra* at nn. 37-9 that this distinction is legally meaningless.
[75] It is on this ground that Howard rejects the notion of the *Cigamatic* facts being a candidate for an application of the 'affected by' rule. Similarly he says that the Commonwealth could never be affected by State criminal or quasi-criminal law, because there has never been any waiver of immunity, similar to that accomplished by ss 56 and 57 Judiciary Act, to open up that possibility.
[76] See *infra* Section III especially at pp. 552-3.
[77] And not very satisfactory ones at that. It may be that s. 56 provides its own choice of law rule in cases to which it applies. See Hogg, *op. cit.* 218ff.

sections 79 and 80.[78] It may be, however, that the general direction of Howard's argument can be preserved by reliance instead on section 64 of the Judiciary Act. This provides that:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

The 'rights of parties' would seem to include substantive as well as procedural rights.[79] On its face the section is a simple direction that the Commonwealth be treated in all respects as a 'subject', and this would seem to mean that *all* relevant State laws are to be picked up and applied, even those which do not of their own force apply to the Commonwealth. The wording of section 64 is far more apt than that of sections 79 and 80 to produce this result. The present writer sees no reason to disagree with P. W. Hogg's[80] argument and reading of the (admittedly for the most part tentative) authorities[81] to this effect. The strongest judicial statement is by Kitto J. in *Asiatic Steam Navigation Co. v. Commonwealth*:[82]

> [Section] 64 must be interpreted as taking up and enacting, as the law to be applied in every suit to which the Commonwealth or a State is a party, the whole body of the law, statutory or not, by which the rights of the parties would be governed if the Commonwealth or a State were a subject instead of being the Crown.

If the objection is put that having State law applicable, even in this indirect way, is inconsistent with 'total immunity', the answer can be made that the State law does not operate here as such, but rather as federal law; section 64 is to be regarded as federally enacting the appropriate body of State law. This was Howard's argument for sections 79 and 80; it can more plausibly be made in the present context.

One further point. It may well be that section 64 can be read, even more widely than suggested so far, as imposing substantive liability on the Commonwealth in situations where there has been no preliminary waiver of such immunity as the Commonwealth enjoys. Certainly on its

[78] *Pedersen v. Young* (1964) 110 C.L.R. 162. See Hogg, *op. cit.* 227ff., and Campbell, 'Federal Contract Law' (1970) 44 *Australian Law Journal* 580, 581. Howard seems to concede as much in his discussion of *Cigamatic: op. cit.* T.A.N. 21.

[79] *Farnell v. Bowman* (1887) 12 A.C. 643, 650, construing a similarly worded colonial act.

[80] Hogg, *op. cit.* 226-30.

[81] Decisions at least partly relying on s. 64 to make applicable State laws not purporting to extend to the Commonwealth are *Pitcher v. Federal Capital Commission* (1928) 41 C.L.R. 385, *Washington v. Commonwealth* (1939) S.R. (N.S.W.) 133, *Parker v. Commonwealth* (1964) 112 C.L.R. 295. All were torts cases concerning the application of either Lord Campbell's or contributory negligence legislation.

[82] (1956) 96 C.L.R. 397, 427. *Cf.* Fullagar J., dissenting on this point, *ibid.* 424. This was an unusual case, in which a majority of the court here actually applied s. 64 to enable the Commonwealth to rely on a liability limiting provision in an Imperial Shipping Act which seemed expressly inapplicable to the Commonwealth.

face it applies to all suits to which the Commonwealth is a party, not just those in tort and contract (for which sections 56 and 57 of the Judiciary Act represent such a preliminary waiver). Total immunity theorists anxious to preserve some content for their doctrine could argue that the word 'suit' must be read in a limited sense as extending only to those civil matters, *viz.* tort and contract, in respect of which the Commonwealth has allowed suits to be brought against it; alternatively, or additionally, it might be argued that the limiting words 'as nearly as possible' in the section, which have received no judicial attention, allow plenty of scope for courts who take a total immunity view to exclude from the operation of the section those matters in respect of which the Commonwealth has not waived its immunity. But for the moment let it be noted that it is by no means an uncomfortably strained reading of section 64 to regard it as in itself amounting to a generalized waiver of immunity from suit.[83]

Assuming, then, that the total immunity doctrine is well founded, but that by a combination of an explicit waiver of immunity and the operation of Judiciary Act, section 64, if not sections 79 and 80, the Commonwealth can become 'affected by' State law, what problems remain for Howard's account?

BOGLE'S CASE

A very formidable one, as Howard himself recognizes,[84] is the accommodation of Fullagar J.'s *dicta* in *Bogle,*[85] suggesting that were the Commonwealth to be a party to a rent contract with a migrant hostel tenant, it would nonetheless not be bound by a Victorian Prices Regulation statute prohibiting rent increases. The perversity of this from a total immunity theorist's point of view is that while on the one hand Fullagar J. insists that the Commonwealth would not be liable under State law for its contracts were it not for Judiciary Act, section 56, on the other hand he says in effect that, even given section 56, the Commonwealth is not bound by *this* State law governing *this* kind of contract. Why isn't this a situation where sections 79 and 80 (or at least section 64) operate together with section 56 to bring the State law into play? Howard argues that the Commonwealth can only become affected by State law with respect to the *implied* terms of its contracts, that where express terms cover the matter State law can have no application. But this seems an exceedingly arbitrary, albeit ingenious, solution. It presupposes the existence of a body of federal contract law which is not composed merely of State law rules.[86] If there is indeed such a body of law, one might expect it to provide for both express and implied contractual terms. On what basis could one argue that it

[83] Constitutionally supported, as for more specific waivers of immunity from suit, by s. 78.
[84] *Op. cit.* Part 2(e), '*Commonwealth v. Bogle*'.
[85] (1953) 89 C.L.R. 229, 259-60.
[86] See generally Campbell, *op. cit.*

differentiates, or should differentiate, between express and implied terms for the purpose of determining the applicability and effect of State laws?

Howard's argument also encounters difficulties in the terms of the Judiciary Act. Take section 64. If the 'rights of parties' were to 'as nearly as possible be the same . . . as in a suit between subject and subject' then the Commonwealth would surely be bound, since the State legislation in question clearly operated to override any rent increase for which 'subjects' may have expressly contracted.[87] Nor even do sections 79 and 80, Howard's preferred vehicles for the (occasional) application of State law, on their face offer any more assistance. True it is that where there are adequate federally created remedies a court may construe the federal law as exhaustive and refuse to allow any remedy of state common or statute law that might otherwise be adopted. But the adequacy of a federal remedy was not in issue in *Bogle*,[88] rather the force of a State *bar* to a remedy. And further, this escape route from the application of sections 79 and 80 can only operate when there is an applicable federal 'law': can the terms of a contract, however express, ever amount to such a 'law'?

THE INDIRECT EFFECT OF CRIMINAL LAWS

Another area of difficulty in Howard's theory is his proposition that although the Commonwealth cannot be directly affected by State criminal and quasi-criminal regulation,[89] nonetheless it may be indirectly affected. His hypothetical example[90] is of the Commonwealth being engaged in an interstate trading operation, going unpunished because of its direct immunity when in breach of State legislation prohibiting the offer of trading stamps, but nonetheless being indirectly affected by being unable to enforce its contracts against persons induced to enter such contracts by the offer of such illegal trading stamps.[91] There is a peculiar aspect of the reasoning supporting this 'indirect effect' conclusion which deserves brief attention, largely because it reflects further on the credibility of the solution offered for the *Bogle*[92] dilemma. This is the suggestion that the inducement is unlawful as a matter of federal law, because it forms part of the 'contractual situation' on which Judiciary Act, sections 79 and 80 operate to give State laws binding force. Howard is unable to say, consistently with his earlier argument, that the inducement forms part of any actual contract, because

[87] So much appears from the actual decision in *Bogle* (1953) 89 C.L.R. 229, where Commonwealth Hostels Pty. Ltd., a corporation not under the 'shield of the Crown', was held unable to enforce a rent rise to which the defendant tenant had agreed.

[88] (1953) 89 C.L.R. 229.

[89] A proposition that will be contested *infra*, as foreshadowed *supra* n. 76. There is no reason to suppose that the Commonwealth's criminal liability should be any different from its civil liability. On the general question of the criminal liability of the *Crown*, see Hogg, *op. cit.* 175-80.

[90] Howard, *op. cit.* text following n. 36.

[91] It is assumed, dubiously, that such 'illegal consideration' would as a matter of State contract law make the contract which it induces unenforceable.

[92] (1953) 89 C.L.R. 229.

if it did it would presumably amount to an express term such as would, on his view, exclude the operation of any State law: thus the resort to rather imprecise 'contractual situation' terminology. But surely sections 79 and 80, if indeed they have any role at all here, must be regarded as operating on 'contracts', not 'contractual situations'. On Howard's own account it is only with respect to its contracts (and torts, not here relevant) that the Commonwealth has by Judiciary Act, section 56 waived its immunity in such a way as to give sections 79 and 80 (and presumably section 64) some work to do. Thus it is only if the trading stamp inducement does form part of a contract that the State law can have any force. It may be that the inducement does form part of a preliminary 'agreement for a contract' to which the Commonwealth is a party, but in that case the inducement would no doubt be an express term of that agreement, which again on Howard's own view[93] would exclude the applicability of any State law. Thus it would seem that, at least on the example given, the Commonwealth cannot, consistently with the rest of Howard's account, become indirectly affected by State quasi-criminal legislation.

PROTECTIVE LEGISLATION

There is one further kind of general consequential problem for total immunity theorists that might be mentioned at this stage: what account can be given of those cases which have upheld Commonwealth legislation explicitly protecting the Commonwealth or its instrumentalities from being affected by State law? *Australian Coastal Shipping Commission v. O'Reilly*[94] is the best example: there the Commonwealth legislation[95] which was upheld exempted the Commission from the embarrassment of State receipt taxation. *Commonwealth v. Queensland*[96] is another: there Commonwealth legislation was held to successfully exempt Commonwealth bondholders from the payment of State income tax on their interest. That case is, however, a little complicated by exclusive power questions, and is better dealt with below. Exclusive power issues apart, there would generally seem no difficulty in finding such protective legislation constitutional. The present writer agrees with Howard[97] that the Commonwealth can legislate to 'discriminate in favour of itself on any subject matter within its enumerated powers'. Thus *O'Reilly*,[98] where the exempting section was held to be a valid exercise of power incidental to sections 51(1) and 98. The obvious difficulty for the total immunity theorist in all of this, however, is that if the Commonwealth already enjoys immunity from the operation of State laws, why then was not this protective legislation construed as redundant? His answer no doubt would be (apart from the unhelpful one that the Court did not think of the immunity point) that such legislation must be

[93] Discussed *supra*, p. 536.
[94] (1962) 107 C.L.R. 46.
[95] Australian Coastal Shipping Commission Act 1956 (Cth), s. 36(1).
[96] (1920) 29 C.L.R. 1.
[97] *Op. cit.* text following n. 41.
[98] (1962) 107 C.L.R. 46.

regarded as simply re-establishing that immunity over a given subject matter which the Commonwealth enjoys as of right, but which it has previously waived in the manner already described. But this hardly covers all the cases: if the 'previous waiver' is limited, as Howard argues, to the areas of tort and contract, then this explanation would not suffice for the *O'Reilly*[99] and *Commonwealth v. Queensland*[100] situations where tax liability was in issue. It may be, as suggested above,[101] that section 64 of the Judiciary Act can be regarded as a generalized waiver of immunity right across the board. But not only is this not Howard's account, clearly it empties the total immunity doctrine of all but the most formal content. A much shorter answer to the problem is that the protective legislation in *O'Reilly*[102] was not redundant, just because the Commonwealth enjoyed no total immunity at any stage, and that when it wanted to protect itself it had to pass valid legislation which overrode as inconsistent the encroaching State law.

(b) *State Laws on Matters Exclusive to the Commonwealth*

There are difficulties enough in talking of the Commonwealth as becoming 'affected by' State laws when there is no *prima facie* reason to suppose that those State laws were constitutionally invalid, as was assumed to be the case in the above discussion. These difficulties are even more acute when subject matters exclusive to the Commonwealth are considered. How can the Commonwealth purport to waive its immunity in any sense when State laws, whose application to the Commonwealth would normally be ensured by such waiver, are in any case invalid as going to a subject matter exclusively within Commonwealth legislative competence? If such State laws are so destined to be invalid how then, in particular, can the decisions in *Chaplin v. Commissioner of Taxes (S.A.)*[103] and *West v. Commissioner of Taxation (N.S.W.)*,[104] which subjected Commonwealth payments to its public servants to taxes imposed by State law, be accommodated, given that the Commonwealth's power to legislate with respect to its own public service is in fact exclusive?[105] *Chaplin*[106] and *West*[107] are not the only cases raising this problem, though they do most clearly reveal it. *Commonwealth v. Queensland*[108] is another, where the High Court held that the Commonwealth was entitled as an exercise of its undoubtedly (if impliedly) exclusive section 51(4) borrowing power to enact a law exempting Commonwealth bondholders from the payment of State income tax. The Commonwealth legislation here was in 'protective' rather than 'waiver'

99 *Ibid.*
100 (1920) 29 C.L.R. 1.
101 *Supra* T.A.N. 83.
102 (1962) 107 C.L.R. 46.
103 (1911) 12 C.L.R. 375.
104 (1937) 56 C.L.R. 657.
105 Howard clearly exposes this dilemma: *op. cit.* T.A.N. 4 and Part 3. The present writer would follow him in deriving the power in question from s. 51(39) as well as from the limited operation of ss 52(2) and 69, noticing that both the power and its exclusiveness are implied rather than express.
106 (1911) 12 C.L.R. 375.
107 (1937) 56 C.L.R. 657.
108 (1920) 29 C.L.R. 1.

form, but in so far as the case proceeded on the assumption that in the absence of such legislation the States were perfectly entitled to tax a bond-holder's interest, the same question of principle arises: why was not the Commonwealth legislation regarded as utterly redundant, since the Commonwealth already enjoyed 'exclusive power immunity'? *Pirrie v. McFarlane*[109] would also seem to raise exclusive power issues, and it is surprising that Howard does not regard the case in that light. If the State tax legislation in *Chaplin*[110] and *West*[111] can be described as interfering with the exercise of the Commonwealth's exclusive power to legislate for its own public servants, surely the State legislation in *Pirrie*[112] could just as well be described as 'Commonwealth public servant' legislation, or if not that at least as legislation interfering with the Commonwealth's exercise of its (exclusive) defence power.[113]

'Total immunity' theorists would argue that when exclusive powers are in issue, the Commonwealth has in fact a *double* immunity: first, that enjoyed by virtue of its exclusive exercise of such powers, and second, that total immunity from the operation of State laws enjoyed anyway by the Commonwealth. It helps clarify matters to keep these considerations rigorously separate.[114]

STATE LEGISLATIVE COMPETENCE

To isolate now the first aspect of this supposed double immunity: can the States ever[115] legislate with respect to a subject matter exclusive to the Commonwealth? Three kinds of affirmative answer have been canvassed.

(i) **Commonwealth Waiver**—One answer may be that the States can so legislate if the Commonwealth allows them to. The Constitution may give the Commonwealth a free hand to act in a certain subject area, but the Commonwealth can waive that privilege if it wants to. The most explicit

[109] (1925) 36 C.L.R. 170.
[110] (1911) 12 C.L.R. 375.
[111] (1937) 56 C.L.R. 657.
[112] (1925) 36 C.L.R. 170.
[113] The latter view was taken by Isaacs and Rich JJ. in dissent. The defence power is exclusive to the Commonwealth, if not in its fully extended form, at least with respect to the activities of military personnel, by implication from the terms of s. 114, and s. 69 read with s. 52(2) as well as by necessary implication from s. 51(6) itself. See Howard, *Australian Federal Constitutional Law* (1968) 325-6.
[114] It should perhaps be noted that a *third* kind of immunity can be identified, *viz* that enjoyed by the Commonwealth by virtue of s. 109 when it legislates inconsistently with a law purporting to bind the Commonwealth made by a State. Thus Howard suggests that the *Pirrie* situation, where the Commonwealth failed to legislate inconsistently with the State traffic law there in question (as it undoubtedly could under the defence power), may be regarded as a waiver of this third kind of immunity: *op. cit.* T.A.N. 68. That the Commonwealth can so protect itself is of course clear, though it might be thought that still more 'immunity' terminology is unhelpful and confusing. What *is* clear is that this kind of immunity is only relevant when concurrently enjoyed powers are in issue, and Howard's treatment of *Pirrie* is unsatisfactory to the extent that it does not canvass the possibility of that case being treated in 'exclusive power immunity' terms.
[115] Constitution, s. 51(37) aside.

suggestion to this effect is in *Chaplin's* case[116] where the Court upheld the Salaries Act 1907 (Cth) in its provision that non-discriminatory State taxation of Commonwealth salary payments 'shall not . . . be deemed . . . to be an interference with the exercise of any power of the Commonwealth'. But no attention was devoted to the significance of a possible exclusive power of the Commonwealth being in issue, and as Howard points out,[117] where such powers are in issue, 'waiver of constitutional privilege' reasoning must be regarded as defeated by the forceful proposition put forward at different times by Higgins J.[118] and Evatt J.[119] that if the States have no power under the Constitution to act in a certain area, the federal parliament cannot alter the Constitution by purporting to allow them to do so.

(ii) **Characterization of Commonwealth Law**—A second answer, advanced by Howard himself,[120] is that the problem may be avoided by an appropriate characterization of the Commonwealth legislative provisions referring to State taxation, be they cast in either 'protective' (as in *Commonwealth v. Queensland*[121]) or 'waiver' (as in *Chaplin*,[122] and less explicity in *West*[123]) form. His suggestion is that such provisions, notwithstanding that they have to do with the applicability of a *State* tax, may be regarded as enacted pursuant to the Commonwealth's own power in Constitution, section 51(2) to legislate 'with respect to . . . taxation'. Since this taxing power is concurrent rather than exclusive, no question now arises as to the invalidity of State tax laws on the ground that they trespass on exclusively Commonwealth territory.[124] The whole character of the problem is changed.

This is very difficult to follow. It is only one aspect of the Commonwealth legislation, *viz* that which overrides or preserves the effect of State taxation, which could possibly be regarded as legislation with respect to taxation. The substantive part of the Commonwealth enactments in question is that which actually provides for the making of salary or pension payments to Commonwealth public servants, or interest payments to Commonwealth bondholders, and this must be legislation with respect to 'public servants' or 'borrowing money on the public credit of the Commonwealth' respectively. Now it is on this substantive subject matter that the State law operates and has its effect. The State law is

[116] (1911) 12 C.L.R. 375, *per* Griffith C.J., Barton and O'Connor JJ. concurring.
[117] *Op. cit.* T.A.N. 62.
[118] *Flint v. Webb* (1907) 4 C.L.R. 1178, 1194.
[119] *West* (1937) 56 C.L.R. 657, 695, 700.
[120] *Op. cit.* Part 3(e); 'Commonwealth Salaries Act and Constitution, s. 51(2)'.
[121] (1920) 29 C.L.R. 1.
[122] (1911) 12 C.L.R. 375.
[123] (1937) 56 C.L.R. 657; n. 160 *infra*.
[124] It will be noted that this route, for what it may prove to be worth, seems only available in *Chaplin, West* and *Commonwealth v. Queensland* types of situations, where State *tax* laws are in issue. It is not clear what possible concurrent, as distinct from exclusive, head of power could support the overriding of State *traffic* laws in a *Pirrie* situation.

not affecting the Commonwealth in the exercise of its taxing powers but rather in the exercise of its apparently exclusive power with respect to public servants or borrowing. The constitutional problem which presently falls for determination is whether State laws must inevitably be bad *ab initio* because they do have some effect on subject matters exclusive to the Commonwealth. This problem does not just fade away because the Commonwealth legislation in question happens to contain other provisions which may not raise exclusive power problems.

Another difficulty with Howard's argument here is that it is not at all clear that Commonwealth laws referring to the effect of State tax laws *may* properly be characterized as made pursuant to section 51(2). Howard recognises[125] that this is not the natural meaning of the words of that paragraph, and that such authority as there is on the question points the other way. To the authority he cites[126] may be added further *dicta* from Evatt J. in *Farley*[127] and also Dixon C.J. in the *Second Uniform Tax* case,[128] quoting Griffith C.J. as early as 1904[129] to the effect that 'the taxation referred to is federal taxation for federal purposes'. Howard attempts to get past this difficulty by arguing that the authority is generally speaking inconclusive and, in the particular case of *Commonwealth v. Queensland*,[130] inadequately reasoned. His central objection to that case is that if the exempting provision there in issue was an exercise of the exclusive section 51(4) borrowing power, then the State law must be regarded as not just overridden by the inconsistent Commonwealth provision but void *ab initio* for trespassing on exclusive Commonwealth ground, a fact which the Court did not recognise. In so far as Howard's argument is set out in 'if . . . then' terms, this repeats the fallacy already noted[131] of making the application of a State law depend on the characterization of (part of) a Commonwealth law. But it may of course be that the State law has to be regarded, in its application to actual interest payments, as so void for exclusive power immunity reasons, in which case Howard is right in saying that the Court was astray in assuming that the State tax law would have been applicable but for the Commonwealth exemption. The important point to appreciate, however, in all of this, is that characterizing the exemption from State tax as an exercise of section 51(2) power in no way makes the decision more satisfactory: the State tax law must still be regarded as potentially intruding on the 'borrowing' power, exclusive to the Commonwealth, and for that reason is still possibly void *ab initio*.

[125] *Op. cit.* T.A.N. 69.
[126] *West* (1937) 56 C.L.R. 657, 686-7, *per* Evatt J., relying in turn on *Commonwealth v. Queensland* (1920) 29 C.L.R. 1, where the Commonwealth's exempting from State taxation of interest on its securities was held to be an exercise of s. 51(4).
[127] (1940) 63 C.L.R. 278, 325.
[128] *Victoria v. Commonwealth* (1957) 99 C.L.R. 575, 614.
[129] *Municipal Council of Sydney v. Commonwealth* (1904) 1 C.L.R. 208, 232.
[130] (1920) 29 C.L.R. 1.
[131] In the preceding paragraph.

(iii) **Characterization of State Law**—The third possible answer to the question of whether the States can ever legislate with respect to a subject matter exclusive to the Commonwealth is one that is rejected by Howard[132] but which, it is submitted, is the least unsatisfactory account. It is that the problem may be avoided by an appropriate characterization, not of any Commonwealth law, but of the State law itself. There is an apparently easy way past the exclusive power immunity difficulties of *Chaplin*,[133] *West*[134] and *Commonwealth v. Queensland*[135] if one could say of the State tax laws there in question that they were not laws with respect to 'Commonwealth public servants' at all, but rather with respect to 'income earners' generally; similarly if one could say of the Motor Car Act 1915 in *Pirrie v. McFarlane*[136] that it was not with respect to 'Commonwealth public servants' or 'members of the defence forces' but rather simply to 'car drivers' generally. Such a reading is consistent with the actual decisions in those cases, where the *prima facia* validity of the State law was always assumed, and with *dicta* by Latham C.J. in *West*.[137] This reading would not of course be available, as Latham C.J. pointed out,[138] where the State law singled out the Commonwealth or its officers for discriminatory treatment, most simply because it would be impossible then to argue that the law was anything else than one with respect to those persons, albeit that it might be with respect to some other subject matter as well. But it should not make any difference that the State law, though cast in generalized and non-discriminatory terms, explicitly mentions the Commonwealth or its instrumentalities (say, if a provision barring all car drivers from parking in city streets were reinforced by a section including within this ban 'drivers of Commonwealth cars'); such an explicit mention may sometimes in fact be necessary, as will be noted below,[139] to realise an intention to bind the Commonwealth. One appreciates the force of Howard's contention that 'characterization' is not part and parcel of the process of determining the validity of a State law in the way that this is so for Commonwealth laws.[140] State legislative competence is plenary, within the limits of the federal Constitution and the requirements of the States' own constitutions that State laws be for the 'peace, welfare and good government' of the particular State. But it would be obscurantist to suggest that no process even analogous to characterization is involved in determining whether a particular piece of State legislation does in fact transgress those limits, including the constitutional limit with which we are here concerned, *viz* on intrusion into matters over which the Commonwealth has exclusive legislative competence. It would not only be consistent with the decisions so far cited but also

132 *Op. cit.* text following n. 59.
133 (1911) 12 C.L.R. 375.
134 (1937) 56 C.L.R. 657.
135 (1920) 29 C.L.R. 1.
136 (1925) 36 C.L.R. 170.
137 (1937) 56 C.L.R. 657, 668.
138 *Ibid.*
139 Section III *infra*, p. 547ff.
140 Howard, *op. cit.* text following n. 59.

logically respectable to insist that what should be decisive in determining whether a State law does intrude on Commonwealth exclusive power is not whether some aspect of it may or may not possibly affect in some way some subject matter within the Commonwealth's exclusive preserve, but rather whether it is a law 'for' or 'with respect to' that purpose.

The real difficulty with this approach is of course that it has not found favour with the present High Court, at least in the specific context of the Commonwealth's expressly exclusive power under section 52(1) to legislate with respect to federal places.[141] It has been held, at first tentatively[142] but now decisively,[143] that a State law of quite general application infringes Commonwealth exclusive power in its application to a federal place, notwithstanding that there is nothing in that State law which can be regarded as particularly or discriminatorily directed at that place. These decisions are unquestionably inconvenient for the view advanced above, but it may be that they will not be regarded as conclusively settling the law for exclusive powers other than those relating to federal places. While it is hardly possible to argue that some exclusive powers are more exclusive than others, it should not be overlooked that the 'borrowing', 'military defence' and especially 'public service' powers that have been the subject of the whole preceding discussion are only impliedly exclusive whereas the 'federal places' power is unequivocally express, and also that all the majority judgments in *Worthing v. Rowell*[144] and *R. v. Phillips*[145] confine their remarks specifically to the context of section 52(1). Perhaps more importantly, the recent 'federal places' decisions, demanding as they did immediate legislative redress,[146] have been almost universally regarded[147] as in many respects aberrant, poorly reasoned and generally as constituting a most unhappy chapter of judicial history. It is to be hoped, and may even be likely, that they will be entirely buried after a not too decent interval.

[141] Notwithstanding the hitherto influential opinion of Professor Cowen, in 'Alsatias for Jack Shephards?' (1960) 2 *M.U.L.R.* 455, 471: '[T]he exclusiveness of Commonwealth power under section 52(1) depends upon the classification of the law as one with respect to the place. It would follow that any State law directed specifically to the area of land comprehended by the federal enclave would be bad for intrusion into an exclusive Commonwealth legislative area, but this analysis does not operate to deny validity to a State law operating *generally* throughout the geographical area of the State which is not bad for inconsistency under section 109.'

[142] *Worthing v. Rowell* (1970) 44 A.L.J.R. 230, with Barwick C.J., Menzies and Windeyer JJ., and a particularly hesitant Walsh J., just outnumbering the dissentients McTiernan, Kitto and Owen JJ.

[143] *R. v. Phillips* (1970) 44 A.L.J.R. 497. The whole court, including McTiernan and Owen JJ. (Kitto J. had retired) fell into line on this point.

[144] (1970) 44 A.L.J.R. 230.

[145] (1970) 44 A.L.J.R. 497.

[146] Commonwealth Places (Application of Laws) Act 1970 (Cth), and supporting State legislation.

[147] See, *e.g.*, Lane, 'The Law in Commonwealth Places' (1970) 44 *Australian Law Journal* 403 and 'The Law in Commonwealth Places—A Sequel' (1971) 45 *Australian Law Journal* 138; O'Brien, case note (1971) 8 *M.U.L.R.* 320; Howard, 'Federal Places and Exclusive Legislative Powers', (1970) 9 *University of Western Australia Law Review* 360.

If, however, the 'federal places' cases do prove to settle the law across the whole exclusive power field, the inevitable and unsatisfactory consequence follows that *Chaplin*,[148] *Commonwealth v. Queensland*,[149] *Pirrie*[150] and *West*[151] must all be regarded as wrongly decided to the extent that they regarded as valid State legislation trespassing, however slightly, on subject matters exclusive to the Commonwealth. The *Chaplin*[152] 'waiver' principle and Howard's section 51(2) solution of the tax cases have both been argued to be inapplicable, and it is difficult to see any other solution.[153]

However it will be appreciated that all the above discussion has gone only to the scope of 'exclusive power immunity'. Even if an unsatisfactory conclusion is forced upon us here, and the scope of that immunity is in fact larger than has hitherto been recognized in the cases, this has no implications at all as to the existence or scope of that other kind of Commonwealth immunity—'total immunity' from the application of State laws to itself or its servants—which is the central concern of this paper, and to which we may now return.

EXCLUSIVE POWERS AND TOTAL IMMUNITY

Total immunity questions are the second aspect of the Commonwealth's 'double immunity'. They only arise in an exclusive power context if one can get the State laws in question past the first, exclusive power immunity, hurdle. It has been argued that this is not to be regarded as an impossible feat (if certainly now unlikely after the 'federal places' cases) provided that such State laws can be characterized as *not* laws with respect to an exclusive Commonwealth subject, however else they may be positively characterized. Given that they can get past this hurdle, the exclusiveness or otherwise of the Commonwealth powers in this situation is now quite irrelevant. The total immunity problems that do now arise are exactly the same as those already discussed above in the context of non-exclusive Commonwealth powers.

The first of them is that if the Commonwealth already enjoys immunity from State legislation purporting to bind it, why is it ever necessary for the Commonwealth to enact 'protective' legislation, as in *Commonwealth v. Queensland*[154] avoiding the application of State tax laws? Two answers are possible. One is possibly consistent, but only laboriously and unconvincingly so,[155] with the total immunity view: this is that the Commonwealth must be regarded as having, prior to the enactment of the particular

[148] (1911) 12 C.L.R. 375. [149] (1920) 29 C.L.R. 1.
[150] (1925) 36 C.L.R. 170. [151] (1937) 56 C.L.R. 657.
[152] (1911) 12 C.L.R. 375; *supra* at n. 116.
[153] It might just be possible to argue, on the analogy of the recent Commonwealth Places legislation, that the relevant State law might be 'incorporated by reference' as *federal* law in Commonwealth legislation which purports to waive exclusive power immunity, but this is hardly convincing, especially when State taxing laws are in issue.
[154] (1920) 29 C.L.R. 1. *Cf. O'Reilly,* discussed *supra* T.A.N. 94.
[155] As discussed *supra* T.A.N. 94.

protective legislation in question, made a generalized waiver of its immunity, which waiver is now specifically retracted. The other is simply that this confirms one's suspicion that the whole 'total immunity' view is misconceived: that the Commonwealth and its servants (not to mention its bondholders) enjoy no *prima facie* immunity from the application of State laws.

The other problem is just the familiar one of specifying the circumstances, if any, in which—consistently with total immunity—the Commonwealth can be said to waive its immunity, or at least allow itself to become 'affected by' State laws. This is raised specifically by the *Chaplin*[156] and *West*[157] situations, and here a total immunity theorist[158] would seem to have a short answer: the Salaries Act 1907 in *Chaplin*[159] itself constituted just such a waiver, as did, though less explicitly, the legislation in issue in *West*.[160] It will be noted, however, that our theorist cannot simply say that the Commonwealth legislation here operated to expose Commonwealth instrumentalities to State tax laws applying *as* State tax laws, because it is axiomatic for total immunity theorists that no State law can affect the Commonwealth of its own force: the States are not, and never were, legislatively competent to bind the Commonwealth. The 'affected by' *dicta* have to be explained by arguing that State laws only operate to bind the Commonwealth in their capacity as *federal* laws, as transmuted with the help of section 64 (if not sections 79 and 80) of the Judiciary Act in situations to which that section is applicable,[161] or by other specific legislation (of which the recent Commonwealth Places legislation[162] is no doubt an example) providing that State law is to operate in this way. It is perhaps possible to regard the *Chaplin*[163] and *West*[164] legislation as giving tax laws the character of federal laws in their application to Commonwealth instrumentalities, but it is suggested—without pursuing the point too vigorously—that there is a certain incongruity in regarding State *taxing* laws, imposing taxes to provide revenue for State treasuries, as ever capable of being federal law in the same way as State rules governing tortious or contractual or criminal liability. Surely some less cumbrous account of the role of the *Chaplin*[165] and *West*[166] 'waiver' legislation is possible?

[156] (1911) 12 C.L.R. 375.
[157] (1937) 56 C.L.R. 657.
[158] A hypothetical one: Howard does not specifically discuss this point.
[159] (1911) 12 C.L.R. 375.
[160] The Salaries Act 1907 (Cth) was not to the point in this case as it did not go to pensions. The Superannuation Act 1922-34 (Cth), under which the pensions in question were paid, did not specify any immunity from State tax for pensions in the hands of recipients. But the Financial Emergency Acts 1931 (Cth) were held to disclose a clear intention to permit this taxation in so far as they enabled the making of regulations prescribing a maximum limit to such taxation (though no actual regulations were made). By providing for a ceiling on State tax, the Commonwealth in effect conceded the validity of State taxation up to that level.
[161] As discussed *supra*, pp. 533-5.
[162] *Supra*, n. 146.
[163] (1911) 12 C.L.R. 375.
[164] (1937) 56 C.L.R. 657.
[165] (1911) 12 C.L.R. 375.
[166] (1937) 56 C.L.R. 657.

If one adopts the view that not only is the total immunity view ill-founded but that the Commonwealth enjoyed (exclusive power questions aside) no immunity of any kind in the *Chaplin*[167] and *West*[168] situations, one confronts a difficulty in the 'waiver' form of the legislation there in issue: if State laws, including State tax laws, may be applicable to the Commonwealth without any kind of waiver activity by the Commonwealth, why then was not the legislation upheld in those cases simply treated as redundant? One answer perhaps lies in the view expressed by Latham C.J. and, more clearly, Starke J. in *West*[169] to the effect that the legislation is not 'waiver' legislation at all, but rather legislation protecting—subject to certain conditions[170]—federal officers and perhaps the Commonwealth itself in the exercise of its power to fix the remuneration of those officers. A better answer, it is submitted, is one in terms of the 'prerogative immunity' view advanced below. It is that State laws may bind the Commonwealth, but only if they specifically or by necessary implication purport to do so; the reading of *Chaplin*[171] and *West*[172] then becomes that the State taxes did not unequivocally purport to apply to the Commonwealth, so that the Salaries Act and other legislation in issue was necessary to effect the Commonwealth's intention to be bound.

It is submitted that the position reached is that the 'total immunity' view, as stated so far in general terms, has no sound theoretical foundation, and that the consequential problems to which it gives rise can only be resolved by reasoning which is both cumbersome and unconvincing. The Commonwealth does undoubtedly enjoy a constitutionally based immunity by virtue of its exclusive exercise of certain powers: here the States have no power to legislate at all, let alone so as to bind the Commonwealth. Just how far that immunity extends is a vexed question, but one that has no bearing on arguments about 'total' immunity: the issues are quite distinct.

However, leaving now exclusive power immunity questions to one side, there is undoubtedly something in the notion of Commonwealth immunity from State law. *Cigamatic*[173] cannot just be willed away. It will be argued that the foundations and extent of this immunity, such as it is, can be analysed much more economically and convincingly from a starting point having nothing to do with implications derived from the creation or operation of the Australian federal system.

III AN ALTERNATIVE VIEW: PREROGATIVE IMMUNITY

Let us put to one side 'exclusive power immunity', the 'immunity' which may be said to accompany section 109 self-protection[174] and, it may be

[167] (1911) 12 C.L.R. 375.
[168] (1937) 56 C.L.R. 657.
[169] *Ibid*. 673, 678.
[170] In *Chaplin,* that the State tax be non-discriminatory; in *West,* that it not exceed a certain ceiling.
[171] (1911) 12 C.L.R. 375.
[172] (1937) 56 C.L.R. 657.
[173] (1962) 108 C.L.R. 372.
[174] *Supra,* n. 114

added, the specific immunity against State taxation of Commonwealth property that section 114 of the Constitution provides:[175] all these are of a different conceptual order from the kind of implied immunities which total immunity theorists insist are a concomitant of the Australian federal system. These apart, it is submitted that the only context in which 'immunity' talk is at all meaningful is that of the exercise of certain prerogative rights by the Crown. The Commonwealth does not enjoy anything resembling 'total immunity': the only implied immunities in the Australian system are extra-Constitutional prerogative immunities, and these are quite different in scope and of much less significance than any implied Constitutional immunities in which total immunity theorists would have us believe.

The Nature of Prerogative Immunity

In general terms, 'prerogative rights' are a not very well defined bundle of common law powers, privileges and immunities, enjoyed originally by the monarch personally and then by 'the Crown' as a personification of or symbol for the State.[176] The most important of them for our purposes are immunity from suit, immunity from the operation of statutes, the privilege of prior right to debt payments (which also constitutes an 'immunity' if it is the case that interferences with that privilege are barred), and certain prerogative powers—for example, to wage war—reliance on which may immunize the Crown and its servants from liability to which they might otherwise be subject.[177] It may be noted that some of these immunities are enjoyed only by the Crown itself as an entity, either as a matter of law (immunity from suit) or because they could have no other referent (prior right to debt payments). Others have been extended to all those agencies of executive government describable as 'servants' or 'instrumentalities' of the Crown or as 'under the shield of the Crown':[178] immunity from the operation of statutes is enjoyed by Crown servants, at least to the extent that such application would impair some interest or purpose of the Crown, and immunity from liability in

[175] It may be possible to argue that ss 75(3) and 77(3) are the source of another specifically constitutional Commonwealth immunity to the extent that they guarantee non-interference with the Commonwealth's right of access to State courts exercising federal jurisdiction: see *dicta* in *Commonwealth v. Rhind* (1966) 40 A.L.J.R. 407, 412 (*per* Barwick C.J.), 414 (*per* Menzies J.). This really amounts to no more than a variation on the exclusive power immunity theme.

[176] See *Farley* (1940) 63 C.L.R. 278, 320-1 *per* Evatt J. for one of the few judicial attempts to classify prerogatives, if not quite in the terms used here.

[177] *Semble,* in the presence of national danger in time of war, the prerogative may attract authority to do acts not otherwise justifiable like acquiring property without statutory authority: see *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508, *Burmah Oil v. Lord Advocate* [1965] A.C. 75 and also *Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd* (The *Wooltops* case) (1922) 31 C.L.R. 421.

[178] See Hogg, *op. cit.* 204ff. for a discussion of the relative merits, and implications, of these respective labels.

the proper exercise of a prerogative power also extends equally to the Crown and its servants. The distinction should be understood, but is of only marginal significance in the discussion which follows.

The most important point to appreciate is that all of these prerogative immunities are *prima facie* enjoyed just as much by the Crown in right of the States as by the Crown in right of the Commonwealth.[179] If any immunity doctrine emerges here, it is not one like the 'total immunity' view. It is not one which works only in favour of the Commonwealth.

Commonwealth v. Cigamatic

Cigamatic[180] is no safe guide beyond the immediate context of the prerogative. There seems no foundation for the view that the concept of the 'Commonwealth's relationship with its own people', as employed by Dixon C.J.,[181] has any very wide meaning. The relationships in question, with which we are told the States cannot interfere, are in Dixon C.J.'s usage *legal* relationships involving competing rights and duties. More specifically, they are Commonwealth claims of right against its own subjects, and more specifically still, they seem confined to *prerogative*-based (or 'governmental' or, more narrowly, 'fiscal') claims of right: 'I do not speak of legal rights which are the immediate product of federal statute and so protected by s. 109 of the Constitution'.[182] Nor does he include the rights that may arise by the Commonwealth's acceptance, by its 'choosing to enter into a transaction', of 'some general [state] law governing the rights and duties of those who enter into . . . [that] transaction'.[183] It is also quite clear that by 'people' or 'subjects' he does not mean to include the States themselves and so extend such immunity as does attach to the area of 'Commonwealth-subject relationships' across the whole field of Commonwealth activity: 'There are no conflicting claims [here] between State and Commonwealth. The conflict is between the Commonwealth and its own subjects'.[184] The present writer's argument is that Dixon C.J.'s talk about the 'relationship of the Commonwealth and its own people' goes only to expound, in general terms, the concept of a prerogative right with which the States cannot interfere: it does not in any way provide the conceptual foundation for a qualitatively different kind of immunity, still less one stretching across the whole field of Commonwealth activity. In his *Uther*[185] dissent, Dixon J. perhaps gives some

[179] The only exception is the immunity flowing from the prerogative power to wage war; whatever the extent of that power may be, it seems that it is possessed solely by the Governor-General to the exclusion of State Governors: *Joseph v. Colonial Treasurer* (*N.S.W.*) (1918) 25 C.L.R. 32.

[180] (1962) 108 C.L.R. 372.

[181] *Supra* at n. 18. The terminology varies slightly: '. . . the Commonwealth and its own subjects', 'the legal relations of this new polity with its subjects' (*Uther* (1947) 74 C.L.R. 508, 528, 530); 'the rights of the Commonwealth with respects (*sic*) to its people', 'legal rights and duties between the Commonwealth and its people' (*Cigamatic* (1962) 108 C.L.R. 372, 377).

[182] (1962) 108 C.L.R. 372, 378.

[183] *Ibid.*

[184] *Uther* (1947) 74 C.L.R. 508, 528.

[185] *Ibid.*

support for this latter reading in that he begins by founding his argument on the denial that States can legislate as to the rights which the Commonwealth enjoys against its own subjects and specifying that the prerogative issue is merely an 'added reason', but it will be noted that he ends that judgment[186] by resting on the 'single ground' that the States may not reduce or destroy the Commonwealth Crown's prerogative. In *Cigamatic*,[187] he assimilates the two notions more clearly:

> The right of the Commonwealth in an administration of assets to be paid in preference . . . springs from the nature of the Commonwealth as a government of the Queen. . . . [To destroy these rights by State legislation is] to control legal rights and duties between the Commonwealth and its people.

The majority judgment of Menzies J. in *Cigamatic*[188] rests explicitly, and only, on the prerogative. Both Owen[189] and Kitto[190] JJ. agreed with him.

The Extent of Prerogative Immunity

How far do the various prerogative immunities extend? How may they be reduced? In some contexts the Crown may by appropriate executive action waive its entitlement, for instance by not claiming a procedural advantage, or not pursuing a property right. But the usual method of abrogating Crown privilege is simply by a statute which either expressly or by necessary implication[191] extends to the Crown. In a unitary system the operation of such statutes presents no analytical difficulty: the rationale of their effect is that the Crown by its very assent to the bill, however formal this may have become since the establishment of parliamentary supremacy, must be taken to concede such intrusions on the prerogative as the legislation entails. This analysis of course holds for the States and Commonwealth considered separately: the Commonwealth parliament can unquestionably bind the Crown in right of the Commonwealth, and a State legislature can bind the Crown in right of that State.

But problems arise where multiple Crown entities are involved, as in the Australian federal system. Can the Commonwealth bind the Crown in right of the States? Can a State, by legislation which expressly or by necessary implication purports to do so, bind the Crown in right of another State, or of the Commonwealth, or even—for that matter—of Britain?[192] Fullagar J. in *Bogle*[193] reaches a simplistic solution by what amounts to an extension of the unitary system reasoning just noted: State legislation cannot be binding on the Crown in right of the Commonwealth

[186] *Ibid.* 534.
[187] (1962) 108 C.L.R. 372, 377.
[188] *Ibid.* 388.
[189] *Ibid.* 390.
[190] *Ibid.* 381. Kitto J. also agreed with the Chief Justice.
[191] See Hogg, *op. cit.* 169-70, for a discussion of the meaning of this criterion, and also *infra*, n. 213.
[192] See *Attorney-General for England v. Sorati* [1969] V.R. 88, especially 99.
[193] (1953) 89 C.L.R. 229, 259.

because the latter has not assented to it. It is submitted that this argument cannot be decisive, for reasons which have already been stated at length,[194] and that there are *no prima facie* limits on the capacity of any legislature in Australia to bind, or limit the prerogative of, the Crown in right of any other community (be it Commonwealth or State) provided that that legislation is otherwise constitutionally valid.

The last sentence of course has a sting in its tail. The Commonwealth and States do not legislate for each other, or at all, in a vacuum. One is obliged to consider not just the threshold issue of construction, *viz* whether the statute in question is intended to bind the Crown in right of any other jurisdiction than that of the enacting legislature,[195] but whether the enacting legislature has constitutional power to do so. It is at this point that writers on administrative law, in whose hands the whole question of 'the Crown' and its prerogatives has unfortunately tended to be left, invariably abandon further analysis as beyond their scope and refer one back to 'the provisions of the Commonwealth Constitution and the implications to be drawn from them'.[196] But one need not despair in prospect of being led back into the whole issue of implied constitutional immunities and possible exceptions thereto—the tortuous subject matter of the first sections of this paper. For it is the present writer's argument that it is not the immunities themselves which are founded on the Constitution, but rather only the capacity of legislatures to get at and modify them. *Cigamatic*-style[197] prerogative immunities—in particular the immunity associated with prior right to debt payment, immunity from the operation of statutes generally, and immunity from suit—are enjoyed by the Crown in right of both Commonwealth and States, and do not derive from the federal Constitution.[198]

What, then, is the impact of the Australian constitutional arrangements on the ability of the various governments to modify or destroy each other's prerogative immunities? The Commonwealth is undoubtedly in a superior position. Its power is to legislate for the 'peace, order and good government of the Commonwealth' as a whole, and accordingly it may freely act to destroy such of the States' prerogative immunities as stand in the way of its achieving that end, provided it stays within the bounds of its enumerated powers,[199] and does not discriminate against particular States or the States as a whole when the subject matter of the legislation could meaningfully apply to Commonwealth subjects at

[194] *Supra*, pp. 527-9.

[195] As discussed *supra* at nn. 42-3.

[196] Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed., 1970) 268. See also Hogg, *op. cit.* 190, 227.

[197] (1962) 108 C.L.R. 372.

[198] Though they may be regarded as implicitly recognized in that document: ss 61 and 106.

[199] This is the force of the whole course of decision since *Engineers* (1920) 28 C.L.R. 129. The *dicta* of Dixon and Evatt JJ. in *Farley* (1940) 63 C.L.R. 278, 313, 323-4, are merely the most explicit judicial statements to this effect.

large.[200] The States' power is much more limited. They cannot legislate at all with respect to any subject matter (as necessarily so characterized) which comes within the Commonwealth's exclusive power. They cannot tax Commonwealth property. Such of their legislation as is inconsistent with an exercise of the Commonwealth's concurrent legislative power goes into abeyance for the duration of the Commonwealth law. And their legislative powers may only be exercised for the peace, welfare and good government of the State.

This last mentioned limitation means that a State can only breach prerogative immunities of the Crown in right of the Commonwealth to the extent that the Commonwealth executive government activities or claims in question are somehow referable to the territorial confines of the State. It is perhaps here that Dixon C.J.'s concept of the 'legal relationship between the Commonwealth and its subjects' comes into its own, as helping to identify—albeit not very clearly—such classes of Commonwealth activity or claims of right as have to do *not* with the good government of a State but with that of the Commonwealth as a whole, and are accordingly beyond State power to affect. The present writer is prepared to regard *Cigamatic*[201] as involving a particular Commonwealth prerogative immunity of a kind inaccessible to State legislative interference for this reason, though there is still much to be said for the argument[202] that the legislation in issue in *Cigamatic*,[203] as in *Uther*,[204] could and therefore should have been characterized as going to the good government of the State. This view, while utterly refusing to draw large conclusions from the underlying reasoning of the majority, does at least give the decision itself a toehold, which after all the academic effort that has gone into its justification can scarcely be denied it.

It may also be argued that the 'territorial' limitation on State constitutional competence serves to explain the statements of Dixon J.[205] and Fullagar J.,[206] otherwise inexplicable on the prerogative immunity view, that no State could have made the Commonwealth liable in tort (or, no doubt, contract) before the Commonwealth itself did so by statute, *viz* Judiciary Act, sections 56 and 57. Presumably this claim would extend, *a fortiori*, to State laws purporting to expose the Commonwealth to criminal or quasi-criminal liability. Now perhaps the reason this so, if indeed it is, is that such a State law could not be characterized as one for the good government of the State: it goes rather to the relation-

[200] *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31, especially the judgment of Dixon J. Constitution, s. 114, prohibiting Commonwealth taxation of State property, is of course another more explicit restraint.
[201] (1962) 108 C.L.R. 372.
[202] Discussed *supra* T.A.N. 27.
[203] (1962) 108 C.L.R. 372.
[204] (1947) 74 C.L.R. 508.
[205] *Ibid.* 529. Mentioned *supra* at n. 72.
[206] *Bogle* (1953) 89 C.L.R. 229, 260.

ship of the Commonwealth with its subjects, to the good government of the Commonwealth as a whole. This accommodation has some marginal credibility when Commonwealth contracts are in issue, just as it had in the context of debt priority claims: both these situations involve claims of right by the Commonwealth as an entity, and such claims may be conceptually difficult to locate territorially in such a way as to expose them to State legislation. But when the tortious or criminal liability of the Commonwealth or a Commonwealth servant is in issue, it is much more difficult to make out a case along these lines. The regulation of tortious and criminal activity occurring within a State (and torts and crimes are rather more easily 'locatable in space' than debt priority or even contractual claims) would seem to be pre-eminently a matter for the good government of that State, and this is so whether the offender happens to be an ordinary person *or* another government or its servant operating within the boundaries of the State. It is submitted that the *dicta* of Dixon and Fullagar JJ. have weight only when premised on the assumption of the total immunity theory that *no* State legislation of any kind is or ever was capable of affecting the Commonwealth of its own force. If so large an assumption is ill-founded, as has been argued in this paper, then the specific claims in issue here must also be regarded as ill-founded. The ability of State laws to make the Commonwealth liable in tort and contract is not dependent on the Commonwealth having enacted sections 56 and 57 of the Judiciary Act. The ability of State criminal and quasi-criminal laws to bind the Commonwealth and its servants is not contingent upon any prior Commonwealth waiver of immunity from such proceedings, although it may in fact be, as has been suggested[207] that section 64 of the Judiciary Act can be construed *as* a quite generalized waiver of immunity from suit. In either case State laws purporting explicitly or by necessary implication to apply to the Commonwealth might of their own force have exposed the Commonwealth to liability, as well as merely fixing the incidents of that liability once conceded. None of this is to deny that there are important limits on the States' legislative competence imposed by their own constitutions, nor is it to deny that where activities or claims of the Commonwealth as an entity rather than the activities of its individual instrumentalities are in issue there may still be room for metaphysical as well as geographical argument as to the territorial limits of State competence. The present writer's suggested treatment of *Cigamatic*[208] itself possibly represents the furthest such argument can credibly go. Dixon C.J.'s 'Commonwealth-subject relationship' concept has only to date been canvassed in this very specific context of debt priority claims, or at best Commonwealth 'fiscal rights', and it is submitted that it would be both difficult and undesirable to try to stretch the language much beyond

[207] *Supra* T.A.N. 83.
[208] (1962) 108 C.L.R. 372, *supra* at n. 201.

this. Why limit State legislative competence when the Commonwealth is so capable of protecting itself should it feel unduly hampered?

It may be noted that *Pirrie v. McFarlane*[209] stands as straight-forwardly to do with legislation—concerning car drivers—for the good government of the State. The only remaining difficulty with that case[210] is that the Victorian Motor Car legislation did not explicitly purport to apply to the Commonwealth or its servants:[211] if it is the case that Crown servants enjoy Crown prerogative immunity from the application of statutes to the extent that such application impairs a function of the Crown[212] (which impairment is arguably the case here), may it not be that the defendant serviceman could have continued to rely on that immunity, arguing that the legislation failed to pass the threshold test of construction that any prerogative-reducing legislation must? The answer must be that the legislation did purport to apply to all car drivers, including Commonwealth drivers, if not expressly then at least by necessary implication. This was the force of the majority opinions on this point, though 'necessary implication' terminology was not used.[213]

Consequential Problems?

An advantage of the present analysis is that it reduces to a mere side issue what to the 'total immunity' theorists was a central preoccupation: *viz* the elaborate business of defining constitutionally valid waivers of immunity and the circumstances in which they operate. Since the Commonwealth and the States both have power (though within limits, and in the case of the States reasonably substantial ones) to reduce or destroy each other's prerogative immunities, there is not very much immunity left for either recipient of such attention to waive.

There are only two kinds of situations in which the possibility of waivers of immunity can even arise. One is where a particular government's immunity is *prima facie* guaranteed by the *constitutional* inability of another government to intrude upon it: the limits imposed by the State and Federal Constitutions in this respect have already been noted.[214] It is clear that no purported waiver of immunity here could possibly operate

[209] (1925) 36 C.L.R. 170.

[210] The unresolved exclusive power immunity issue apart, see *supra* at n. 150.

[211] S. 24 of the Act declared that it applied 'to persons in the public service of the Crown as well as to other persons', but all the opinions proceeded on the assumption that this reference was only to the State Crown. See further on this question *supra*, n. 43.

[212] *Supra* at n. 178. See further Hogg, *op. cit.* 174, 206.

[213] (1925) 36 C.L.R. 170, 179-80 (*per* Knox C.J.) 229 (*per* Starke J.) and especially 218 (*per* Higgins J.): 'for that regulation to be effective *all* the traffic must be bound'. Even if the very narrow test of necessary implication laid down by the Privy Council in the *Bombay* case [1947] A.C. 59 must be accepted, *viz* that the Crown is bound only if the statute's 'beneficent purpose must be wholly frustrated unless the Crown were bound', the *Pirrie* facts would seem to satisfy this criterion. See further Hogg, *op. cit.* 169-70.

[214] *Supra* T.A.N. 199ff.

to validate otherwise unconstitutional legislation:[215] if, for example, the present writer is wrong and it is indeed the case[216] that no State can destroy the Commonwealth's prerogative immunity from suit (given that this follows from the 'territorial' limitations on State constitutional competence), then no purported waiver by the Commonwealth could make such a State law binding of its own force. It may however be that the same result, at least in this case, can be achieved by a Commonwealth waiver which does not purport to give life to an unconstitutional State law but which rather operates directly to achieve the same result. Thus, perhaps, Judiciary Act, sections 56 and 57, waiving immunity from suit in the specific areas of tort and contract; thus perhaps also section 64 of the Judiciary Act, to the extent that it can be construed as a generalized waiver of immunity from suit. The Commonwealth's own head of power for such legislation, if one is needed, is no doubt section 78 of the Constitution.

The other kind of situation in which 'waivers' may come in issue is a rather less complex one, uncomplicated by questions of constitutional competence. This is just the situation which arises when prerogative immunity continues to be enjoyed simply because legislation which might otherwise have reduced it does not expressly or by necessary implication purport to do so. It is quite likely, for example, that the Commonwealth should wish to waive aspects of its own prerogative immunity from the operation of State statutes, not least because there is no general body of federal law to regulate its transactions. The Commonwealth is in any event bound, it has been argued, when otherwise valid State legislation expressly or by necessary implication purports to bind it. But the difficulty is that State legislation may very often not lend itself easily to that reading: an intention to bind by 'necessary implication' may often be more difficult to establish than was the case in *Pirrie v. McFarlane*.[217]

There are several ways in which the Commonwealth might cope with this situation. One is to enact legislation quite specifically waiving certain aspects of its prerogative immunity. Thus the Salaries Act 1907, upheld in *Chaplin*.[218] There is no difficulty in finding a constitutional foundation for that enactment in the Commonwealth's implied power to legislate for its own public servants. It is also possible to construe the Judiciary Act provisions just discussed, *viz* sections 56, 57 and 64, in this light; as going to remedy not a constitutional deficiency in State law but merely its inexplicitness.

A second way is to provide in general terms that State laws should govern and be binding on courts adjudicating suits to which the Com-

[215] This is the Higgins/Evatt proposition discussed *supra* at nn. 117-9.
[216] As Dixon and Fullagar JJ. would have it: *supra* at nn. 205-6.
[217] (1925) 36 C.L.R. 170, *supra,* n. 213. This may be argued to have been the case in *Chaplin* and *West,* thus demanding Commonwealth 'waiver' action.
[218] (1911) 12 C.L.R. 375.

monwealth is a party, therefore in effect providing that State law (in the absence of course of constitutional provisions or Commonwealth laws to the contrary) shall, notwithstanding that it does not in terms or by necessary implication apply to the Commonwealth, bind it in all its activities in respect of which it may become party to a legal action. This the Commonwealth has done by enacting section 64 of the Judiciary Act, if not sections 79 and 80.[219] If section 78 of the Constitution will not provide a sufficient foundation for this legislation, there would seem no great difficulty in implying a Commonwealth legislative power to waive what after all are only implied immunities.

A third possible mode of Commonwealth action is at the executive rather than legislative level. The simplest method of the Commonwealth waiving its immunity from suit, *e.g.*, avoiding all the difficulties about the status of State and federal legislation respectively in this area, is for it to appear in court. Executive waivers of executive immunity surely need no formal constitutional foundation. And it may be that the Commonwealth can waive other aspects of its prerogative immunity simply by executive action, *viz* by 'entering into transactions' in such a way as to make it clear that it intends right and duty conferring State laws to operate. Thus the 'affected by *dicta* of Dixon and Fullagar JJ.[220] But given that it will very often not be clear whether in a specific case the Commonwealth does intend to submit to particular legislation, it is suggested that it is better (in the absence of specific Commonwealth legislation in point) to regard section 64 as constituting the 'real' waiver and the executive action as having significance only when it operates to reinforce that section. If the Commonwealth wants to insist on its immunity and avoid the general affect of section 64 then, in the interests of all parties understanding their rights at the outset, it should specifically legislate to this effect.

Bogle's Case Revisited

It is still difficult to accommodate Fullagar J.'s *Bogle*[221] *dicta* in all of this. One is obliged to say that not only did the State law not purport to apply to the Commonwealth, and that the Commonwealth did not intend to submit to it, but that for some reason section 64 failed to operate, either of its own force or in conjunction with section 56 of the Judiciary Act, to put the Commonwealth in the same position as a 'subject' with respect to the particular contract rule enacted by the State rent restriction legislation. Perhaps section 56 did not operate here because the Commonwealth came to court as a *plaintiff*—but why then should section 64 not operate of its own force? Perhaps the Commonwealth may only become subject to *general* contract rules like those embodied in the Goods Act 1958—but on what basis can one sustain such an arbitrary, albeit con-

[219] *Supra*, pp. 534-5.
[220] *Supra* at nn. 66-8.
[221] (1953) 89 C.L.R. 229, 259-60.

venient, distinction? Perhaps this was one of those cases where the qualification in section 64 operated, that is where it was not 'possible' for the Commonwealth to have the same rights as a subject—but it is difficult to give this limitation such a content without sliding back in the direction of complicated theories already contested. The present writer is inclined to unrepentantly submit, with all due respect, that the *Bogle*[222] *dicta* were wrong. Certainly they cannot be accommodated at all convincingly by the 'total immunity' view.[223]

IV CONCLUSION

Cigamatic[224] does not establish any 'total immunity' of the Commonwealth from the application of State laws, founded on implications to be derived from the Australian federal system. Thus the Commonwealth can be bound by State laws without previously 'waiving its immunity'. Equally, it may be that the Commonwealth will need to protect itself from the operation of State law: such legislation will not be redundant.

The only immunities which the Commonwealth enjoys which are not founded on specific sections of the Constitution are certain prerogative immunities attached to the Crown. But these are enjoyed also by the Crown in right of the various States. Prerogative immunities may be abrogated by statute, and *prima facie,* State laws purporting to do so expressly or by necessary implication may bind the Crown in right of the Commonwealth, just as Commonwealth laws may bind the States. But the provisions of the Federal and State Constitutions do impose constraints on the legislative power of both Commonwealth and States. When these are balanced out, it is evident that the Commonwealth has more power in practice to bind the States than have the States to bind the Commonwealth. The most significant constraint on State power is that State laws be for the peace, welfare and good government of the State: though the limits of that constraint are by no means clear, it is likely that it can accommodate the actual decision in *Cigamatic*.[225] But given the Commonwealth's ample ability to protect itself, such constraints as there are on State power to bind the Commonwealth should be construed as narrowly as possible.

[222] *Ibid.*
[223] *Supra,* pp. 536-7.
[224] (1962) 108 C.L.R. 372.
[225] *Ibid.*; *supra* at nn. 201, 208.