# LEGAL LANDMARKS

## CONSTITUTIONAL AND ADMINISTRATIVE LAW

### *Constitutional Relations between the Commonwealth and the States*

During the course of 1962 the High Court handed down decisions in cases which involved important questions of Commonwealth-State relations. The most important and far-reaching of these cases was *Commonwealth of Australia v. Cigamatic Pty. Ltd.*[1] in which a principle of law embodied in a decision[2] of the Court which had stood for fifteen years was rejected.

In the *Cigamatic* case the facts were as follows. A company having gone into liquidation, the Commonwealth sought to establish its right to be paid two types of debts in priority to other debts, one type being sales tax payable under the Sales Tax Assessment Act, the other telephone charges payable under the Post and Telegraph Act. It was claimed that these debts were entitled to priority in the liquidation despite the fact that the New South Wales Companies Act 1936-1957 laid down a different order of priorities.[3] This contention was against the authority of a previous decision of the Court—*Uther v. Federal Commissioner of Taxation*[4]—where it was held that the priority provisions of the New South Wales Companies Act were binding on the Commonwealth and that it was within the power of a State Parliament to modify the prerogative rights of the Commonwealth Crown in respect of the payment of debts. However, in *Uther's Case,* Dixon J. (as he then was) delivered a vigorous dissent in which he denied the constitutional capacity of a State Parliament to affect such rights on the ground that it was a matter exclusively within the province of the Commonwealth.[5] In the *Cigamatic Case,* a majority of the High Court (Dixon C.J., Kitto, Menzies, Windeyer and Owen J.J.; McTiernan and Taylor J.J. dissenting) upheld the doctrine of federal immunity propounded in his dissenting judgment.

It had of course already been recognized that the Commonwealth Parliament could by legislation exempt the Commonwealth Crown and its agencies from the operation of State taxing legislation which affected the relations between the Commonwealth and its citizens.[6] In *Australian Coastal Shipping Commission v. O'Reilly*[7]

1. (1962) 36 A.L.J.R. 97.
2. *Uther v. Federal Commissioner of Taxation* (1947) 74 C.L.R. 508.
3. See s. 297.
4. (1947) 74 C.L.R. 508.
5. *Ibid.*, at pp. 527-34.
6. See, for example, *West v. Commissioner of Taxation* (*N.S.W.*) (1936-37) 56 C.L.R. 657.
7. (1962) 35 A.L.J.R. 468.

decided a few months earlier than the *Cigamatic Case* it was held that receipts given by the Australian Coastal Shipping Commission, a government instrumentality, in the course of its statutory operations, were not subject to duties imposed by the Victorian Stamps Act because of a specific provision in the Commonwealth Act which established the Commission exempting that body from State taxation. The view of the majority in this case was that s. 98 of the Constitution (the navigation power) allied with s. 51(i) (the inter-state trade and commerce power) conferred power on the Commonwealth to set up a statutory corporation to participate in the inter-state coastal trade and furthermore justified a legislative provision which exempted such a body from state taxation in the course of its operations, such a provision prevailing over inconsistent State law by virtue of s. 109 of the Constitution.[8]

In the *Cigamatic Case* there were no provisions in either the Sales Tax Assessment Act or the Post and Telegraph Act which directly upset the scheme of priorities contained in the State Act.[9] Consequently, there was no basis for invoking s. 109 of the Constitution. Nevertheless a majority of members of the Court held that the State Act did not affect the debts in issue, basing their argument on an inherent prerogative or government right of the Commonwealth which was immune from State encroachment.[10] However, McTiernan J. (who with Taylor J. dissented) pointed out that it was "within the constitutional power of the Commonwealth to enact legislation giving debts due to the Commonwealth the priority which the Commonwealth thinks fit if it is dissatisfied with the order of priority accorded such debts under State law."[11]

It is clear from the judgments of the majority that they were not prepared to erect a complete barrier of exemption to protect the Commonwealth or its agencies from the operation of State law.[12] If, for example, the Commonwealth entered into a contract for the sale of goods, such a transaction would not be regarded as being of an essentially governmental nature so as to attract the mantle of immunity from provisions of a State Sale of Goods Act importing conditions as to quality of the goods which were the subject of the contract. However, it would seem on the basis of the principle in

8. The legislation in question was the Australian Coastal Shipping Commission Act **1956** (Cwth) s. **36**(i) and The Stamps Act **1946** (Vic.) s. **17**.
9. In *Uther's Case* a majority of the Court had held that s. **32** of the Sales Tax Assessment Act had not conferred any statutory right of priority of payment of debts due for sales tax.
10. See, especially, the judgment of the Chief Justice **36** A.L.J.R. at pp. 96-98.
11. *Ibid.*, at p. 99. See also the judgment of Taylor J. at pp. 99-102.
12. "It is *not* a question of the authority or the power of a State to make some general law governing the rights and duties of those who enter into some description of a transaction, such as the sale of goods, and of the Commonwealth in its executive arm entering into a transaction of that description": per Dixon C.J. 36 A.L.J.R. at p. 98. Italics added.

*The Australian Shipping Commission Case* that the Commonwealth could legislate for such exemption provided that the legislation was passed under a valid head of Commonwealth power and that the exemption could be regarded as reasonably incidental to the carrying out of operations sanctioned by the legislation.

As the law now stands, the Commonwealth and its agencies are placed in a most advantageous position in respect of both prerogative or governmental activities and business or commercial activities. But there is an important difference between these types of activities. Where they are of the former nature, there is an automatic exemption from the effects of a State Act (such as a tax law) which interferes with or detracts from such functions of government. But in the case of commercial activities carried on by its agencies the Commonwealth must expressly legislate for exemption from the operation of provisions of a State Act if such exemption is desired. Of course, in the light of increasing governmental intervention in social and economic life, the distinction between governmental and commercial activities is becoming increasingly more difficult to define.[13] Therefore, the better and more logical course for the Commonwealth to follow in the future would be to legislate expressly for the exemption which it desires, where it sets up a statutory corporation or commission, rather than to rely on a court's ability to draw the distinction between inherent prerogative rights and rights of a different nature.

*The Commonwealth Marriage Act*

In *Attorney-General for Victoria v. Commonwealth of Australia*[14] the question to be determined by the High Court was whether certain provisions of the Marriage Act (C'wth) 1961 were within the constitutional power of the Commonwealth Parliament as being laws with respect to marriage under s. 51(xxi) of the Constitution. The provisions of the Act in question were ss. 89 and 90, providing for legitimation of illegitimate children by the subsequent marriage of their parents, s. 91, providing in certain circumstances for the legitimation of children of a marriage void at the time of celebration, and s. 94 which made bigamy a Commonwealth offence. The sustaining of these provisions would of course mean that inconsistent provisions of State law would be rendered invalid. It was held by majorities of the Court that (a) ss. 89 and 90 were valid (4-3)[15] and (b) s. 91 was valid (6-1).[16] The Court unanimously upheld the validity of s. 94.

13. See *Australian Coastal Shipping Commission v. O'Reilly:* 35 A.L.J.R. 468 at p. 471.
14. (1962) 36 A.L.J.R. 104.
15. Kitto, Taylor, Menzies and Owen JJ.; Dixon C.J., McTiernan and Windeyer JJ. dissenting.
16. McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.; Dixon C.J. dissenting.

The argument for the Attorney-General of Victoria was that the impugned provisions did not show a sufficient connection with the subject of marriage to fall within the ambit of s. 51(xxi) of the Constitution, that the legitimation provisions were concerned with a status arising under State law which regulated matters such as the devolution of property, and that such matters were the exclusive province of the States.

Kitto J., one of the majority judges, in sustaining the legitimation provisions, placed emphasis on the fact that it was a basic end of marriage to provide a pre-requisite for the legal recognition of family relationships and that a law providing for legitimation *per subsequens matrimonium* added to this legal significance of marriage.[17] On the other hand, McTiernan J. considered that the term "marriage" in s. 51 bore its own limitations and that the legitimation of children born *before* marriage was outside its province.[18] Dixon C.J., who also dissented, pointed out that the impugned provisions left their legal imprint almost entirely on matters within the province of the State: matters such as the guardianship of infants and the interpretation of statutes dealing with succession to property where the word "child" was used. For this reason he was not prepared to categorize the law as one with respect to "marriage". The bigamy provision was sustained by all members of the Court on the ground that it was designed to prevent the profanation of the marriage ceremony.[19]

The instant case illustrates what has been described as the "expansive" interpretation of the various heads of power vested in the Commonwealth by the placita of s. 51 of the Constitution—an interpretation which has its origins in the *Engineers' Case*. It also suggests that with the growth of Commonwealth legislation on matters of private law which fall within these placita the time is near when interpretation of such federal statute law will lead to the evolution of an extensive Commonwealth common law.

R. D. LUMB

*Availability of Certiorari*

The decision of the Full Court of Queensland in *The Queen v. Tennant ex parte Wood*[1] is noteworthy in regard to the limitation applied to the use of certiorari to correct an error of law of a non-jurisdictional type appearing on the face of the record of the proceedings before an administrative tribunal or inferior court. This particular use of certiorari, as is well known, was resurrected by the Court of Appeal in *R. v. Northumberland Compensation Appeal*

17. (1962) 36 A.L.J.R. 104 at p. 111.
18. *Ibid.*, at p. 109. 19. *Ibid.*, at p. 107.
1. [1962] Qd.R. 241.