FEDERAL LIMITATIONS ON THE LEGISLATIVE POWER OF THE STATES AND THE COMMONWEALTH TO BIND ONE ANOTHER

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INTRODUCTION

The principle that the legislature can enact laws which bind the executive is a familiar one. The prerogative can be abrogated or abolished by legislation[1] and the decisions of the executive made subject to administrative review.[2]

More interesting, however, is the relationship within the federation between the legislature of one polity and the executive of another. To what extent can the laws of one polity bind the executive of another, or abrogate or abolish its prerogatives?

The High Court, over the last century, has had a very difficult time in answering these questions. Fundamental though they be to our governmental system, there has never been a clear and consistent principle established to provide ready answers to them. After the centenary of federation, one would think we would understand how the polities within that federation are intended to interact, but we do not.

This article addresses the current state of the law with regard to the power of the legislature of one polity within the federation to bind the executive government of another, and the legislative power of one polity to impose a tax upon another. In doing so it provides critical analysis of the recent High Court judgment in *Austin v The Commonwealth*[3] and its effect upon the *Melbourne Corporation*[4] principle. It then analyses the fundamental *Cigamatic*[5] doctrine and addresses its possible replacement with a reverse application of the *Melbourne Corporation* principle, as a means of providing a more coherent basis for determining the difficult question of the extent to which one polity may legislate to bind or affect another.

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1 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

2 See, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Administrative Decisions Tribunal Act 1997* (NSW).

3 *Austin v Commonwealth* (2003) 195 ALR 321 ('*Austin*').

4 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*').

5 *Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372 ('*Cigamatic*').

POWER OF THE COMMONWEALTH PARLIAMENT TO ENACT LAWS BINDING ON THE STATE EXECUTIVE

The High Court's initial constitutional approach to the issue of federalism was to establish an implied immunity of instrumentalities, so that at least in the exercise of their 'governmental' functions, neither the Commonwealth nor State executive governments could be affected by the laws of the other.[6] This implication was overturned by the *Engineers' Case*, so that the laws of the Commonwealth and the States have full operation within the subjects upon which they have power to legislate, subject to the application of s 109 to resolve inconsistent laws.[7] Commonwealth laws could therefore bind the States and State laws could bind the Commonwealth.

The *Engineers' Case* left open the possibility that different considerations may apply to discriminatory laws, and laws concerning taxation or the prerogative.[8] Laws concerning taxation are discussed below. Subsequent cases have also held that the Commonwealth may make laws affecting the prerogative of a State.[9]

The category of discriminatory laws was explored in *Melbourne Corporation.*[10] There a majority of the Court identified an implied limitation on the Commonwealth Parliament's power to legislate with respect to the States. The implied limitation is derived from the federal system of government which requires the existence of separate governments exercising independent functions.[11] The nature of this limitation, however, varied in the judgments. Justice Dixon referred to 'a law which discriminates against States' or which 'places a particular disability or burden upon an operation or activity of a State' and 'upon the execution of its constitutional powers.'[12] Justice Starke referred to a law which 'curtails or interferes in a substantial manner with the exercise of constitutional power' by a State.[13] Justice Rich referred to laws which 'single out' the States and impose on them restrictions which prevent them from performing the normal and essential functions of government, or laws of general application which would have this effect.[14] Justice Williams referred to the exercise of power 'for the purpose of affecting the capacity of the other to perform its essential governmental functions.'[15] Chief Justice Latham focused upon issues of characterization, to determine whether the Commonwealth law was one with respect

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6 *D'Emden v Pedder* (1904) 1 CLR 91; *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Traffic Employees Association* (1906) 4 CLR 488.

7 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers' Case*').

8 Ibid 143–4, 156–7 (Knox CJ, Isaacs, Rich and Starke JJ). See also *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 390 (Dixon J commenting on these exceptions).

9 See, eg, *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 92–3 (Mason J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 140–1 (Mason J), 215 (Brennan J) ('*Tasmanian Dams Case*'), and the cases discussed therein.

10 (1947) 74 CLR 31.

11 Ibid 81, 83 (Dixon J), 66 (Rich J), 74–5 (Starke J), 99 (Williams J).

12 Ibid 79.

13 Ibid 75.

14 Ibid 66.

15 Ibid 99. Note, however, that his Honour then dealt with the issue as one of characterization.

to State functions rather than one with respect to a head of Commonwealth legislative power.[16]

The implied limitation identified by the High Court in *Melbourne Corporation* clearly applied as a limitation on legislative power. There were also suggestions that it was a limitation on Commonwealth executive power. Justice Starke was the clearest, expressly referring to the implication as a limitation on executive power.[17] Justices Rich[18] and Williams[19] referred generally to the exercise of 'the constitutional powers' of the Commonwealth or the States against the other, which presumably extends to executive power as well as legislative power.

In a series of subsequent cases, the *Melbourne Corporation* principle was refined[20] so that the implied limitation was expressed as having two distinct elements:

> (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities ['the limitation against discrimination'] and
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> (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments …[21]

This split into two elements, which has since been overturned,[22] was used not only to describe the different types of laws which would breach the implied limitation, but also to set different tests for determining whether a breach had occurred. It was a means of drawing together the various descriptions, rationales and tests set out in the *Melbourne Corporation* judgments.

The first element dealt with 'discrimination'. In the *Queensland Electricity Commission* case, it was noted that this first element applied to discrimination against a particular State, as well as against States generally.[23] In order to determine if a law is 'discriminatory' it is necessary to look to its purpose, which is to be ascertained 'by

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16 Ibid 61.

17 Ibid 75. See also *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 247 (Deane J) ('*Queensland Electricity Commission*'). Note, however, *Aboriginal Legal Service of Western Australia v Western Australia* (1993) 9 WAR 297, 319–20 (Nicholson J) where his Honour observed that it does not apply to resolutions of a House of the Parliament, as these are not exercises of legislative or executive power.

18 *Melbourne Corporation* (1947) 74 CLR 31, 66.

19 Ibid 99.

20 *Victoria v Commonwealth* (1971) 122 CLR 353, 424 (Gibbs J), 391–2 (Menzies J), 410–11 (Walsh J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 93 (Mason J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 191–2 (Gibbs CJ), 216 (Stephen J), 225–6 (Mason J); *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 313 (the Court); *Tasmanian Dams Case* (1983) 158 CLR 1, 139–41 (Mason J), 169 (Murphy J), 214–15 (Brennan J), 281 (Deane J); *Queensland Electricity Commission* (1985) 159 CLR 192, 206–7 (Gibbs CJ), 217 (Mason J), 226–7 (Wilson J), 231–3 (Brennan J), 245–9 (Deane J), 259–62 (Dawson J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 163–4 (Brennan J), 199–202 (Dawson J), 241–5 (McHugh J); *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 228–33 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

21 *Queensland Electricity Commission* (1985) 159 CLR 192, 217 (Mason J); quoted with approval in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Australian Education Union Case*').

22 *Austin* (2003) 195 ALR 321.

23 (1985) 159 CLR 192, 217 (Mason J), 235–6 (Brennan J), 247 (Deane J), 262 (Dawson J).

reference to the substance and actual operation of the law in the circumstances to which it applies'.[24] The discrimination may operate so as to isolate the State from the application of the general law. However, a law which discriminates against a State by depriving it of a right, privilege or benefit not enjoyed by others, so as to place it on an equal footing with others, will not breach the *Melbourne Corporation* principle.[25]

The test for determining whether there was a breach of the *Melbourne Corporation* implication under this first element appeared merely to be whether there was an impermissible form of discrimination. In relation to this first element, there was no need to establish that the effect was to threaten the continued existence of the State or its structural integrity. It appeared to be sufficient to establish that a discriminatory disability or restriction was imposed upon the exercise of the functions of the State executive or legislature.[26]

The second element of the implied limitation was directed at laws of general application, rather than discriminatory laws. Where a law was one of general application, it had to 'operate to destroy or curtail the continued existence of the States or their capacity to function as governments' before there was a breach of the implied limitation. This appeared to be a higher test of application than that concerning discriminatory laws under the first element. In the *Tasmanian Dams Case*, Mason J stressed that this second element operated 'to prohibit impairment of the capacity of the State to function as a government, rather than to prohibit interference with or impairment of any function which a State government undertakes.'[27] His Honour concluded that it was not enough that a Commonwealth law adversely affected the State in the exercise of a governmental function or the exercise of its prerogative. There must be a 'substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system'.[28]

Despite the more rigorous nature of this test, the High Court has been quite liberal in its application. For example, in *Re Australian Education Union; Ex parte Victoria,* a majority of the High Court concluded that it was 'critical' to the capacity of a State to function as a government that it have the right to determine the number and identity of the persons whom it wishes to employ, their term of appointment, and the number and identity of the persons it wishes to dismiss. At the higher levels of government, the majority also considered it critical to a State's capacity to function that it determine the terms and conditions on which those persons shall be engaged.[29] In *Solomons v District Court of New South Wales,* Kirby J[30] concluded that the Commonwealth may not enact

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24 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 240 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Victoria v Commonwealth* (1996) 187 CLR 416, 500 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ).

25 *Queensland Electricity Commission* (1985) 159 CLR 192, 217 (Mason J).

26 Ibid 226 (Wilson J).

27 *Tasmanian Dams Case* (1983) 158 CLR 1, 139.

28 Ibid.

29 *Australian Education Union Case* (1995) 184 CLR 188, 232 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See, however, Dawson J at 249–50, where his Honour points out the artificiality of the argument.

30 The other members of the Court did not address this issue as they resolved the case on grounds of statutory construction.

laws which burden the consolidated revenue funds of the States,[31] as the power of a State to control its finances, including the imposition of taxes and appropriation, is 'essential to its capacity to function as a government.'[32]

The High Court has since thrown the status of the *Melbourne Corporation* principle into confusion by its judgments in *Austin.* A majority of the Court rejected the view that there are two elements to the limitation, preferring the application of a single test.[33] Justice McHugh, dissenting from this approach, stated that he accepted as 'settled doctrine' the view set out by Mason J in the *Queensland Electricity Commission* case that there are two rules arising from the necessary constitutional implication.[34] His Honour concluded with the following telling point:

> [p]erhaps nothing of substance turns on the difference between holding that there are two rules and holding that there is one limitation that must be applied by reference to 'such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments"'. If there is a difference in content or application, it may lead to unforeseen problems in an area that is vague and difficult to apply. If there are no differences, no advantage is to be gained by jettisoning the formulation of Mason J in *Queensland Electricity Commission*.[35]

There are two main problems with the majority's approach in *Austin.* The first is that the exact nature of the 'single test' remains unclear. This is exacerbated by the use of different terminology throughout in relation to the test. The second problem is that the practical application of the test appears to conflict with the theory set out in the judgments.

The primary judgment on the subject is the joint judgment of Gaudron, Gummow and Hayne JJ. Their Honours rejected the notion that the 'discrimination' test stood on its own, and that no more was required to breach the *Melbourne Corporation* principle.[36] They concluded that there is but one limitation with a single test of application, although in assessing the impact of particular laws, 'such criteria as "special burden" and "curtailment" of "capacity" of the states "to function as governments"' may be used.[37] Their Honours rightly observed that to make distinctions in the application of the two elements of the *Melbourne Corporation* test on the basis of whether the law is one of general application or one which discriminates, tends to favour form over substance.

One might assume then, that the test to be applied is that set out in what was previously considered the second element, namely that the law operates to 'destroy or curtail the continued existence of the States or their capacity to function as governments'. However, their Honours appear to have set a lower test, stating that the 'essential question' in all cases is 'whether the law restricts or burdens one or more of

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31 *Solomons v District Court of New South Wales* (2002) 211 CLR 119, 167 [134].
32 Ibid 168–9 [137] (Kirby J). See also *Melbourne Corporation* (1947) 74 CLR 31, 52–3 (Latham CJ).
33 *Austin* (2003) 195 ALR 321, 331–2 [24] (Gleeson CJ), 357 [124] (Gaudron, Gummow and Hayne JJ), 399 [281] (Kirby J dissenting).
34 Ibid 383 [223].
35 Ibid 383 [224] (citations omitted).
36 Ibid 357 [123].
37 Ibid 357 [124].

the states in the exercise of their constitutional powers.'[38] This appears to be contrary to the distinction made earlier by Mason J[39] that to breach the *Melbourne Corporation* principle, a law must impair the capacity of the State to function as a government, rather than interfere with or impair a function that it undertakes. However, Gaudron, Gummow and Hayne JJ expressed their approval of this distinction.[40] Perhaps it is assumed that a restriction of 'constitutional powers' necessarily impairs the capacity of the State to function as a government. It remains unclear how the test applies if a function of the State is affected, rather than its 'constitutional powers', or indeed, what is the relationship between the constitutional powers of a State and its functions. For example, is any restriction of an executive function a restriction of its 'constitutional powers' which includes its executive powers?

In *Austin,* the issue was whether two Commonwealth laws imposing an additional tax upon the pensions of State judges were constitutionally valid. The tax was part of a general scheme to tax the superannuation benefits of all high income earners, but it applied differently to judges to avoid other constitutional problems[41] and because their pension scheme was unfunded.[42] The different manner of its application led to a financial disadvantage for judges.

In their application of their test, Gaudron, Gummow and Hayne JJ concluded, following the *Australian Education Union* case, that it is critical to a State's capacity to function as a government that it retain the ability to determine the terms and conditions on which it engages officers at the higher levels of government, such as judges.[43] While this may be so, it is hard to see how a Commonwealth tax on superannuation prevents a State from determining the terms and conditions upon which it engages judges. It is even more difficult to see how a tax on judicial superannuation threatens the continued existence of the State or its ability to function. One should note that the Commonwealth tax upon superannuation continues to apply to other senior officers at the higher levels of State government and the States have not, so far, ceased to be able to function as a consequence.

Their Honours noted that judges, like other citizens, are subject to taxes of general application. However, they observed, this tax was discriminatory, and it was this discrimination which resulted in the invalidity of the law.[44] This conclusion appears to place their Honours' judgment within the category that they initially criticized. It isolates the test of discrimination from the general principle requiring the preservation of the constitutional system, and it places an emphasis on form rather than substance. Exactly the same financial burden on judges could have been applied by a law of

38 Ibid 364 [143] Gaudron, Gummow and Hayne JJ. See also at 366 [148] where their Honours described the test in this particular case as whether the laws 'restrict or control the states… in respect of the working of the judicial branch of the state government'.

39 *Tasmanian Dam Case* (1983) 158 CLR 1, 139. See also 213–15 (Brennan J).

40 *Austin* (2003) 195 ALR 321, 365 [146] (Gaudron, Gummow and Hayne JJ).

41 The Commonwealth applied the tax to the judges directly, rather than the pension fund, because it was concerned that otherwise it would breach s 114 of the *Commonwealth Constitution* by taxing the property of the State.

42 The tax was more burdensome for judges, because it was not taken from an existing fund, but rather imposed upfront on judges who had not yet received such amounts by way of their pension.

43 *Austin* (2003) 195 ALR 321, 366 [152].

44 Ibid 368–9 [161]–[162].

general application, but their Honours suggest that this would not have breached the *Melbourne Corporation* principle. If not, then the discrimination test must have a lower threshold than the test for laws of general application — which is exactly the approach to which their Honours objected in principle earlier in their judgment.

Chief Justice Gleeson took a similar view as to the principles involved, concluding that both the concepts of discrimination and burden need to be understood in the light of the wider principle which protects the States from destruction or the impairment of their capacity to function as independent governments.[45] In terms of the application of the principle, Gleeson CJ agreed that State judges may be subject to 'general, non-discriminatory taxation, and the mere fact that the incidence of taxation has a bearing upon the amount and form of remuneration they receive does not mean that federal taxation of state judges is an interference with state governmental functions.'[46] However, he concluded that the differential treatment of judges rendered the laws constitutionally impermissible, because of their 'interference with arrangements made by states for the remuneration of their judges'. He cited as the practical manifestation of that interference the effect upon the capacity of the State to recruit and retain judges.[47] In other words, the discriminatory nature of the law had the effect of discouraging people from accepting appointment as a judge, or continuing to hold office as a judge. Again, however, it is difficult to see how 'discouragement' impairs the independent functioning of the State, suggesting that the mere fact of 'discrimination' leads to the application of a lower test. People could be just as easily discouraged from accepting a State judicial office by a law of general application which affected their remuneration or prospective pension entitlements, but Gleeson CJ rejected the suggestion that such a law would be constitutionally impermissible.[48]

Justice Kirby, while dissenting, agreed with the approach of Gaudron, Gummow and Hayne JJ that there is only one constitutional limitation. He considered that the validity of a law must be considered by reference to its effect on the 'continuing existence of the states, and whether there is an impermissible degree of impairment of the state's constitutional functions.'[49] Accordingly, 'discrimination' must be measured against that criterion. Mere discrimination is not enough to give rise to invalidity.[50] It is the effect of the legislation upon the capacity of the State to function, rather than the mere ease with which its constitutional functions may be exercised, which must be assessed.[51]

In applying these principles, Kirby J contested the 'proposition that imposition of such a tax has a significant and detrimental effect on the power of a state to determine the terms and conditions affecting the remuneration of its judges.'[52] His Honour concluded that the tax in question fell 'far short of impairing, in a substantial degree, the state's capacity to function as an independent constitutional entity.'[53]

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45 Ibid 332 [24].
46 Ibid 333 [28].
47 Ibid.
48 Ibid.
49 Ibid 399 [281].
50 Ibid 403 [294].
51 Ibid 400 [283].
52 Ibid 401 [290].
53 Ibid 404 [299].

The most that one can conclude from the majority in *Austin,* is that there is now, in theory, only one test to identify a breach of the *Melbourne Corporation,* although when discrimination is a factor, the application of the test appears to be altered. The test appears to be directed more at the impairment of the 'constitutional powers' or capacities of a State, and less at the question of whether the law threatens the independent functioning of the State.

Apart from its muddying of the test or tests to be applied to identify breaches of the *Melbourne Corporation* principle, *Austin* is notable also for its extension of that principle. Previously the *Melbourne Corporation* principle had been regarded as protection for the executive government of a State and its ability to function. Some Justices, however, had made observations suggesting that it extends to the protection of the State's independence with respect to all of its constitutional powers, be they legislative, executive or judicial.[54] In *Austin,* the High Court held that the *Melbourne Corporation* principle protects the 'constitutional powers' of a State, including 'the working of the judicial branch of the state government'.[55] It presumably also extends, therefore, to the working of the legislature of a State, perhaps invalidating Commonwealth laws which restrict the privileges and powers of the Houses of the State Parliament or their committees.

In *Australian Capital Television v Commonwealth,*[56] two Justices extended the protection further. Justice Brennan applied it to the protection of 'functions of the State', performed by electors, which lead to the exercise of a State's powers, such as voting and political communication.[57] Justice McHugh observed that, subject to a plain intention to the contrary, 'the powers of the Commonwealth do not extend to interfering in the constitutional and electoral processes of the States.'[58] In his view this even extended to elections of local government authorities.[59]

POWER OF STATE LEGISLATURES TO BIND THE COMMONWEALTH EXECUTIVE

The executive is bound by the law, be it statute or common law. It cannot dispense with the application of the law to its own officers.[60] Accordingly, if a law validly binds the executive, the executive (and its officers) are required to obey the law.[61]

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54 *Queensland Electricity Commission* (1985) 159 CLR 192, 207 (Gibbs CJ), 217 (Mason J), 232 (Brennan J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 216 (Stephen J). See also *Melbourne Corporation* (1947) 74 CLR 31, 75 (Starke J), 79 (Dixon J), where their Honours also referred to the exercise of 'constitutional powers'.

55 *Austin* (2003) 195 ALR 321, 364 [143], 366 [148] (Gaudron, Gummow, Hayne JJ). See also at 384 [228] (McHugh J), 400 [284] (Kirby J).

56 (1992) 177 CLR 106.

57 Ibid 163.

58 Ibid 242.

59 Ibid 244; cf at 199–202 (Dawson J), where his Honour rejected the application of the implied prohibition in this case.

60 *A v Hayden* (1984) 156 CLR 532, 540 (Gibbs CJ), 550 (Mason J), 562 (Murphy J), 580 (Brennan J), 592 (Deane J); *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ); *Coco v Newnham* (1997) 97 ALR 419, 455 (Lee J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 427–8 (Brennan CJ), 444 (Dawson, Toohey and Gaudron JJ) *; Egan v Chadwick* (1999) 46 NSWLR 563, 592 (Priestly JA).

The first question to ask, however, is whether a law intends to bind the executive. There is a presumption that a law will not bind the 'Crown', or as the High Court now prefers to characterize the principle, a law will not 'apply to the members of the executive government',[62] unless it does so expressly or by necessary intendment.[63] This presumption applies not only to the executive government of the enacting polity, but also to the executive government of other polities within the federation.[64]

Once it is ascertained that a law is intended to apply to the executive government of another polity, the question is whether there is legislative power to do so. As the States have plenary legislative power,[65] they have the power to legislate upon any subject matter, as long as it has not been withdrawn from them by the *Commonwealth Constitution*.[66] However, there must be a relevant connection between the law and the territory of the polity in which the law is enacted.[67] If this connection is satisfied, and the law is not inconsistent with a Commonwealth law, then the next question is whether there are any implications derived from the federal system established by the Commonwealth Constitution which would prevent a State law from binding the Commonwealth.

The general rule in answer to this question was first established in *Cigamatic*[68] and has since been revised by the High Court in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*.[69] It provides that a State law of general application, which regulates the exercise of the Commonwealth's executive 'capacities and functions'[70] (for example, by regulating activities it undertakes, such as the sale of

61 *Pirrie v McFarlane* (1925) 36 CLR 170, approved in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 428 (Brennan CJ), 444 (Dawson, Toohey and Gaudron JJ).

62 *Commonwealth v Western Australia* (1999) 196 CLR 392, 409 [33] (Gleeson CJ and Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 346–7 [17]–[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

63 *Bropho v Western Australia* (1990) 171 CLR 1, 19–22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

64 *Jacobsen v Rogers* (1995) 182 CLR 572, 585 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

65 *Powell v Apollo Candle Co Ltd* (1885) 10 AC 282, 289; *Clayton v Heffron* (1960) 105 CLR 214, 250 (Dixon CJ, McTiernan, Taylor and Windeyer JJ); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9(the Court). See also now: *Australia Acts 1986* (UK and Cth) s 2.

66 See, eg, *Constitution* ss 52, 90, 114. Note that Imperial limitations were removed by the *Australia Acts 1986* (UK and Cth).

67 *Clayton v Heffron* (1960) 105 CLR 214, 250 (Dixon CJ, McTiernan, Taylor and Windeyer JJ); *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372, 408 (Mahoney JA); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 12–14; *Kable v DPP (NSW)* (1996) 189 CLR 51, 66 (Brennan CJ), 76 (Dawson J).

68 *Cigamatic* (1962) 108 CLR 372. Note, however, the earlier dissenting judgment of Dixon J in *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 ('*Uther's Case*'), where the reasoning is better explained.

69 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 ('*Re Residential Tenancies Tribunal*').

70 Ibid 424, Brennan CJ defined 'capacities and functions' as meaning 'the rights, powers, privileges and immunities which are collectively described as the "executive power of the Commonwealth" in s 61 of the *Constitution*'; Dawson, Toohey and Gaudron JJ defined 'capacities of the Crown' as meaning 'its rights, powers, privileges and immunities': 438.

goods or entering into a contract), is validly binding[71] on the executive government of the Commonwealth.[72] Where, however, the law alters or impairs the capacities or functions of the executive, the law will be invalid as it is beyond the legislative power of a State.[73]

There is still significant dispute amongst members of the Court as to the validity of the above general rule. Justices McHugh and Gummow have taken a different approach. Both have argued that the *Cigamatic* doctrine does not apply where the Commonwealth's executive powers are conferred by legislation, as the issue is then governed by s 109 of the *Constitution*.[74] Both have also argued that the States have no constitutional power to bind the Commonwealth with respect to its executive powers derived from s 61 of the *Constitution*.[75] It is only in relation to these non-statutory executive powers that the *Cigamatic* doctrine applies.[76]

Both, however, have also struggled to justify the application of State laws, in fields such as contract, to the Commonwealth executive where the executive's powers are derived from s 61 of the *Constitution*. In these cases, McHugh J concluded that the Commonwealth 'submits' to the State law, but it is not then open to the State to change the nature and effect of its laws, even by a law of general application.[77] Justice Gummow, having found that the *Cigamatic* doctrine did not apply to the Authority created by legislation, contented himself with merely describing the *Cigamatic* doctrine. His Honour left unclear whether he supported it.[78] However, his Honour noted the view of Fullagar J that the Commonwealth may become 'affected by' State laws rather than bound, and observed that the examples given by Fullagar and Dixon JJ were of 'legislation which enacted or qualified in some respect the common law of personal obligations with respect to such matters as the formation and discharge of contracts.' His Honour concluded that the *Cigamatic* doctrine accepts that State legislation of general operation which qualifies the common law in respect of certain kinds of

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71 Some Justices would say that the law does not 'bind' the Commonwealth but rather 'affects' it by regulating transactions that it enters into: *Commonwealth v Bogle* (1953) 89 CLR 229, 259 (Fullagar J), referring to *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 308 (Dixon J); *Uther's Case* (1947) 74 CLR 508, 528 (Dixon J). See also *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 473 (Gummow J). The distinction, however, is far from satisfactory.

72 *Pirrie v McFarlane* (1925) 36 CLR 170; *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 427 (Brennan CJ), 439 (Dawson, Toohey, Gaudron JJ).

73 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 424 (Brennan CJ), 439 (Dawson, Toohey and Gaudron JJ). Note, however, the rejection at 454–5 (McHugh J), 472 (Gummow J), 505 (Kirby J) of any meaningful distinction between the capacities of the Commonwealth and their exercise.

74 Ibid 452–3 (McHugh J), 469–70 (Gummow J).

75 Ibid 451, 454 (McHugh J), 464 (Gummow J).

76 Ibid 453 (McHugh J).

77 Ibid 454.

78 However, as his Honour was prepared to criticize the majority's analysis as to the distinction between the capacities of the Commonwealth and their exercise, it may be assumed that he would have criticized the aspects of the *Cigamatic* doctrine he decided to record, if he now disagreed with them. Note, in contrast, His Honour's earlier views in R P Meagher and W M C Gummow, 'Sir Owen Dixon's Heresy' (1980) 54 *Australian Law Journal* 25.

transactions or business activities may have an 'impact' upon the activities of the Commonwealth executive.[79]

Both McHugh J[80] and Gummow J[81] have continued to advocate their positions and to argue that the doctrine remains unsettled.

Finally, Kirby J took a third approach to the *Cigamatic* principle, arguing that it should be 'reverently laid to rest',[82] and replaced with a development of the *Melbourne Corporation* principle. His Honour has justly noted that the scope of the implied immunity identified in *Cigamatic* varies from one formulation to another, and that this is unsatisfactory for such a fundamental doctrine.[83] In particular, he noted that those who assert that the States cannot 'bind' the Commonwealth executive in its exercise of executive power, have had to resort to the qualification that the Commonwealth might be 'affected by' State laws of general application, but that this distinction is so uncertain as to cast doubt on the integrity of the initial immunity.[84] His Honour was equally critical of the distinction, which was supported by Brennan CJ, Dawson, Toohey and Gaudron JJ, between the capacities of the Commonwealth and the exercise of those capacities.[85]

POWER OF STATE LEGISLATURES TO BIND THE EXECUTIVE OF ANOTHER STATE

The first issue that arises is whether a State may legislate in a manner that has effect outside its boundaries. In the nineteenth century, the courts took the view that colonial legislatures were subordinate and that their legislation could not, therefore, have an extra-territorial application.[86] This view was later modified so that the issue became one of whether a law was for the peace, order and good government of the jurisdiction concerned.[87] There must be a connection between the law and the jurisdiction which enacts it.

The classic description of such a connection was given by Dixon J in *Broken Hill South Ltd v Commissioner of Taxation (NSW)*. His Honour considered that a State is competent to 'make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition … of a liability to taxation or any other liability.' The relationship with the territory may be presence, residence or domicile within it, or the carrying on of business there, 'or even remoter connections'.[88] The

79 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 473.
80 *Commonwealth v Western Australia* (1999) 196 CLR 392, 421 [78]. Note, that although McHugh J was disagreeing with Hayne J's application of the *Cigamatic* doctrine, Hayne J also noted at 471 [230] that 'it may well be that there is still room for doubt' about the *Cigamatic* doctrine.
81 *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780, 790 [52].
82 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 509.
83 Ibid 502.
84 Ibid 504–5.
85 Ibid 505.
86 See, eg, *Phillips v Eyre* (1870) LR 6 QB 1, 20 (Willes J); *Macleod v A-G (NSW)* [1891] AC 455, 457 (Lord Halsbury LC); *Ray v M'Mackin* (1875) 1 VLR (L) 274, 280 (Barry J).
87 *Croft v Dunphy* [1933] AC 156, 163.
88 *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, 375.

connection may be that property is physically within the State or that a company[89] or ship is registered there.

In *Pearce v Florenca*, the rationale for the limitations on the extra-territorial application of State laws was again adjusted. Justice Gibbs saw the modern justification as being 'that it may avoid conflicts with other rules of law applicable to the area in which the legislation is intended to operate.'[90] It therefore finds its basis in the federal system established by the *Commonwealth Constitution*.

Justice Gibbs noted that the test whether a law is one for the peace, order and good government of the State is 'exceedingly vague and imprecise' and that the more specific test which has become settled is that a law is 'valid if it is connected, not too remotely, with the State which enacted it, or, in other words, if it operates on some circumstance which really appertains to the State.'[91] His Honour concluded that the connection between the law and the State should be liberal and that even a remote and general connection will suffice.[92]

Sub-section 2(1) of the *Australia Acts 1986* (UK and Cth) provides that the legislative powers of State Parliaments include the full power to make laws for the peace, order and good government of the State 'that have extra-territorial operation'. Section 5 provides that s 2 is subject to the *Commonwealth Constitution*. Thus, to the extent that an extra-territorial limitation upon State legislative power is derived from the federal structure imposed by the *Commonwealth Constitution*, s 2(1) does not remove that limitation.[93] Accordingly, s 2 of the *Australia Acts* may do no more than recognize the position existing prior to its enactment.

A State law may therefore have an extra-territorial effect in another State, as long as the law has a relevant connection to the State enacting it. For example, a New South Wales law may prohibit actions in Queensland which cause the pollution of rivers flowing through New South Wales.[94]

The next question is whether a State law intends to bind the Crown in right of another State. This is an issue of statutory interpretation. The Crown in right of another State may be bound expressly, or by necessary intention. It may be the case that no issues of extra-territoriality apply. For example, where the Crown in right of Queensland owned land situated in New South Wales, it was bound by State laws governing tenancies relating to such land.[95]

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89 *Myer Emporium Ltd v Commissioner for Stamp Duties* (1967) 68 SR (NSW) 220.

90 *Pearce v Florenca* (1976) 135 CLR 507, 519.

91 Ibid 517.

92 Ibid 518. See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 (the Court); *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 374 (the Court); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 22–3 [9] (Gleeson CJ), 34 [48] (Gaudron, Gummow and Hayne JJ), cf 82 [189] (Callinan J dissenting), where his Honour noted that the above cases did not involve equal competing connections.

93 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14. See also *Port Macdonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 372–3, where a connection between the State and the activities the subject of the law was still required by the Court; and *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 271 (Brennan CJ, Dawson, Toohey, Gaudron JJ).

94 *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78, 87–8 (Gleeson CJ).

95 *Public Curator of Queensland v Morris* (1951) 51 SR (NSW) 402.

Where there is no problem with impermissible extra-territoriality, and the State law is clearly intended to bind the Crown in right of another State, is it subject to any additional limitations derived from federal principles established by the *Commonwealth Constitution*? Chief Justice Gleeson in *Mobil Oil Australia Pty Ltd v Victoria* argued that the *Melbourne Corporation* principle 'also has significance in relation to an exercise of State legislative power which destroys or weakens the legislative authority of another State or its capacity to function as a government.'[96] Similar arguments were made by McHugh and Gummow JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*.[97] Justice McHugh also concluded in *Re Residential Tenancies Tribunal* that

> [f]ederalism is concerned with the allocation of legislative power, and it is a natural and, to my mind, necessary implication of a federation that no polity can legislate in a way that destroys or weakens the legislative authority of another polity within that federation.[98]

Accordingly, where a State law would otherwise be valid, it may still be incapable of applying to the Crown in right of another State to the extent that it impermissibly discriminates against the State or impairs the capacity of the State to function as a government.

THE POWER TO TAX ANOTHER POLITY

Application of State taxes to the Commonwealth: Can a State tax the Commonwealth at all? Justice Dixon considered that the States are not capable of taxing the Commonwealth with respect to acts done by the Commonwealth in the exercise of its powers or functions, and that this is a 'necessary consequence' of the system of Government established by the *Constitution*.[99] This is because of the 'supremacy' of the federal government, its exclusive or paramount legislative powers, the independence of its fiscal system and the elaborate constitutional provisions governing the financial relations of the Commonwealth and the States. His Honour concluded that the establishment of the Commonwealth was 'anything but the birth of a taxpayer'.[100] The case in which His Honour made these observations, however, was determined on the basis that the State law in question was not intended to bind the Crown in right of the Commonwealth, rather than on the question of whether it had the power to do so.

If a State could not impose a tax upon the Commonwealth, one would wonder why s 114 of the *Commonwealth Constitution* expressly provides that a State shall not impose any tax on property of any kind belonging to the Commonwealth. The fact that it was considered necessary to make such an express provision is relevant. Moreover, the prohibition only extends to taxes upon 'property' belonging to the Commonwealth. Section 114 does not prohibit other forms of State taxes from applying to the Commonwealth.

The restriction of the prohibition to taxes on 'property of any kind belonging to the Commonwealth' has required the High Court to determine the relationship between

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96 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 76 ALJR 926, 931 [15] (Gleeson CJ).
97 (1996) 189 CLR 253, 288.
98 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 451.
99 *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1, 22.
100 Ibid.

the tax, property and to whom the property 'belongs'. A State tax may apply to the private 'owner' of property even though the property is leased to the Commonwealth and the cost is passed on to the Commonwealth through the lease.[101]

Where a State tax is not prohibited from applying to the Commonwealth by s 114, the Commonwealth may exercise its legislative power to exempt itself and its instrumentalities (at least to the extent that they are not commercial profit-making bodies) from the obligation to pay State taxes.[102] The Commonwealth may also legislate to immunize payments made by itself, such as salary and superannuation paid to its public servants,[103] or interest paid on Commonwealth securities,[104] from State taxes although if it does not do so, State taxes will apply. Whether, and to what extent the Commonwealth can legislate to exempt private individuals from the payment of State taxes remains unclear.[105] Section 51(ii) of the *Commonwealth Constitution* is not an adequate power to achieve this, as it applies only to taxation by the Commonwealth, not the general subject of taxation.[106] The question will be whether the Commonwealth has a sufficient head of legislative power to do so in any particular case.

A further question is whether a Commonwealth law which excluded the application of a State tax to some or all subjects, would breach the *Melbourne Corporation* principle, as the ability to raise revenue through taxation is essential to a State's capacity to function as a government.[107] Prior to *Austin,* it would have been difficult to argue that a Commonwealth law which affects the application of a State tax breaches the *Melbourne Corporation* principle, because the State could impose tax on other subjects, so its ability to raise revenue in order to function would not be threatened.[108] However, in *Austin*, the High Court concentrated on the impact of the impugned Commonwealth law upon the constitutional powers of the State, rather than its financial consequences.[109] Therefore, a breach of the *Melbourne Corporation* principle

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101 *Bevelon Investments Pty Ltd v City of Melbourne* (1976) 135 CLR 530, 536–7 (Barwick CJ), 539 (Gibbs J), 545 (Stephen and Mason JJ), 549 (Jacobs J), 551 (Murphy J).

102 *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46, 54–6 (Dixon CJ) (Kitto (at 61), Taylor (at 61) and Owen JJ (at 71) agreeing). The legislative power supporting such legislation was s 51(i) with s 98.

103 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 670 (Latham CJ). See also Starke J, 678. Note that reliance was not placed upon s 51(ii) to support such legislation, but rather the power of the Commonwealth to legislate in relation to Commonwealth salaries under ss 52(ii) and 51(xxxix). However, Evatt J considered at 684–5 that the Commonwealth has no power to grant its officers immunity from non-discriminatory State taxation legislation.

104 *Commonwealth v Queensland* (1920) 29 CLR 1. The legislative power relied upon was s 51(iv).

105 See *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227, and the discussion of the case in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 343–6.

106 *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 232 (Griffith CJ); *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 686 (Evatt J); *Victoria v Commonwealth* (1957) 99 CLR 575, 614 (Dixon CJ); cf *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 637 (Murphy J).

107 *Solomons v District Court of New South Wales* (2002) , 211 CLR 119 168–9 [137] (Kirby J). See also Zines, above n 105, 345.

108 Zines, above n 105, 348.

109 *Austin* (2003) 195 ALR 321, 331–2 [24] (Gleeson CJ), 364 [143] (Gaudron, Gummow and Hayne JJ).

would be more likely to be found where a Commonwealth law prevented the application of a State tax.

Under s 114, the Commonwealth may also consent to the application of State taxes upon its property.[110] Section 114 provides that a 'State shall not, without the consent of the Parliament of the Commonwealth … impose any tax on property of any kind belonging to the Commonwealth'. Consent must be given positively by way of Commonwealth legislation.[111] In *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*,[112] Mason and Murphy JJ held that the application of a State stamp duty to transfers of property to the Trust was not in breach of s 114 because the Commonwealth legislation evinced an intention that State taxes should apply.[113]

A State may not impose a discriminatory tax upon the Commonwealth or its officers or pensioners, as this may be beyond the legislative power of the State because it is not a law for the 'peace, welfare and good government of the State',[114] or because it is implicit in the conferral of Commonwealth executive power that its exercise shall not be made the 'subject of special liabilities or burdens under State law',[115] or because it would be an attempt to interfere with the normal working of the Commonwealth's services.[116]

Application of Commonwealth taxes to the States: Section 114 also has a reverse operation. It prohibits the Commonwealth from imposing any tax on property of any kind belonging to a State. Section 114 is therefore a limitation on the legislative power of the Commonwealth through s 51(ii) of the *Commonwealth Constitution* to impose taxation.[117]

Subject to s 114 of the *Commonwealth Constitution*, the Commonwealth may impose taxes upon the States.[118] Section 114 only protects the States from a tax that applies to the ownership or holding of property, rather than one on transactions which affect its property.[119] A Commonwealth tax may apply to the lessee of Crown land belonging to a State,[120] as the tax is applied to the lessee, not to the State. A tax upon income produced by property of the State is not a tax upon the property of the State.[121]

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110 *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 232 (Griffith CJ).

111 Ibid; *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 595 (Williams J).

112 (1979) 145 CLR 330, 357 (Mason J), 357 (Murphy J).

113 Note, however, that consent was not express, but inferred from the terms of the Commonwealth legislation, which immunized the Trust from certain State taxes, but impliedly did not do so in relation to others, which were to be paid out of its funds.

114 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 669 (Latham CJ). Note, however, that this case was determined prior to *Melbourne Corporation* (1947) 74 CLR 31, and that the approach taken by the judges may have been different if it were decided after the *Melbourne Corporation Case.*

115 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681 (Dixon J).

116 Ibid 687 (Evatt J).

117 *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780, 789 [46] (Gummow J).

118 *A-G (NSW) v Collector of Customs for NSW* (1908) 5 CLR 818; *Victoria v Commonwealth* (1971) 122 CLR 353.

119 *Queensland v Commonwealth* (1987) 162 CLR 74, 98 (Mason CJ, Brennan and Deane JJ), 104 (Dawson J).

120 *A-G (Qld) v A-G (Cth)* (1915) 20 CLR 148; *Osborne v Commonwealth* (1911) 12 CLR 321.

121 *South Australia v Commonwealth* (1992) 174 CLR 235, 252–3 (Mason CJ, Deane, Toohey and Gaudron JJ), 260 (Dawson J).

However, a tax on the proceeds of sale of property is also a tax on ownership.[122] Similarly, a capital gains tax which applies to the disposal of an asset of a State superannuation fund is a tax on property within s 114.[123] Some doubt exists as to whether a tax upon an unfunded State pension scheme would amount to a tax upon State property.[124]

Section 51(ii) provides that Commonwealth taxes must not discriminate between States or parts of States. In addition, a Commonwealth tax must not discriminate against the States or their officials.[125] Such a law may not be one with respect to taxation within s 51(ii) of the *Constitution*,[126] or may not be a law for the peace, order and good government of the Commonwealth.[127] It may also breach the *Melbourne Corporation* principle.[128] In the *Melbourne Corporation* case, Dixon J referred to the principle 'that the federal power of taxation will not support a law which places a special burden upon the States'. His Honour observed

> [t]hey cannot be singled out and taxed as States in respect of some exercise of their functions. Such a tax is aimed at the States and is an attempt to use federal power to burden or, may be, to control State action. … The federal system itself is the foundation of the restraint upon the use of the power to control the States.[129]

Application of State taxes to other States: As McHugh and Gummow JJ pointed out in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*

> there is no prohibition placed upon one State imposing upon another State a tax with respect to property of the other State within the area of the first State or with respect to dealings by the other State in such property.[130]

There must, however, be a relevant connection between the State enacting the tax and the subject matter of the tax.[131] If there is no relevant connection, the tax will be invalid. For example, a State cannot impose an annual head tax on any person who had at some time or another visited the State.[132] A State Parliament 'has no general power

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122 *Queensland v Commonwealth* (1987) 162 CLR 74, 98 (Mason CJ, Brennan and Deane JJ), 105 (Dawson J).

123 *South Australia v Commonwealth* (1992) 174 CLR 235, 254 (Mason CJ, Deane, Toohey and Gaudron JJ), 255 (Brennan and McHugh JJ), 258 (Dawson J).

124 *Austin* (2003) 195 ALR 321, 327 [16] (Gleeson CJ).

125 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 669 (Latham CJ), 687 (Evatt J).

126 Ibid 687 (Evatt J).

127 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 669 (Latham CJ); *Victoria v Commonwealth* (1971) 122 CLR 353, 403 (Windeyer J).

128 *Victoria v Commonwealth* (1971) 122 CLR 353, 391–2 (Menzies J), 404 (Windeyer J), 410–11 (Walsh J), 424 (Gibbs J); *Austin* (2003) 195 ALR 321, 364 [142] (Gaudron, Gummow and Hayne JJ).

129 *Melbourne Corporation* (1947) 74 CLR 31, 81.

130 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 288; see also *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780, [45] (Gummow J).

131 *Millar v Commissioner of Stamp Duties* (1932) 48 CLR 618; *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337; *Myer Emporium Ltd v Commissioner for Stamp Duties (NSW)* (1967) 68 SR (NSW) 220; *Johnson v Commissioner of Stamp Duties (NSW)* [1956] AC 331; *Ex parte Iskra* [1963] SR (NSW) 538; *O'Sullivan v Dejneko* (1964) 110 CLR 498; *Welker v Hewett* (1969) 120 CLR 503; *Cox v Tomat* (1971) 126 CLR 105.

132 *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, 356 (Latham CJ).

to make strangers to its territory liable in its courts to judgments or sentences by way of enforcing contributions to the revenue of the State.'[133]

Where there is a relevant connection, it is possible that the *Melbourne Corporation* principle may extend so that a State may not legislate to destroy another State or curtail in a substantial manner the exercise of its powers.[134] Justices McHugh and Gummow have warned, however, that any general principle derived from federalism which prevented a State from taxing the property of another State, could be exploited. An affluent State could take advantage of its tax-free status by acquiring significant assets in another State, depriving it of part of its anticipated revenue.[135]

A lacuna in the taxation power: The broad application of s 114 has led to the development of a lacuna in the collective legislative power of the Commonwealth and the States. In *Municipal Council of Sydney v Commonwealth*, the High Court held that the reference to 'a State' in s 114 extended to local councils established by a State.[136] A consequence of this decision is that the Commonwealth is unable to impose a goods and services tax ('GST') upon the property of a State, including the property of local councils. During negotiations between the Commonwealth and the States prior to the implementation of the GST, each State agreed to contribute voluntarily to the Commonwealth the amount of the GST that would have been payable if the State were bound by the tax in relation to its property.[137] This avoided the administratively costly and complicated process of exempting the property of the State from the application of the GST, and also removed what would have been a large exemption that would inevitably have skewed the economic effect of the GST.

A problem, however, arose in relation to local government. The Commonwealth could not impose the GST on local government because of s 114 of the *Commonwealth Constitution*, but the States could not legislate either to impose the GST on local government because of the prohibition in s 90 of the *Commonwealth Constitution* on the imposition of excises by a State. The result was a lacuna in legislative power, with neither jurisdiction being capable of imposing the GST on the property of local government bodies. In the end, the Commonwealth legislated so that its local government financial assistance, which is paid to the States for distribution to local government, is now granted subject to the condition that the State withhold from any local government authority financial assistance in the amount of any unpaid 'voluntary' GST.[138]

Can the Commonwealth impose a 'State tax'? This may seem an absurd proposition, but it has recently been, and remains, an issue pursued by the

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133 *Welker v Hewett* (1969) 120 CLR 503, 512 (Kitto J).

134 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 288 (McHugh and Gummow JJ), referring to the statement of Starke J in *Melbourne Corporation* (1947) 74 CLR 31, 74.

135 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 288–9.

136 *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208.

137 See clause 17 of the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations, set out in *A New Tax System (Commonwealth – State Financial Arrangements) Act 1999* (Cth) sch 2.

138 *Local Government (Financial Assistance) Act 1995* (Cth) s 15 (aa). See also *A New Tax System (Commonwealth – State Financial Arrangements) Act 1999* (Cth), sch 2, clause 18.

Commonwealth government both politically and in the management of its accounts. Professor Zines has noted that 'it seems hardly credible that the Commonwealth could impose a tax payable to the State.'[139] He observed that such a tax may not be supported by s 51(ii) of the *Commonwealth Constitution*.

The issue did, in fact, arise however, after the High Court's judgment in *Ha v New South Wales*,[140] which invalidated State franchise fees relating to tobacco, and by inference those relating to petroleum and liquor. The Commonwealth and the States had agreed that if this occurred the Commonwealth would impose a tax to collect an equivalent amount of revenue which would then be redistributed to the States. The Commonwealth law did not provide for the tax to be directly collected by or payable to the States, as this would give rise to concerns as to the applicability of s 51(ii)[141] and presumably also breach s 81 of the *Commonwealth Constitution*. Instead, the Commonwealth increased its rate of customs and excise duties on petroleum and tobacco, and increased its wholesale sales tax on liquor, and returned the additional revenue (less Commonwealth administrative costs) to the States by way of grants.

However, the Commonwealth government insisted that each State Premier write to the Commonwealth Treasurer requesting the imposition of this tax, as a 'State tax', before it would issue the press release announcing the proposed tax. The date of the press release was crucial, because it is Commonwealth practice to apply taxes, when enacted, retrospectively back to the date of their announcement. Although the States objected, on the grounds that the Commonwealth excise was patently not a State tax, and constitutionally could not be so,[142] they were required by the Commonwealth to comply or lose access to more than $5 billion in revenue. While the other States capitulated late on the day of the High Court's judgment in *Ha,* and sent the required letter, the Queensland government removed from its letter the reference to a 'State tax'. The Commonwealth government refused to issue the press release upon that day, and many millions of dollars in revenue was lost as a consequence.[143]

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139 Zines, above n 105, 348.

140 *Ha v New South Wales* (1997) 189 CLR 465 ('*Ha*').

141 As noted above, s 51(ii) has been confined in its application to laws with respect to Commonwealth taxation, not taxation generally: *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 232 (Griffith CJ); *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 686 (Evatt J); *Victoria v Commonwealth* (1957) 99 CLR 575, 614 (Dixon CJ). Cf *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 637 (Murphy J).

142 If it were a State tax, it would breach the prohibition in s 90 of the *Commonwealth Constitution*. There was also a concern that the response to *Ha* would be seen as a 'scheme' that was, in its overall effect, constitutionally invalid: *W R Moran Pty Ltd v Deputy Commissioner of Taxation for New South Wales* [1940] AC 838; or an unconstitutional attempt to achieve indirectly that which could not be achieved directly: *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83.

143 The additional customs duty was avoided by tobacco companies moving very large quantities of tobacco out of bond store during this period. For example, the Annual Report 1998 of Rothmans Holdings Ltd, noted gains resulting from the clearance of goods from bond store, and recorded that 'these gains, together with associated transactions affected by the High Court decision, resulted in an abnormal pre tax accounting profit of $74,591,000 or $47,738,000 after tax'. This amount would have also presumably included profit resulting from the failure to pay State franchise fees immediately before the High Court's judgment was handed down. This is the subject of ongoing litigation.

The Queensland government capitulated the following day and the press release was then issued by the Commonwealth. It described the new Commonwealth tax as a 'State tax imposed and collected by the Commonwealth at the request and on behalf of the States and Territories.'[144] The additional excise and sales taxes when enacted were backdated to the day after the *Ha* judgment was handed down. The fact that the Commonwealth government was prepared to accept the loss of many millions of dollars in revenue (which would have flowed to the States) is indicative of how serious (and foolish) it was about the notion of imposing a 'State tax'.

Since then, the GST has been imposed by the Commonwealth. Again, the revenue from it is collected by the Commonwealth and most of it is redistributed to the States through grants. Section 11 of the *A New Tax System (Commonwealth – State Financial Arrangements) Act 1999* (Cth) provides that the rate and base of the GST are not to be changed unless each State agrees to the change. This provision, of course, can be amended by ordinary Commonwealth legislation, which simultaneously amends the rate or base of the GST without State agreement, but it is indicative of the Commonwealth position that it is a 'State tax'. Associate Professor Owen Covick has noted that in its accounting, the Commonwealth treats the GST as a 'State tax'. The Commonwealth Budget states that the 'GST is collected by the Commonwealth, as an agent for the States and Territories, and appropriated to the States'.[145] If this were true, and the States were the principals in imposing the GST, the consequence would be that the imposition of the GST would be illegal, as the States would be imposing an excise contrary to s 90 of the *Commonwealth Constitution*.

One consequence of the Commonwealth's treatment of the GST in this manner is that it has removed it from its statistics of taxes imposed by the Commonwealth.[146] This presumably would allow the Commonwealth government to claim that the incidence of tax imposed by the Commonwealth government has been reduced.[147]

Clearly on this point, the constitutional position is at odds with the Commonwealth's political and accounting position.

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144 Commonwealth Treasurer, 'Constitutional Invalidation of State Business Franchise Fees: Temporary Commonwealth Safety Net Arrangements' (Press Release, 6 August 1997).

145 Budget Paper No 1, 2002–03, 11–13. See discussion in Owen Covick, 'The 2002–03 Commonwealth Budget', *Economic Issues No 4*, South Australian Centre for Economic Studies, 10.

146 Ibid 11–12; Mark Davis, 'Budget Honesty Undermined', *Australian Financial Review* (Sydney), 30 August 2000, 21.

147 See the analysis by John Edwards, the Chief Economist with HSBC Bank, that shows that if the GST figures are put back into the Commonwealth budget it shows that taxation as a share of GDP has gone up during the period Mr Costello has been Treasurer. Edwards also notes that 'Costello not only takes the GST off taxes but also takes the equivalent payments to the states off spending' with the consequence that while it appears that government spending has been reduced since the GST was introduced, it has not: John Edwards, 'Spending like the rest of us', *The Sydney Morning Herald* (Sydney), 30 April 2003, 15.

ANALYSIS

The Cigamatic doctrine

The starting point for analysis of the question whether State laws may bind the Commonwealth is usually a consideration of the Commonwealth's enumerated legislative powers. In brief, the argument appears to be that in a federation, there is a presumption that neither polity can legislate for the other. However, the Commonwealth has enumerated legislative powers that allow it to legislate for the State. The State, on the other hand, does not have enumerated powers, so it cannot legislate for the Commonwealth.[148]

There are a number of problems with this argument. First, the presumption on which it rests was rejected by the High Court in the *Engineers' Case.*[149] It is difficult to understand how the majority judgment in the *Engineers' Case* can be used to support the proposition that the Commonwealth's enumerated powers can be used to bind the States, without recognizing that it also rejected the proposition that one polity cannot legislate to bind the other. As Knox CJ, Isaacs, Rich and Starke JJ said in the *Engineers' Case:*

> The doctrine of "implied prohibition" finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning. The principle we apply to the Commonwealth we apply also to the States, leaving their respective acts of legislation full operation within their respective areas and subject matters, but, in the case of conflict, giving to valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of sec. 109.[150]

Secondly, it is not clear why the Commonwealth's enumerated powers may bind a State but the State's wider plenary powers may not bind the Commonwealth. The argument that a State cannot bind the Commonwealth because when the States acquired their legislative powers, the Commonwealth did not exist,[151] is not convincing. Meagher and Gummow have pointed out, amongst others, that State legislative power applies to those who were not born at the time power was first conferred on the colonies and applies to bodies and polities which did not exist at that time.[152] Equally, arguments that a State law can only bind the Crown in right of the State, because the Crown in right of the State has assented to the law, whereas the Crown in right of the Commonwealth has not,[153] have since been dismissed as incorrect.[154]

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148 *Uther's Case* (1947) 74 CLR 508, 529–30(Dixon J); *Cigamatic* (1962) 108 CLR 372, 377–8 (Dixon CJ); *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 440 (Dawson, Toohey and Gaudron JJ), 451 (McHugh J).

149 (1920) 28 CLR 129. See also, John J Doyle, '1947 Revisited: The Immunity of the Commonwealth from State law' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 47 53–4, 57.

150 (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ).

151 *Uther's Case* (1947) 74 CLR 508, 530 (Dixon J).

152 Meagher and Gummow, above n 78, 28. See also Doylea bove n 149, 62.

153 *Commonwealth v Bogle* (1953) 89 CLR 229, 259 (Fullagar J); *Victoria v Commonwealth* (1971) 122 CLR 353, 379 (Barwick CJ) .

154 *Re Residential Tenancies Tribunal (*(1997) 190 CLR 410, 446 (Dawson, Toohey and Gaudron JJ), 505–6 (Kirby J). Note also Kirby J's dismissal at 506–7 of a similar argument by McHugh

Further, the argument that State legislative powers are 'subordinate', because they are not granted under the *Commonwealth Constitution* and consist of the 'undefined residue of legislative power which remains after full effect is given to the provisions of the *Constitution* establishing the Commonwealth and arming it with the authority of a central government of enumerated powers'[155] appears to deny the States the plenitude of their legislative powers. The legislative powers of the States and the Commonwealth were originally conferred by statutes enacted by the Westminster Parliament and applied by paramount force. Although the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12 was the later enactment, it enacted a Constitution which preserved all State legislative power,[156] unless it was exclusively vested in the Commonwealth or withdrawn from the State by the *Constitution*.[157] Most of the enumerated powers of the Commonwealth in that Constitution are concurrent powers. Hence the 'undefined residue' of legislative power of a State is far more extensive than the Commonwealth's legislative power which is limited to enumerated subjects.

There may be more validity in an argument about whether State legislation is for the 'peace, welfare and good government' of the State. For example, if a State law purported to apply to the Commonwealth and had no relevant connection to the State (for example, a law directing the Governor-General in the exercise of his or her powers concerning a dissolution of the Commonwealth Parliament)[158] then it would be beyond the legislative competence of the State. However, the same could be said for a Commonwealth law in relation to a State function that did not have a relevant connection to a Commonwealth head of legislative power. In *Uther's Case,* Dixon J remarked that it is surely 'for the peace, order and good government of the Commonwealth, not for the peace, welfare and good government of New South Wales, to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict.'[159] To the extent that this suggests that a law may not have a dual character, it would not now be accepted.[160] A law may be one for the peace, order and good government of the State because it relates to transactions occurring within the State or property within the State,[161] and yet may still affect the Commonwealth. The two do not appear to be mutually exclusive. In fact, on the 'peace, order and good government' test, it is the Commonwealth which is more confined in its legislative powers, as its enumerated heads of power are more limited.

JA in *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 597. The argument related to 'representation' in Parliament, rather than 'assent'.

155 *Uther's Case* (1947) 74 CLR 508, 530 (Dixon J); see also, *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 440 (Dawson, Toohey and Gaudron JJ) .

156 *Constitution* s 107.

157 *Constitution* s 52. See also ss 90, 114, 115.

158 *Uther's Case* (1947) 74 CLR 508, 521 (Latham CJ) .

159 (1947) 74 CLR 508, 530 .

160 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 13 (Kitto J); *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 354 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

161 *Pearce v Florenca* (1976) 135 CLR 507, 518 (Gibbs J). See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14(the Court); *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 374; *Kable v DPP (NSW)* (1996) 189 CLR 51, 66 (Brennan CJ), 76 (Dawson J); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 22–3 [9] (Gleeson CJ), 34 [48] (Gaudron, Gummow and Hayne JJ).

Given that the High Court permits dual characterization of Commonwealth laws, so that a Commonwealth law may be validly characterized as falling within a Commonwealth head of power even though it is a law with respect to a State function,[162] it is not clear why it should not also accept that a State law with respect to a Commonwealth function is equally valid as long as there is a sufficient connection with the State.

The underlying basis for the argument why an enumerated head of Commonwealth legislative power can be used to bind a State while plenary State legislative power cannot be used to bind the Commonwealth, is reliance upon a belief in Commonwealth legislative 'supremacy' derived from s 109 of the *Constitution*. However, it should be remembered that s 109 deals with inconsistencies between the application of valid Commonwealth and State laws. It is not a limitation on legislative power as such. It does not deny the State the power to enact a law, it merely prevents the law's operation during such time as the inconsistency continues.[163] Section 109 does not make the States subordinate to the Commonwealth.[164] It merely deals with a conflict between two valid laws. It says nothing about the ability of a State law to bind the Commonwealth executive.[165] Further, any implication derived from it would appear to work in the other direction. As the Commonwealth Parliament may, assuming it has a head of legislative power, legislate in a manner inconsistent with a State law to which it objects which purports to bind the Commonwealth, then there is no need to draw an implication that State laws cannot bind the Commonwealth.

In my view, it is more logical to approach the question of whether State laws can bind the Commonwealth from a different point of view. The fact that the Commonwealth Parliament has only enumerated legislative power, rather than plenary legislative power, is a *limitation* on the Commonwealth's legislative power. Unlike the States, the Commonwealth is incapable of legislating to regulate the wide range of transactions and activities undertaken by individuals, corporations and governments.[166] If the Commonwealth executive government were only bound by Commonwealth law, and no other law, then it would not be subject to significant areas of legal regulation. In this sense it would not only be 'beyond the law', but also unable to take advantage of the application of the law to protect its interests.

The *Commonwealth Constitution* was enacted, however, in the context of the common law and on the assumption of its continuing application.[167] The Commonwealth 'lives and moves within the Australian common law.'[168] Not only does the common law confer upon the Commonwealth executive government its prerogative powers, but it

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162 *Melbourne Corporation* (1947) 74 CLR 31, 79 (Dixon J).

163 *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 573 (Latham CJ).

164 *Victoria v Commonwealth* (1937) 58 CLR 618, 636–7 (Evatt J); *Jacobsen v Rogers* (1995) 182 CLR 572, 591 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

165 Doyle, above, n 149, 62.

166 *Queensland Electricity Commission* (1985) 159 CLR 192, 246 (Deane J).

167 *Uther's Case* (1947) 74 CLR 508, 521 (Latham CJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 457 (McHugh J), 473 (Gummow J). See also Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240; Sir Owen Dixon, 'Sources of Legal Authority' reprinted in *Jesting Pilate,* (1965) 198.

168 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 473 (Gummow J).

also binds the Commonwealth executive government, and its officers and agents, subject to those special powers conferred upon it by prerogative, the *Constitution*, and subject to legislative abrogation.[169] It is accepted that the Commonwealth executive government may not exempt itself from the application of the law by executive warrant. This may only occur by legislation.[170]

The common law, of course, may be altered or completely overridden by State legislation. In our legal system the common law and State legislation are intricately entwined, with legislation making small or large adjustments to continuing common law rules. If one accepts that the Commonwealth executive government is subject to the common law, then the question arises whether it is subject to the common law as altered by State legislation. If not, a dual system would develop, with courts having to apply and develop common law principles where they apply to the Commonwealth, even though they have been replaced by State statute law and otherwise no longer exist. Judges who have addressed this issue appear to have concluded that State laws of general application which alter the common law in relation to matters such as contract or tort, do indeed apply to the Commonwealth.[171]

This is where the fundamental problem arises in *Cigamatic*. If, as a matter of constitutional principle, States cannot legislate to bind the Commonwealth, then how can such State laws continue to apply to the Commonwealth? The explanation given most commonly is that the Commonwealth is not 'bound' by these State laws but is 'affected' by them.[172] This is because it has 'submitted' itself to the State legislative regime by entering into transactions governed by it (eg a contract) or by incorporating a company pursuant to the State's laws.[173]

The 'affected by' argument is not very convincing. It appears to be playing with words. What is meant by 'affected by' is that the Commonwealth may, pursuant to that State law, be obliged to act in a certain way, or prohibited from doing so. It is, in effect, 'bound', as Dixon J observed in *Uther's Case*.[174] As for the argument of voluntary

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169 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 457 (McHugh J).

170 *A v Hayden* (1984) 156 CLR 532, 540 (Gibbs CJ), 550 (Mason J), 562 (Murphy J), 580 (Brennan J), 592 (Deane J); *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ); *Coco v Newnham* (1997) 97 ALR 419, 455 (Lee J); *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 427–8 (Brennan CJ), 444 (Dawson, Toohey and Gaudron JJ); *Egan v Chadwick* (1999) 46 NSWLR 563, 592 (Priestley JA).

171 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 308 (Dixon J); *Uther's Case* (1947) 74 CLR 508, 528 (Dixon J); *Commonwealth v Bogle* (1953) 89 CLR 229, 260 (Fullagar J); *Cigamatic* (1962) 108 CLR 372, 378 (Dixon CJ); *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 427 (Brennan J), 458 (Dawson, Toohey and Gaudron JJ), 458 (McHugh J), 473 (Gummow J), 507–9 (Kirby J).

172 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 308 (Dixon J); *Commonwealth v Bogle* (1953) 89 CLR 229, 260 (Fullagar J).

173 Query what effect the referral of power by the States to the Commonwealth and the subsequent enactment of the *Corporations Act 2001* (Cth) will have in relation to bodies incorporated now pursuant to a Commonwealth law.

174 (1947) 74 CLR 508, 528. His Honour said: 'General laws made by a State may affix legal consequences to given descriptions of transactions and the Commonwealth, if it enters into such a transaction, may be *bound* by the rule laid down' [emphasis added]: at 528. See also *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 427 (Brennan CJ), who considered that the Commonwealth is 'bound' by State laws of general application, but qualified the meaning of 'bound', and Dawson, Toohey and Gaudron JJ who said that 'it is impossible to

submission, there is little choice for the Commonwealth if it wishes to operate in the commercial world. It may not have sufficient legislative power to establish its own legal regime as an alternative. Further, one could argue just as easily that if the Commonwealth entered into contracts with companies incorporated in a State or lent money to them, then it submitted itself to State laws upon the allocation of priority in the winding up of those companies which alter the common law prerogative of the Commonwealth.[175] Why is the Commonwealth not 'affected by' such a law?

A more plausible argument is that the Commonwealth is bound by State laws because they are 'picked up' or applied by way of Commonwealth law (eg through the *Judiciary Act 1903* (Cth) or the *Commonwealth Places (Application of Laws) Act 1970* (Cth). However, as Professor Zines has argued, it appears that this was not what was meant by the Justices who advocated the 'affected by' argument.[176]

A review of how the Justices of the High Court in *Re Residential Tenancies* dealt with this issue of the application to the Commonwealth of State laws of general application, again highlights the inherent problems with the *Cigamatic* doctrine.

Chief Justice Brennan argued that a State law which purports to impose a burden on the Crown in right of the Commonwealth is invalid because it is either offensive to s 61 of the *Commonwealth Constitution* to the extent that it affects the enjoyment of the prerogative or is inconsistent with a Commonwealth law under s 109 to the extent that it burdens the enjoyment of a statutory power.[177] However, his Honour concluded that a State law of general application which governs transactions that the Crown in right of the Commonwealth chooses to enter into, may 'bind' it.[178] His Honour considered that the Commonwealth is 'bound' in the sense that it acquires rights and assumes obligations by entering into the transaction.[179] As for the effect of a State criminal law, his Honour considered it meaningless to say that it binds the Crown in right of the Commonwealth. If the agent or servant of the Crown is acting in the exercise of a statutory power conferred by a valid Commonwealth law, then the issue is governed by s 109. If the agent or servant is acting pursuant to the prerogative, then there is no prerogative power to dispense the servant or agent from liability under the State criminal law.[180] It is not clear why, under the rationale expressed earlier by Brennan CJ, the State criminal law is not invalid because it imposes a burden on the exercise of the prerogative contrary to s 61. Nor is it clear why a State law of general application which governs transactions does not burden the prerogative by limiting the way in which it may be exercised.

Justice McHugh also held in *Re Residential Tenancies Tribunal* that it is 'settled doctrine' that the States have no constitutional power to bind the Commonwealth.[181] His Honour based this proposition on the principle that 'in the absence of a grant of

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say what is meant by "affected by State laws" if it does not mean that the Crown in right of the Commonwealth is bound by them': at 447.

175 The High Court in *Cigamatic* (1962) 108 CLR 372 held that the Commonwealth was not subject to such a law.

176 Zines, above n 105, 358.

177 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 426 .

178 Ibid 427.

179 Ibid.

180 Ibid.

181 Ibid 451.

power, express or implied, no polity within a federation has the power to bind another polity within that federation.'[182] His Honour considered, however, that the Commonwealth executive is bound by the common law, except where the common law is inconsistent with the grant of executive power under the *Constitution* or a federal statute.[183]

On the difficult issue of the application of State laws to the Commonwealth executive government, in summary, McHugh J concluded that State laws may validly apply to the Commonwealth where:

1. the State law affects executive powers of the Commonwealth exercised pursuant to a Commonwealth law (subject to any s 109 inconsistency), because the Commonwealth law is presumed to accept the application of State laws, unless the contrary is indicated;[184]
2. the State law governs the creation of a relationship between the Commonwealth and a subject even where the relationship arises from executive power derived from s 61 of the *Constitution*, because the Commonwealth chooses to subject itself to the State law by entering into that relationship;[185] and
3. the State law is one of general application which 'merely regulates the manner or mode of performing an activity'[186] which is carried out by, amongst others, Commonwealth servants or agents in the course of executing executive powers derived from s 61 of the *Constitution*, because such laws are unlikely to infringe the extraordinary executive powers and capacities of the Commonwealth as a 'political sovereign'.[187]

The first two exceptions appear to be based upon notions of Commonwealth consent or submission to the application of State laws, while the final one appears to be based upon some kind of distinction between the 'core' aspects of executive power relating to political sovereignty, as opposed to the operations of the Commonwealth executive government in its 'legal and personal capacities'. It is harder to establish in relation to the third category an element of Commonwealth voluntary 'submission' to the application of State laws.

Further, the logical development of the notion of Commonwealth submission to State laws from categories 1 to 3 leads to the ultimate conclusion that the Commonwealth submits to the application of State laws to the Commonwealth executive unless it acts, by legislation, to exlude the application of those State laws to it.[188] This would nullify altogether the *Cigamatic* doctrine.

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182 Ibid. See also *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 597 (McHugh JA) where he applied the 'enumerated powers' argument.

183 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 457 (McHugh J).

184 Ibid 452; See also *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 597 (McHugh JA), where he supported the 'affected by' doctrine.

185 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 455.

186 Ibid 458.

187 Ibid 456, 458.

188 Note that the State law must be intended to bind the Crown in right of the Commonwealth: *Bropho v Western Australia* (1990) 171 CLR 1; *Jacobsen v Rogers* (1995) 182 CLR 572.

Justice McHugh also concluded that a State law will not bind the Commonwealth where:

4. the State law purports to change the nature or effect of a State law governing a relationship already entered into by the Commonwealth as described in category 2 above, even if the State law is one of general application;[189]
5. the State law attempts to discriminate against the exercise of an executive activity arising from the operation of s 61 of the *Commonwealth Constitution*;[190] and
6. the State law infringes upon the 'extraordinary capacities or powers' of the Commonwealth as a 'political sovereign', such as the power to engage in diplomatic relations.[191]

Category 4, while it may be useful to explain the outcome of *Cigamatic* (i.e. that the Commonwealth voluntarily submitted itself to State laws concerning the winding up of companies incorporated in the State, but did not submit itself to an amendment to that law), is problematic in practice. A change in State laws which affects contractual rights would then affect all contracts except those to which the Commonwealth was already a party (even if the change were beneficial to the Commonwealth),[192] but would presumably affect new contracts entered into by the Commonwealth pursuant to the amended law because the Commonwealth voluntarily submits itself to the application of the law. How then would State tort law reform affect the Commonwealth when it has a continuing relationship of duty of care for particular subjects? Why is it that the Commonwealth in voluntarily submitting itself to State laws and the common law does not submit itself to those laws as changed from time to time during the course of its relationship with the subject?

Category 5 appears to be a recognition of a 'reverse-*Melbourne Corporation*' principle, although McHugh J sources it to the earlier case of *West v Commissioner of Taxation (NSW)*[193] instead.[194] Justice Dixon there considered that it is 'implicit in the power given to the executive government of the Commonwealth that the incidents and consequences of its exercise shall not be made the subject of special liabilities or burdens under State law.'[195]

Category 6 gives rise to a difficult distinction between different types of executive functions, which would only further complicate the application of the *Cigamatic* doctrine if generally adopted.[196]

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189 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 455 (McHugh J).
190 Ibid 457–8.
191 Ibid 456–8.
192 Note, however, that if the Commonwealth were sued upon the contract, s 64 of the *Judiciary Act 1903* (Cth) would most likely have the effect of applying the State law as amended to the Commonwealth.
193 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657.
194 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 458.
195 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681.
196 See the extensive criticism of such distinctions in *Ex parte Professional Engineers' Association* (1959) 107 CLR 208, 235 (Dixon CJ), 275 (Windeyer J); *Victoria v Commonwealth* (1971) 122 CLR 353, 382–3 (Barwick CJ), 398 (Windeyer J), 424 (Gibbs J); *Queensland Electricity Commission* (1985) 159 CLR 192, 214–5 (Mason J); *Re Lee; Ex parte Harper* (1986) 160 CLR 430,

Justice Gummow also took up the exception in category 1 above. His Honour concluded that where an executive body is created by a Commonwealth statute, and its powers are conferred and governed by Commonwealth statute, the issue of whether a State law can apply to that body or govern its activities is a question to be resolved by s 109 of the *Constitution*.[197] As much Commonwealth executive power is now governed by statute, this is a simple way of avoiding in practice many of the problems concerning *Cigamatic.* It throws the onus back on the Commonwealth, through its legislative power, to determine whether the application of State laws should be excluded. It does not, however, explain how the *Cigamatic* doctrine applies to the Commonwealth executive government when it is exercising powers derived from s 61 of the *Commonwealth Constitution*.

Justice Gummow's position on this point remains unclear. His Honour made limited remarks about the 'content of the *Cigamatic* doctrine'.[198] He appeared to query the ability of a State law to impose a criminal offence upon the Commonwealth executive government itself, as opposed to imposing criminal liability on individual officers of the executive government, while possibly accepting the ability of civil laws to bind the Commonwealth.[199] His Honour also noted the argument that Commonwealth laws may be 'affected by' State laws, and observed that the examples given by judges have been confined to State laws of general application which qualify the common law of personal obligations.[200] His Honour also referred to the contrast between such laws and laws which 'detract from or adversely affect the very governmental rights of the Commonwealth in the exercise of which it might engage in such transactions.'[201] It is not clear, however, whether his Honour endorsed the 'affected by' argument or any distinction between laws affecting the 'governmental rights' of the Commonwealth and other rights, or how his Honour justified such arguments, other than by the application of precedent. Given his Honour's previous strident criticism of the *Cigamatic* doctrine, which concluded with the hope that 'the High Court will at the earliest opportunity be invited to reconsider, and reconsider, the correctness of the decision in *Cigamatic*',[202] it is remarkable that as his Honour was a Justice of the High Court on the occasion where leave was first given to reconsider the correctness of *Cigamatic,* he did no more than recite what was held in that case, neither criticizing nor endorsing its reasoning.

The joint judgment of Dawson, Toohey and Gaudron JJ reinterpreted the *Cigamatic* doctrine so that State laws do not apply to the Commonwealth to the extent that they impair the 'capacities' of the Commonwealth. The justification given for this is the argument that the Commonwealth has enumerated legislative powers, but the States 'do not have specific legislative powers which might be construed as authorizing them to restrict or modify the executive capacities of the Commonwealth.'[203] Note, that this principle is not applied to prevent State laws from 'binding' the Commonwealth.

452 (Mason, Brennan and Deane JJ); *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 230–1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

197 *Re Residential Tenancies* (1997) 190 CLR 410, Ibid 469.

198 Ibid 472–4.

199 Ibid 472.

200 Ibid 473.

201 Ibid.

202 Meagher and Gummow, above n 78, 29.

203 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 440.

Rather it is confined to invalidating laws restricting or modifying the 'executive capacities' of the Commonwealth. This distinction appears to be traced back to the *Melbourne Corporation* principle that the *Constitution* is predicated upon the continuing separate existence of the Commonwealth and the States. The argument then appears to be that the Commonwealth Parliament has enumerated legislative powers that would permit it to impair State executive capacities, were it not for the *Melbourne Corporation* implication, but the States, with no enumerated legislative powers, do not have legislative power to impair the Commonwealth's executive capacities, so that no implication is required.[204] However, the States, with no enumerated legislative powers, may still enact laws which bind the Commonwealth, as long as they do not impair the Commonwealth's executive capacities.[205]

This argument avoids the problems of the 'affected by' argument, and clearly accepts the proposition that State laws may 'bind the Crown in right of the Commonwealth and its agencies'.[206] Its difficulty lies in the inadequate explanation of why State Parliaments, without enumerated legislative powers, may legislate to bind the Crown in right of the Commonwealth except where that legislation impairs its executive capacities. It is understandable if this is derived from an implication based upon federalism, and is the reciprocal application of the *Melbourne Corporation* principle, but their Honours argue instead that it is the result of a mere absence of legislative power. If the State has no legislative power, and it is not because of a prohibition implied from the *Commonwealth Constitution*, it must be because the law is not one for the peace, welfare and good government of the State. However, their Honours did not develop the argument this far.

The rationale for the *Cigamatic* doctrine is unsound, and the distinctions it requires a court to draw are unclear and unworkable.[207] It has led some judges to hold that State laws may not bind the Commonwealth,[208] and others to hold that in some cases they may do so.[209] The *Cigamatic* doctrine has also been subject to intense academic criticism,[210] but yet when the opportunity for it to be overruled arose in *Re Residential Tenancies Tribunal,* a majority of the Court decided to apply it in a reinterpreted form, continuing to apply difficult and perhaps illusory distinctions, without adequately identifying a firm constitutional foundation to support them. It is extraordinary that

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204 Ibid.

205 Ibid 443–4.

206 Ibid 446.

207 Lower courts have had great difficulty in discerning and applying the principles. See, eg,*Deputy Commissioner of Taxation v DTR Securities* (1985) 1 NSWLR 653, 666 (Lee J); *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 593 (McHugh JA); *Trade Practices Commission v Manfal* (1990) 97 ALR 231, 236–9 (Wilcox J), 258 (French J); *Re Commissioner of Water Resources* [1991] 1 Qd R 549, 555–7 (Byrne J); *Aboriginal Legal Service of Western Australia (Inc) v Western Australia* (1993) 9 WAR 297, 322–3 (Nicholson J); *Coco v Shaw* [1994] 1 Qd R 469, 477 (McPherson SPJ); *Whiteford v Commonwealth of Australia* (1995) 38 NSWLR 100, 107 (Kirby P).

208 *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 596–7 (McHugh JA); *Whiteford v Commonwealth of Australia* (1995) 38 NSWLR 100, 107 (Kirby P).

209 *Trade Practices Commission v Manfal* (1990) 97 ALR 231, 240 (Wilcox J); *Re Commissioner of Water Resources* [1991] 1 Qd R 549, 556–7 (Byrne J); *Coco v Shaw* [1994] 1 Qd R 469, 477 (McPherson SPJ).

210 Meagher and Gummow, above n 78; Doyle, above n 149, 47; Zines, above n 105, 361–6.

over one hundred years after federation, it is still unclear how our federal system is intended to function, and more specifically to what extent State laws may bind the Commonwealth executive.

Ultimately, if the Commonwealth objects to a State law of general application applying to it, it may enact a law which will prevail over the State law pursuant to s 109 of the *Commonwealth Constitution*.[211] Both McHugh and Gummow JJ read the *Cigamatic* principle as not applying to executive powers derived from statute, because s 109 was the appropriate mechanism to deal with any conflict.[212] If this approach were generally accepted, it would mean that State laws would apply to bodies created by legislation, such as the Defence Housing Authority, or even the Defence Forces themselves, subject to inconsistent Commonwealth legislation. This approach has the benefit of being consistent with the judgment of the High Court in *Pirrie v McFarlane,*[213] where it was stressed that the Air Force is organized by Commonwealth legislation, which restricts to some extent the civil rights and duties of soldiers, but does not exempt them from obedience to the civil law. Such an approach would seriously limit the application of the *Cigamatic* doctrine, as these days much executive power is based on legislation, rather than the prerogative or the general executive power conferred by s 61 of the *Commonwealth Constitution*.

The enactment of inconsistent legislation by the Commonwealth Parliament is subject to there being an appropriate head of legislative power to support such a law, although this will almost always be the case where a law concerns the functions of the Commonwealth government.[214] It is also subject to any other express or implied constitutional prohibitions. The only real problem occurs where the Commonwealth is unaware of the State law and its effect on Commonwealth bodies, and later wishes to legislate with retrospective effect to establish an inconsistency. In *University of Wollongong v Metwally*, a majority of the High Court held that the Commonwealth Parliament could not legislate with retrospective effect to remove an inconsistency, as this would override the operation of the *Constitution*.[215] It must therefore be doubtful if the Commonwealth could legislate retrospectively to create an inconsistency for the purposes of s 109 if the inconsistency did not exist at the relevant time.[216]

Finally, it should also be noted that the application of the *Cigamatic* doctrine may be limited by the fact that in some cases Commonwealth laws 'pick up' and apply State laws[217] or remove Commonwealth advantages in litigation.[218] However, these

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211 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 504 (Dawson, Toohey and Gaudron JJ), 504 (Kirby J).

212 Ibid 452–3 (McHugh J), 469–70 (Gummow J). See also *Cigamatic* (1962) 108 CLR 372, 378 (Dixon CJ).

213 (1925) 36 CLR 170, 228 (Starke J).

214 The express incidental power in s 51(xxxix) of the *Constitution* is particularly relevant here.

215 (1984) 158 CLR 447, 455–8 (Gibbs CJ), 469 (Murphy J), 474–5 (Brennan J), 476–9 (Deane J).

216 Ibid 457 (Gibbs CJ). His Honour expressly objected to the proposition that the Commonwealth could retrospectively reveal an intention to cover the field with the result that a State law would be retrospectively invalidated: at 457. Cf Murphy J where he considered that retrospective Commonwealth laws could render a State law invalid, but could not render valid what s 109 had made invalid: at 468–9.

217 See, for example, s 79 of the *Judiciary Act 1903* (Cth). The State law then applies as a federal law.

provisions are often limited[219] and uncertainty remains as to the extent to which they apply if the State law is directed at Commonwealth executive power, rather than being a law of general application.[220] Accordingly, the *Cigamatic* doctrine remains relevant.

A 'reverse Melbourne Corporation' principle?

In the *Melbourne Corporation* case, a number of Justices suggested that the implication had a two-way application. Chief Justice Latham observed that the 'Commonwealth Parliament has no power to make laws with respect to State governmental functions as such, and the State Parliaments have no power to make laws with respect to Commonwealth governmental functions as such'.[221] Similarly, Starke J observed that 'neither Ffederal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or "obviously interfere with one another's operations".'[222] Justice Williams also concluded that the States may not exercise their constitutional powers for the purpose of 'affecting the capacity' of the Commonwealth 'to perform its essential governmental functions'.[223]

However, in practice the *Melbourne Corporation* principle has been applied to protect the States from Commonwealth laws, rather than the reverse. Accordingly, support for the proposition that the *Melbourne Corporation* principle is a limitation on the legislative or executive powers of the States is limited.[224]

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218 See, for example, s 64 of the *Judiciary Act 1903* (Cth), which was applied to laws of substance as well as procedure in *Maguire v Simpson* (1977) 139 CLR 362; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

219 See, for example, *Re Residential Tenancies Tribunal* (1997) 190 CLR 410; *Commonwealth v Western Australia* (1999) 196 CLR 392, where s 64 of the *Judiciary Act 1903* (Cth) did not apply to proceedings in the Residential Tenancies Tribunal or before a mining warden; *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55, where s 64 did not apply because other Commonwealth legislation 'covered the field', leaving no room to import a State law. Regarding the limitations on the application of s 79 of the *Judiciary Act 1902* (Cth) see *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), 146 [60] (McHugh J); *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 593–4 [72]–[74] (Gleeson CJ, Gaudron and Gummow JJ), 609–10 [129]–[130] (McHugh J); *Commonwealth v Mewett* (1997) 191 CLR 471, 556 (Gummow and Kirby JJ).

220 *Austral Pacific Group Ltd v Airservices Australia* (2000) 203 CLR 136, 156–7 [57] (McHugh J) referring to *Maguire v Simpson* (1977) 139 CLR 362, 390 (Gibbs J) , 402 (Mason J), 403–4 (Jacobs J) ; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 267 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ); *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 428 (Brennan CJ), 460(McHugh J) , 474 (Gummow J).

221 *Melbourne Corporation* (1947) 74 CLR 31, 61. Note, however, that in *Uther's Case* (1947) 74 CLR 508, his Honour qualified this by stating that the *Melbourne Corporation* principle cannot be applied in favour of the Commonwealth in the same way as to a State, because a State has no means of protecting itself against Commonwealth legislation, but the Commonwealth can protect itself from State legislation because of the application of s 109 of the *Commonwealth Constitution*: at 520.

222 *Melbourne Corporation* (1947) 74 CLR 31, 74 (citations omitted).

223 *Melbourne Corporation* (1947) 74 CLR 31, 99.

224 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 507–8 (Kirby J); *Commonwealth v Western Australia* (1999) 196 CLR 392, 435–6 [122]–[123] (Gummow J); *Aboriginal Legal Service of Western Australia v Western Australia* (1993) 9 WAR 297, 319 (Nicholson J); *Coco v Shaw* [1994] 1 Qd R 469, 495–6 (Ryan J); *Local Government Association of Queensland (Inc) v*

Is *Cigamatic* merely a reflection of the application of part of the *Melbourne Corporation* principle? Chief Justice Dixon, who was the principal architect of the *Cigamatic* principle, denied such a suggestion. His Honour considered that the question of whether the legislative powers of the States could extend over a prerogative of the Commonwealth 'cannot be regarded as simply governed by the applicability of the principles upon which *Melbourne Corporation v The Commonwealth* depended'.[225] His Honour focused instead on the absence of State legislative power, rather than the application of an implication derived from federalism to limit existing legislative powers. In *Re Residential Tenancies Tribunal,* Brennan CJ took the same approach. His Honour concluded that the *Melbourne Corporation* principle could not apply because it proceeds on the basis that the Commonwealth otherwise has legislative power to affect the prerogatives of the State, and that those powers must therefore be limited to satisfy the requirements of a federation.[226] In contrast, his Honour concluded that the States had no such legislative power to begin with.[227]

Justices Dawson, Toohey and Gaudron, who also formed part of the majority, considered that the *Cigamatic* distinction between laws of general application and laws affecting the capacities of the Commonwealth executive, was based upon the fundamental principle recognised in *Melbourne Corporation* that the '*Constitution* is predicated upon the continuing separate existence of the Commonwealth and the States'.[228] However, their Honours noted the necessity of differentiating in the application of this principle to the Commonwealth and the States. They too applied the 'enumerated powers' argument, so that the *Melbourne Corporation* principle was necessary to restrain the enumerated powers of the Commonwealth, but unnecessary to apply to the States which do not have power to impair the executive capacities of the Commonwealth.[229]

Nevertheless, in interpreting the *Cigamatic* doctrine, Dawson, Toohey and Gaudron JJ used the language of the *Melbourne Corporation* case. Their Honours incorporated in their version of the *Cigamatic* doctrine, notions of discrimination which have long formed part of the *Melbourne Corporation* principle. They observed that 'a State law which discriminates against the Commonwealth government and imposes a disability upon it will have an impact upon such a relationship [of equality between the Crown and its subjects] and will constitute an interference with its executive capacities'.[230]

Most importantly, their Honours drew a distinction between laws which impair the 'capacities' of the executive, and those which assume the existence of those capacities but merely regulate the exercise of those capacities.[231] The distinction drawn is similar to that drawn in the *Tasmanian Dams Case* by Mason J between laws which impair the capacity of a State to function as a government, and those laws which impair its

Queensland [2001] QCA 517, [67] (Williams JA). See also, Meagher and Gummow, above n 78, 26; Zines, above n 105, 353.

225 *Cigamatic* (1962) 108 CLR 372, 378.

226 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410, 425.

227 Ibid 424–5.

228 Ibid 440.

229 Ibid.

230 Ibid 443.

231 Ibid 439. See also Francesca Dominello, 'Intergovernmental immunities and judicial reasoning' in Tony Blackshield, Michael Coper, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 344.

functions.[232] The High Court in *Austin,* by taking the *Melbourne Corporation* test back to the broad principle protecting federalism, and applying that test to protect the constitutional powers and capacities of the States, appears to have drawn the *Melbourne Corporation* test even closer to that set out in *Cigamatic.*

Given first, the unsatisfactory basis of the *Cigamatic* doctrine; secondly, the fact that it can no longer be argued by the Commonwealth to give it a general immunity from State laws; and thirdly, the approach of the majority in *Re Residential Tenancies Tribunal* in adopting tests conceptually similar to those in the *Melbourne Corporation* case, it would appear to be time to reconsider the extent to which State laws can bind the Commonwealth. A 'reverse-*Melbourne Corporation*' principle, based upon the federal system established by the *Constitution*, could apply to prevent State laws from restricting or burdening the Commonwealth in the exercise of its constitutional powers. Indeed, the confusion wrought by the High Court in the *Austin* case may give birth to the opportunity to harmonize the two streams of authority in the *Melbourne Corporation* and *Cigamatic* cases.

From a Commonwealth point of view, this approach would have distinct advantages because in some ways the *Melbourne Corporation* principle appears to be broader than that in *Cigamatic*. For example, the *Cigamatic* doctrine only extends to protect the capacities of the executive. The *Melbourne Corporation* principle, however, extends to protect all the constitutional powers of the polity, be they executive, legislative or judicial,[233] perhaps even extending as far as functions which are necessary to allow it to exercise its constitutional powers.[234]

While of course a State could not legislate to affect the legislative capacities of the Commonwealth, as such a law would be contrary to the *Commonwealth Constitution*,[235] State laws may otherwise affect the actions of Members of the Commonwealth Parliament (outside Parliamentary proceedings) or the operation of Commonwealth elections. In the absence of a s 109 inconsistency, the application of a 'reverse-*Melbourne Corporation*' principle may be more useful to the Commonwealth in such circumstances than the *Cigamatic* doctrine.

A case where such an issue arose is *Local Government Association of Queensland (Inc) v Queensland.* There a State law provided that local government councillors who nominated for election to the Commonwealth Parliament automatically vacated their local government office. The Commonwealth Solicitor-General, intervening in the case, was unable to seek the application of the *Cigamatic* doctrine, as the State law did not affect the executive capacities of the Commonwealth.[236] Instead, he sought the

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232 (1983) 158 CLR 1, 139 (Mason J).

233 *Austin* (2003) 195 ALR 321, 364 [143], 366 [148] (Gaudron, Gummow and Hayne JJ); *Queensland Electricity Commission* (1985) 159 CLR 192, 207 (Gibbs CJ), 217 (Mason J), 232 (Brennan J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 216 (Stephen J). See also, *Melbourne Corporation* (1947) 74 CLR 31, 75 (Starke J), 79 (Dixon J), where their Honours also referred to the exercise of 'constitutional powers'.

234 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 163 (Brennan J) , 242 (McHugh J).

235 *Local Government Association of Queensland (Inc) v Queensland* [2001] QCA 517, [49] (Davies JA)].

236 *Local Government Association of Queensland (Inc) v Queensland* [2001] QCA 517,[48] (Davies JA)].

application of a 'reverse-*Melbourne Corporation*' principle. Williams JA accepted this invitation and applied such a principle to protect the Commonwealth.[237] While it is hard to see on the facts why a law with respect to the disqualification of local councillors could be interpreted as imposing burdens on the Commonwealth or affecting its capacity to function,[238] it may have had the effect of discouraging local councillors from standing for office as a Member of the Commonwealth Parliament. To this extent, the *Melbourne Corporation* principle, as subsequently espoused by the High Court in *Austin*,[239] would have supported the argument that such a law was an invalid interference with the constitutional powers and capacities of the Commonwealth.

CONCLUSION

The distinction drawn between the powers of the Commonwealth and the States to enact laws which bind each other, based upon the enumerated powers of the Commonwealth, is inadequate. It is only really relevant to inconsistency of laws under s 109 of the *Commonwealth Constitution*. It is not a satisfactory basis for the *Cigamatic* doctrine and leads to artificial and unsatisfactory attempts to explain why some State laws do bind the Crown in right of the Commonwealth and others do not.

The *Melbourne Corporation* principle, however, based upon the federal structure of the *Constitution* and the necessity of maintaining independently functioning governments, appears to be a firmer foundation for an explanation of why some State laws may bind the Commonwealth and others may not. It has the additional attraction of being capable of applying to the circumstance where the laws of a State purport to bind another State, and to the legislative attempts of the Commonwealth and the States to tax each other. While it may be that some adjustments would need to be made to the relevant tests to accommodate this expanded role, they could not possibly make it as Byzantine in its complexities as the existing unsatisfactory *Cigamatic* doctrine.

Finally, by adopting one principle to cover all these circumstances, the High Court would at last have a firm starting point to develop an explanation of federalism and how it functions under our *Constitution* — an explanation which has been far too long outstanding.

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237 *Local Government Association of Queensland (Inc) v Queensland* [2001] QCA 517, [70] (Williams JA)]. McMurdo P held at [12] that the law was beyond the competence of the Queensland legislature because the Commonwealth has exclusive legislative power in relation to Commonwealth elections. The whole Court also held that the law was invalid because of inconsistency under s 109 of the *Commonwealth Constitution*.

238 Compare the view of McHugh J in *Street v Queensland Bar Association* (1989) 168 CLR 461, 583, where his Honour noted that 'some subject-matters are the concern only of the people of each State' and that these include 'the qualifications and conditions for holding public office in the State', which would presumably include conditions for holding the office of local councillor.

239 (2003) 195 ALR 321. See the discussion on this case above.