

THE LIABILITY OF THE COMMONWEALTH UNDER SECTION 75(III) AND RELATED QUESTIONS

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I. INTRODUCTION

For many years the judicial basis of the liability of the Crown in right of the Commonwealth to be sued has been a source of delight and disputation to lawyers.¹ The topic has been recently described as "a difficult area and one upon which it is unwise to enter unless it is necessary to do so".² The High Court has shown an unbecoming timidity to explore it. Particularly knotty issues have concerned an issue of federalism: how far the national government may be held by the courts to meet the standards set by state laws.³ After many

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1 See generally, G Sawyer "State Statutes and the Commonwealth" (1962) 1 *University of Tasmania Law Review* 580; R Sackville "The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis" (1969) 7 *Melbourne University Law Review* 15; G Evans "Rethinking Commonwealth Immunity" (1972) 8 *Melbourne University Law Review* 521; C Howard "Some Problems of Commonwealth Immunity and Exclusive Legislative Powers" (1972) 5 *Federal Law Review* 31; RP Meagher and WMC Gummow "Sir Owen Dixon's Heresy" (1980) 54 *ALJ* 25; G Donaldson "Commonwealth Liability to State" (1986) 16 *University of Western Australia Law Review* 135.

2 *Breavington v Godelman* (1988) 62 ALJR 447 at 488 per Dawson J.

3 For a detailed discussion of the philosophy underpinning this interaction see MJ Detmold "Australian Law: Freedom and Identity" (1990) 12 *Sydney Law Review* 482.

years and cases, so basic a question is still unresolved and, to a certain extent, under explored.

The following analysis⁴ depends upon the important and very obvious distinction⁵ between the existence of a court's *jurisdiction* and the imposition of *substantive liability* of a party impleaded in that jurisdiction. A statute (say section 75(iii) of the *Constitution*) may give the High Court jurisdiction between parties without necessarily also giving the plaintiff a substantive right to relief in the exercise of the jurisdiction against the Commonwealth as defendant. If it does not, then the right to obtain the relief against the Commonwealth must be sought from some other source, either common law or statutory.

What is the source of the Commonwealth's liability? There are two possible answers. Either the *Constitution* itself directly imposes liability, or the Commonwealth Parliament may, by appropriate legislation, impose it, or expose the Commonwealth to it from some other source. Another possible source to which the Commonwealth may be exposed is some enacted law of a State. (We may leave aside for the moment, I think, the possibility that there are separate bodies of federal and State 'common law', the latter of which could provide some further independent source of Commonwealth liability.) If an enacted law of a State parliament is relied on, then s 64 of the *Judiciary Act* makes it clear that the Commonwealth is to be placed in no position superior to that of the ordinary litigant in the hearing of the matter.

This article gives a prosaic answer to the source of the Commonwealth's liability. Although present authority suggests a Byzantine melange of sections of both the *Constitution* (ss 75 and 78) and the *Judiciary Act* 1903 (Cth) (ss 39, 56 and 64) as possible sources, the answer is far simpler. Section 75(iii) of the *Constitution* is both the source of the High Court's jurisdiction and the Commonwealth's substantive liability. A conspicuously strong majority of the High Court reached this conclusion long ago in *Commonwealth v New South Wales*.⁶ Recourse to the neglected but *binding*⁷ reasoning in this decision, soundly based in policy, would remove the increasingly perplexed reliance on other provisions. But for the subsequent recusancy of Sir Owen Dixon, Sir George Rich and Sir Frederick Jordan, in *Werrin v Commonwealth*⁸ and *Washington v Commonwealth*⁹ discussed in detail below,¹⁰ the matter would be clear beyond peradventure.

4 See L Aitken "Jurisdiction, Liability and 'Double Function' Legislation" (1990) 19 *Federal Law Review* 31 and the discussion in the Full Federal Court in *Western Australian v Wardley* (1991) 102 ALR 213 at 224.

5 *Magman International v Westpac* (1991) 104 ALR 575 at 595 per Hill J.

6 (1923) 32 CLR 200.

7 In the analysis below we shall see that the majority reasoning in *Commonwealth v New South Wales* has been ignored but never overruled. Furthermore, attempts by Dixon J and others to water down the strength of the holding are, it is submitted, entirely unconvincing.

8 (1938) 59 CLR 150.

9 (1939) 39 SR (NSW) 133.

10 See text to notes 30 to 35 *infra*.

II. COMMONWEALTH LIABILITY: THE POLITICAL DIMENSION

Part of the High Court's present reluctance to discuss the matter is due to its political dimension. To reach a decision on the source of liability is to make a political decision of far-reaching proportions. Strict legalism may disguise that importance but it cannot remove it.

Should the Commonwealth normally be exposed to common law liability? Should it be liable to the dictates of a State's legislation except in those areas where there is a specific inconsistency with a Commonwealth enactment under s 109 of the Constitution, or a State is interfering in an arena which, in terms of the federal compact, is beyond its purview?

The answer in a modern society must be yes. True, like Athena, the Commonwealth sprang fully-formed into existence. That is no reason for denying the operation of State law to the Commonwealth in all but excepted cases. The scope of Commonwealth law-making authority is limited, so recourse must perforce be had to State enactments and the 'common law' when the Commonwealth goes about its business.

Policy points only one way. The Commonwealth's liability to suit by its subjects should be entrenched in the *Constitution*. Any other conclusion takes one back to a time when a Petition of Right was required to sue the Crown. The relationship between the Federal Government and the people of the Commonwealth is not one of ruler and vassal. It will be said that the Federal Executive is controlled by Parliament which, popularly elected, represents the people's wishes as a whole as expressed by election. But so strong is the Executive, in reality, that such an argument deserves little respect. Of course, the Commonwealth (ie the Executive) has a strong interest in controlling both its liability to be impleaded and the legal grounds on which suit may be brought against it. The Federal government has always assumed that it is able to restrict the Commonwealth's liability by legislation.¹¹ That is all the more reason why the Constitution must be construed so as to render the Commonwealth substantively liable. As a matter of principle and interpretation the view which limits the liability is wrong.

The Constitution has made specific provision for overriding State enactments wherever they are inconsistent with a law of the Commonwealth. So, if a State law purports to impose a liability in an area of Commonwealth legislative competence, the Commonwealth may invalidate it. If, however, the substantive liability springs from the *Constitution* itself, or a State enactment beyond federal legislative competence, why should the Commonwealth not be substantively liable if its activities have brought it under the purview of the relevant law, common or statutory?

As we shall see, an ill-defined residual protection, embodied in the *Cigamic* doctrine, still appears to exist to protect the Commonwealth at the High Court's

11 See note 16 *infra*.

choosing. Under this doctrine the Commonwealth is entitled to certain immunities and privilege denied other litigants because of its especial constitutional status.

The argument advanced is that the Commonwealth is liable pursuant to the *Constitution* itself without need for further enactment.

A. POSSIBLE BASES OF COMMONWEALTH LIABILITY

To examine how the Commonwealth is potentially liable at common law or amenable to State laws we must consider of a number of sections of the *Constitution* and the *Judiciary Act*. Unfortunately the analysis which follows is quite complicated and 'black-letter' in the most pejorative sense of that term. Such analysis is necessary to explain the High Court's present position, notwithstanding that the area may be much more simply explained.

In particular, ss 75(iii) and 78 of the *Constitution*, and ss 39(2), 56 and 64 of the *Judiciary Act* have all been suggested as playing their parts.

Section 75(iii) of the *Constitution* provides that the High Court shall have original 'jurisdiction' in all 'matters' in which the Commonwealth or someone suing or being sued on behalf of the Commonwealth is a party.¹² As the scope of the operation of the Commonwealth government has increased, so this head of the High Court's original jurisdiction has become increasingly important. No doubt for this reason the Constitutional Commission in its report recommended this head be retained as part of the original entrenched jurisdiction of the High Court.¹³

In its most recent pronouncements, the Court has regarded Commonwealth liability as springing from the application of certain sections of the *Judiciary Act*. To these it has accorded an almost constitutional deference. But a provision of the *Judiciary Act* is only valid under the *Constitution*. Without constitutional underpinning the *Judiciary Act* cannot provide of itself the basis for the Commonwealth's liability.

B. OUTSTANDING QUESTIONS

On a legalistic level, the interpretation of s 75(iii) raises several difficult questions. As noted, the key issue conceals a policy matter: does s 75(iii) confer a *substantive* right to proceed against the Commonwealth or its representative, as opposed to merely mandating the High Court as a forum in which such an action may be pursued? Secondly, to what extent is the Commonwealth bound by State legislation which appears to affect it? In

12 An issue which will only be considered peripherally in this article but which *is* of practical importance is who and what is the Commonwealth for the purpose of liability under the section. On the United States position under Art III sec 2 of the United States Constitution, see Cowen and Zines p 38.

13 Report of the Constitutional Commission (1988) Vol 1 para 6.61 (hereinafter referred to as "Commission Vol 1").

particular, does the doctrine expressed most recently in *Commonwealth v Cigamatic Pty Ltd (in Liq)*¹⁴ still apply?

Assuming that the argument to be advanced is wrong and s 75(iii) does no more than confer a *jurisdiction* how have the cases described the source of substantive law fixing the content of the Commonwealth's liability? What is the nature of the common law of the Commonwealth? Are ss 39, 56 and 64 of the *Judiciary Act* relevant to the broader constitutional issue concerning s 75(iii) of the *Constitution*?

What of s 78 of the *Constitution*? It provides:

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

It operates uncertainly. It seems to empower the Commonwealth Parliament to remove any immunity which the Crown in right of the Commonwealth or the States may enjoy against suit at common law with respect to actions which fall within the ambit of ss 75 and 76 of the *Constitution*. Such a construction would argue strongly against treating s 75(iii) as a constitutional guarantee. If a substantive right exists under s 75(iii), what need of s 78?

II. SECTION 75(III) OF THE CONSTITUTION

The better view of s 75(iii) has the section on its own rendering the Commonwealth substantively liable. A 'matter' instituted against the Commonwealth engenders a substantive liability. Indeed, the very notion of a 'matter' automatically embodies a substantive right which may be enforced against the Commonwealth. Consequently, the liability may not be impaired or controlled by federal legislation.¹⁵ Is it odd if the Commonwealth Parliament has no control over the Commonwealth's liability?¹⁶ The increasing width given to Crown liability when the Framers were settling s 75(iii) argues that the provision should now be regarded as a deliberate entrenching of a substantive right, whatever the historical view of the Convention.¹⁷

14 (1962) 108 CLR 373 qualifying in *re Foreman and Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508. In *Cigamatic* the High Court held that the Parliament of Victoria had no right to control or abolish the Commonwealth's fiscal right to priority of the payment of debts owed to it by a company in liquidation when debts owed of equal degree were owed to private individuals.

15 *Musgrave v The Commonwealth* (1937) 57 CLR 414 at 546 per Dixon J.

16 The Executive acted promptly to reduce its potential liability consequent upon *Commonwealth v Evans Deakin* (1986) 161 CLR 254 by introducing an amendment to s 64 of the *Judiciary Act*. The proposed s 64(2) would have rendered the Commonwealth or a State liable under the law of another State only where the enacting State itself was bound and, more importantly, allowed the Commonwealth to prescribe by legislation breaches of a State or Territory statute which did *not* confer a correlative right of action against the Commonwealth. The Bill was opposed in the Senate and subsequently lapsed; the incident does, however, reveal how fragile is the reliance on s 64 alone to support a substantive liability.

17 As against this policy argument, note the historical analysis in *Commissioner for Railways v Peters* (1991) 102 ALR 579 at 604 per Kirby P, where his Honour notes that "the process of assimilation" of the

Now there is a logical problem in this interpretation. Section 75(iii) does not point to any existing system of substantive law to determine the *extent* or *nature* of the liability.¹⁸ Sir Owen Dixon once suggested that a wide interpretation of s 75(iii) would require the scope of Commonwealth liability to be fixed as at Federation but such an interpretation would be a very restrictive one for a constitution. How then, it may be said can s 75(iii) be the source of liability?

The answer is clear. When someone sues the Commonwealth in the original jurisdiction, the High Court generates the 'relevant law' upon which the claim is founded in the course of reaching its decision. A claim in tort or nuisance or contract against the Commonwealth does not depend upon the existence of a federal Tort or Nuisance or Contract Act - the Court simply applies existing common law principles immanent in the minds of the judges. It adds nothing to the argument to say that s 75(iii) does not point to specific substantive system of law as the source of liability and so cannot be the source of that liability on its own.

This view is reinforced by venerable authority. In two early decisions, *South Australia v Victoria*¹⁹ and *Commonwealth v New South Wales*,²⁰ a majority on the High Court held that s 75(iii) rendered the Commonwealth substantively liable. Furthermore, be it noted, the majority (comprised of judges with direct experience of the Constitutional Convention) did *not* regard the question of Crown immunity on any historically limited basis at all.²¹ The section conferred a *jurisdiction* and, simultaneously, a *substantive* right.

In *South Australia v Victoria* the Court held that it had jurisdiction, pursuant to s 75 of the Constitution, to hear a 'matter' involving a claim for a declaration that certain land in *de facto* possession of Victoria in fact formed part of South Australia. There was little detailed discussion of the source of liability to make the claim, the Court (Higgins J dissenting) simply proceeding on the basis that the matter was justiciable and the Court had jurisdiction to decide it. Central to the Court's reasoning was that a 'matter' necessarily carried with it the ability to impose substantive liability.

In *Commonwealth v New South Wales* this view was confirmed. A majority of a conspicuously strong court, Knox CJ²² and Issacs, Rich and Starke JJ agreed that s 75(iii) on its own imposed a substantive liability on a State sued by the Commonwealth for negligence. Issacs, Rich and Starke JJ held that:

rights of the Crown and subject "has continued to the present day". See, too, Priestly JA at 614 stating that the Convention Debates leave "little doubt that it was contemplated that the Commonwealth Parliament would in due course legislate for submission by the Crown in right of the Commonwealth and States to suit by subjects as if the Crown were a subject".

18 *Werrin's Case* (1938) note 8 *supra* at 167 per Dixon J.

19 (1911) 12 CLR 667.

20 Note 6 *supra* discussed in detail in HE Renfree *Federal Judicial System of Australia* (1984) pp 163-4.

21 Compare the narrow approach expressed in *Peters* note 17 *supra*.

22 Note 6 *supra* at 206-7.

the jurisdiction conferred by s 75 is beyond the power of Parliament to affect. It can aid it and direct the method of its exercise; but it cannot diminish it.²³

In answer to the argument that s 75 was inapt to impose liability upon the State, the majority replied rhetorically:

If it be said that is [s 75] does not include tort, then nowhere is it included. If it be said that it does include torts but that torts have to be additionally dealt with, the question at once arises: under what provision can a State be made liable for torts? It is, of course, unthinkable that a State can defeat s 75 by declining to be liable for its torts against the Commonwealth or another State.²⁴

Knox CJ observed that:

This power is conferred by the Constitution itself on this Court to take cognizance of this matter. Any legislation by Parliament directed to conferring this power would, therefore, be superfluous as legislation by Parliament to restrict the limits of the jurisdiction would be ineffective.²⁵

Higgins J once again dissented, reasoning that s 78 of the *Constitution* had to be invoked before a liability for tort could be imposed on a State or the Commonwealth.

What function did s 78 fulfil? As we shall see, s 78 has been relied on as a strong indication that some other source of law besides the *Constitution* itself is required to fix substantive liability on the Commonwealth or the States.²⁶ Both Knox CJ²⁷ and Issacs, Rich and Starke JJ²⁸ were unequivocal: s 78 is relevant, not to liability under s 75, but to the subsequent exercise of the conferral of jurisdiction on new courts under ss 76 and 77 in the exercise of 'the judicial power'. As the joint judgment noted, any other interpretation "would enable the Commonwealth to render a State liable to the Commonwealth, and to refuse a reciprocal liability. It would also enable the Commonwealth to make one State liable to another, and leave that other irresponsible to the first".²⁹ As a question of simple interpretation, s 78 looked to 'rights to proceed', not 'the right to proceed'. Only the latter wording would have the restrictive effect contended for.

For whatever reason, subsequent cases³⁰ (discussed below) have ignored the effect of s 78 even though the reading given to it by the majority in *Commonwealth v New South Wales* is the only sensible one.

23 *Ibid* at 216.

24 *Ibid* at 214.

25 *Ibid* at 206-7.

26 The position with respect to the States is especially complicated. It has been recently discussed in *Commissioner for Railways (Qld) v Peters* note 17 *supra* and is discussed in the text to notes 76 to 87 *infra*.

27 Note 6 *supra* at 207 where the Chief Justice stressed the distinction between the jurisdiction under s 75 which is 'independent of' Parliamentary enactment while that under ss 76 and 77 depends upon it.

28 *Ibid* at 214.

29 *Id.*

30 See, in particular, *Peters* note 17 *supra* discussed at the text to notes 76 to 87 *infra*.

A. *FARNELL v BOWMAN*

The reasoning in *South Australia v Victoria* and *Commonwealth v New South Wales* may be traced to the Privy Council's decision in 1887 in *Farnell v Bowman*.³¹ This decision has had a profound influence on the High Court's approach to questions of the Commonwealth's liability. *Farnell v Bowman* was the first important decision in which the New South Wales Government was held liable in tort under a State statute.

It must be seen in its historical context. Prior to the *Petition of Right Act* of 1860 the usual maxim that the King could do no wrong prevented suit against the Crown except in a limited number of situations. That protection was removed both in England and the Colonies by legislation. Broadly interpreted, it could be said that s 75(iii) of the *Constitution* represents such a removal of protection of the Crown in right of the Commonwealth.

The facts of *Farnell* were simple. Farnell, Secretary for Lands for New South Wales, was sued as nominal defendant under the *Claims Against the Colonial Government Act* on the ground that Crown servants had negligently started a fire which had severely damaged the plaintiff's property.

The Government demurred to the claim. At first instance, the New South Wales Supreme Court sitting *en banc* held for the plaintiff two to one and the Privy Council subsequently upheld that decision. The relevant section of the Act empowered "any person having, or deeming himself to have, any just claim or demand whatever against the Government of New South Wales" to sue in the manner prescribed. Martin J, dissenting in the Supreme Court, held that the statute could only mean "such claims or demands as the law then recognised, and cannot be extended to create claims and demands of which at that time it took no cognisance". Faucett J on the other hand, stated:

surely no one would think of bringing an action in any case unless he believed he had, that is, unless he 'deemed himself to have' a just claim.

Sir Barnes Peacock for the Privy Council agreed that the New South Wales Act was apt to confer a substantive right against the Crown whether or not the claim was in tort or otherwise. It was the analogy between the words of the statute in *Farnell* and s 64 of the *Judiciary Act* which subsequently led the High Court in *Evans Deakin v Commonwealth*³² to hold that "... the Judicial Committee [in *Farnell*] had given a similar wide meaning to the words of a New South Wales statute in much the same language ...".³³

31 (1887) 12 App Cas 643.

32 (1986) 66 ALR 412 at 415 discussed in detail in text to notes 56 to 67 *infra*.

33 Brennan J in his vigorous dissent in *Evans Deakin* pointed out that in *Farnell* the statute conferred an express right to proceed against the nominal defendant "at law or in equity" whereas s 64 of the *Judiciary Act* did not contain comparable language although ss 56, 57 and 58 did.

B. THE FATE OF *COMMONWEALTH v NEW SOUTH WALES*

Commonwealth v New South Wales has never been overruled³⁴ but has sunk from view despite its simple appeal. The view expressed in it has had powerful opponents. Neither Sir Owen Dixon in *Musgrave v Commonwealth* and *Werrin v Commonwealth* nor Sir Frederick Jordan³⁵ subsequently endorsed the broad reading of s 75(iii) laid down in it. However, neither of them was able to suggest an alternative solution.

It is a high charge to suggest that Sir Owen Dixon was ever guilty of being legally disingenuous but a close reading of *Werrin's Case* supports that allegation.

In *Werrin v Commonwealth*, Dixon J observed:

No doubt when a jurisdiction is conferred like that given by s 75(iii) ... the source whence the substantive law is to be derived for determining the duties of government presents difficulties. But I should not have thought that s 75 itself could be the source of substantive liability.³⁶

His Honour interpreted the joint judgment of Isaacs, Rich and Starke JJ in *Commonwealth v New South Wales* very restrictively. He felt that:

probably the joint judgment ... was not intended as a pronouncement that the liability of the State within Federal jurisdiction and of the Commonwealth was imposed directly by the Constitution so as to be unalterable and indestructible by legislation.

He preferred to interpret the case as one in which New South Wales had by implication consented to be sued so that it deliberately chose not to raise any claim of immunity.³⁷ It is, with respect, very difficult to see how this narrow interpretation could be culled from a reading of the joint judgment. For whatever reason, without stating his political premises, Sir Owen Dixon did not want any entrenched liability. So great is his continuing influence that from the time of his *dicta* he has controlled the terms of debate.

In *Washington*,³⁸ Sir Frederick Jordan agreed that s 56 was effective to render the Commonwealth liable in a claim brought under the *New South Wales Compensation to Relatives Act* 1897 although he noted that certain "observations in the judgments of the majority [in *Commonwealth v New South Wales*]" pointed in the direction of s 75(iii) being the source of liability on its own.

34 Note, too, the view of Evatt J at first instance in *New South Wales v Bardolph* (1933-34) 52 CLR 455 at 458-9: "The actual decision of the Full Court of this Court in *Commonwealth v New South Wales* is that s 75(iii) of the Constitution enables an action for tort to be brought by the Commonwealth against a State without the consent of that State". His Honour held that the same reasoning applied to s 75(iv). Upon appeal the matter turned on whether there had to be an appropriation of funds before liability might be imposed: see Gavan Duffy CJ at 493 (agreeing with Dixon J); Rich J at 497, Starke J at 503; Dixon J at 516.

35 Note 9 *supra* at 140.

36 Note 8 *supra* at 167.

37 Subsequently, in *Suehle v Commonwealth* (1967) 116 CLR 353 at 355 Windeyer J preferred the narrower view of Dixon J to that of the majority in *Commonwealth v New South Wales*.

38 Note 9 *supra* at 140-1.

III. RECENT CASES: RELIANCES ON THE JUDICIARY ACT

In default of a simple reliance on s 75(iii), the High Court has more recently been driven elsewhere to find the source of liability. Most remarkably, the decision in *Commonwealth v New South Wales* has not even been discussed in the latest decisions. Sections 39, 56 and 64 of the *Judiciary Act* 1903 have been variously invoked to render the Commonwealth substantively liable. The reasoning has a logical attractiveness. It is said that these are laws made pursuant to s 78 of the *Constitution*. Accordingly, the *Constitution* itself does not impose liability directly. Some further law of the Commonwealth Parliament is necessary to expose the Commonwealth to liability without which, presumably, that liability would not exist.

Section 39 of the *Judiciary Act* confers federal jurisdiction upon the Courts of the States in various matters in which jurisdiction to hear a matter is conferred upon the High Court. It includes matters arising under s 75(iii). Section 56 of the *Judiciary Act* provides that a person "making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth" in various courts.³⁹

A. SECTION 64 OF THE JUDICIARY ACT

Section 64 of the *Judiciary Act* provides:

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

The section assumes that a liability exists. It is at best adjuvatory; it makes clear that whatever the source of substantive liability, the Commonwealth is to enjoy no special privilege in litigation over and above that of a private litigant, other things being equal. Were s 64 not enacted, it would be possible to imply the same approach in interpreting s 75(iii) broadly ie the Commonwealth's substantive liability is usually to be equated with that of other litigants. Section 64 adds nothing to the fact of substantive liability and it is misleading to focus upon it. The cases support such a reading.

In *Maguire v Simpson*⁴⁰ the High Court considered the effect of a State Statute of Limitation upon a claim brought by the Commonwealth. Because it dealt with a procedural statute, the case only inferentially touched upon the question of the Commonwealth's substantive liability.

³⁹ The relevant courts are:

- (i) the High Court: s 56(1)(a);
- (ii) if the claim arose in a State or Territory - in the Supreme Court of the State or Territory or any other court of competent jurisdiction there: s 56(1)(b); or
- (iii) if the claim did not arise in a State or Territory - in the Supreme Court of any State or Territory, or other court of competent jurisdiction of any State or Territory: s 56(1)(c).

⁴⁰ (1975-77) 139 CLR 362. For a detailed analysis see L Zines *The High Court and the Constitution* (2nd ed, 1987) pp 324-6.

The Commonwealth Trading Bank wished to share in the distribution of a fund in court under the *Trustee Act* 1925 (NSW), notwithstanding that over six years had elapsed since the debt became due. If the New South Wales Act applied to the Commonwealth's claim, it was statute-barred.

The facts raised a number of issues relevant⁴¹ to the present inquiry. Did the *Cigamatic* doctrine operate to protect the Commonwealth and did s 64 of the *Judiciary Act* apply to substantive rights, or only to procedural rights?

If the section only applied to procedural rights, then the Bank's claim would still exist although it could not be enforced; if it operated substantively, then the Bank's claim would no longer exist since it would be statute-barred.

The High Court concluded that s 64 applied to both procedural and substantive rights. Barwick CJ reached this conclusion after some initial doubts.⁴² Gibbs J could see no reason to imply any procedural limitation "in a remedial provision expressed in the broad terms of s 64".⁴³ Stephen J agreed that the *Limitation Act* operated by virtue of s 64 to make procedural provisions applicable to the Crown in right of the Commonwealth.⁴⁴ Mason J held that s 64 had the effect of applying both procedural and substantive provisions.⁴⁵ Jacobs J could see "no reason why s 64 should not be construed as dealing with the description of substantive rights, including the rights of the parties when the Commonwealth is a plaintiff as well as when it is a defendant".⁴⁶ Murphy J concurred.⁴⁷

Maguire made it clear that s 64 applied to procedural provisions of state legislation which could effectively bind the Commonwealth. Left unanswered, because it did not arise for decision, was whether s 64 on its own sufficed to render the Commonwealth liable to suit by conferring a substantive right against the Commonwealth or a State. As McHugh JA subsequently noted in *Australian Postal Commission v Dao*,⁴⁸

the actual decision in *Maguire v Simpson* does not require its acceptance. In that case, no question arose as to the Commonwealth's immunity from suit. No remedy sought was sought in that case against the Commonwealth or against any party being sued on behalf of the Commonwealth.

In *Australian Postal Commission v Dao*,⁴⁹ New South Wales Court of Appeal held that s 64 of the *Judiciary Act* could not of itself apply a State Anti-

41 An important initial issue was whether the Bank was the Commonwealth for the purposes of s 75(iii) and s 64.

42 Because of the position s 64 occupied in the *Judiciary Act* but concluded that the section did apply both procedurally and substantively: note 40 *supra* at 372.

43 *Ibid* at 399, realising that part of his decision was *obiter*: "In one sense it is sufficient to dispose of this case to say that s 64 certainly applies to procedural rights".

44 *Ibid* at 405.

45 *Ibid* at 408.

46 *Ibid* at 410.

47 *Id.*

48 Note 49 *infra* at 26.

49 (1985) 63 ALR 1.

Discrimination Act to the operations of the Commonwealth Post Office.⁵⁰ McHugh JA⁵¹ held that:

Section 64 does not begin to operate as against the Commonwealth until the plaintiff has a cause of action which he can bring against the Commonwealth. When the basis of the plaintiff's claim is tort or contract, ss 56 and 64 of the *Judiciary Act* give the plaintiff the right to bring his action against the Commonwealth. Section 64 also operates to apply any relevant State law to the action.⁵²

In seeing whether ss 56 and 64 could operate to apply the action under the Anti-Discrimination Act against the Commonwealth, his Honour held that no tort was committed by the Commonwealth in failing to comply with the terms of the Act since, *ex hypothesi*, it was not bound by its terms.⁵³ It followed that the Commonwealth was not liable on any combination of ss 56 and 64.

In reaching this conclusion, McHugh JA distinguished *Pitcher v Federal Capital Commission*.⁵⁴ There the High Court had held that the widow of a man, killed as the result of the negligent action of a Commonwealth instrumentality, could bring an action relying upon the *Compensation to Relatives Act* 1897 (NSW), against the Commonwealth. McHugh JA held that what was apparently a 'State law', was, in fact, at all times binding upon the Commonwealth because of the operation of specific provisions in the Commonwealth legislation which applied the State law to the Commonwealth.⁵⁵

Sections 56 and 64 of the *Judiciary Act* were next considered in detail in *Evans Deakin v The Commonwealth*.⁵⁶ There the High Court heard an appeal from the Supreme Court of Queensland in which the Commonwealth had demurred to a claim brought against it pursuant to the *Queensland Subcontractors' Charges Act* (1974). If s 64 of the *Judiciary Act* imposed

50 On appeal to the High Court, the question turned on the operation of s 109 of the Constitution. The High Court appeal is discussed in the text to notes 97 to 99 *infra*.

51 As he then was.

52 Note 49 *supra* at 26.

53 *Ibid* at 41-2.

54 (1928) 41 CLR 385.

55 Note 49 *supra* at 41. His Honour reasoned that the New South Wales Act bound the Commonwealth because of s 6 of the *Seat of Government Acceptance Act* 1909 (Cth). Therefore, *before* the claim commenced, the defendant was bound by the Act which was in force in the Territory. The timing of the operation of Act on the Commonwealth is particularly important for the reasoning of the High Court in *Evans Deakin* discussed in text to notes 52 to 63 *infra*. If the Act in *Pitcher* applied to the Commonwealth *before* the cause of action arose, *Pitcher* supported the view of McHugh JA (and Brennan J in dissent in *Evans Deakin*) that some other legislation (*viz* the *Judiciary Act*) was required to render the Commonwealth substantively liable.

On the other hand, if the legislation in *Pitcher* applied only at the time that the Commonwealth was sued, the case was authority, albeit unarticulated, that s 64 alone sufficed to render the Commonwealth liable. See *Evans Deakin* note 16 *supra* at 418 where the majority disagreed with McHugh JH, in *Dao*, stating "It may be added that s 56 would have been manifestly defective if it had been intended to be the source of substantive rights in actions to which the Commonwealth is a party, since that section applied only when the Commonwealth is the defendant". Cf Brennan J in dissent at 425.

56 For a detailed critique of the decision, see D Rose "The Government and Contract" in P Finn (ed) *Essays in Contract* (1987) p 9 at 233-8.

substantive liability on the Commonwealth, the State Act would bind the Commonwealth even if the claim was not one 'in contract or in tort' within the terms of s 56 of the *Judiciary Act*.

The facts in *Evans Deakin* were straightforward. A head contractor, Maltry, had contracted with the Commonwealth to perform certain construction work at an airport in Brisbane. Evans Deakins subsequently agreed with Maltry to perform part of the required work as a subcontractor. Evans Deakin performed the work and a large amount of money was owed to it on that account by Maltry.

Monies were also owed by the Commonwealth to Maltry under the head contract. Maltry went into liquidation and Evans Deakin then gave notice to the Commonwealth pursuant to the Queensland Act under which it claimed a charge in respect of a sum of money payable at the date of the notice, and in respect of a further sum representing retention monies also payable to Evans Deakin. Regrettably, neither the Commonwealth nor Maltry paid any part of the sum due to Evans Deakin. It sought a declaration against the Commonwealth that it was entitled to the statutory charge conferred upon it by the Queensland Act.

Importantly, it was expressly conceded by all parties that nothing in the Queensland Act bound the Crown in right of the Commonwealth of its own effect. That is, only if s 64 of the *Judiciary Act* or some other source imposed liability would the Commonwealth be bound. The Supreme Court of Queensland held that s 78 of the Constitution, and ss 56 and 64 enacted under it, combined to render the Commonwealth liable.⁵⁷

The High Court⁵⁸ in a joint judgment (Brennan J dissenting) held that the reasoning which underlay *Maguire's Case* required the Commonwealth to be bound by the Queensland Act.

The majority, relying on the reasoning in *Maguire* and *Farnell* concluded that:

in every *suit* to which the Commonwealth is a party, s 64 requires the rights of the parties to be ascertained, as nearly as possible, by the same rules of law, substantive procedural, statutory and otherwise, as would apply if the Commonwealth were a subject instead of being the Crown. That result seems entirely just; the Commonwealth acquires no special privileges except where it is not possible to give it the same rights and subject it to the same liabilities as an ordinary subject.⁵⁹

The decision is correct but the reliance on s 64 alone is too narrow. Section 75(iii) of the Constitution renders the Commonwealth liable. The dangers of

57 The Queensland court disagreed with Justice of Appeal McHugh's analysis of *Pitcher*. Applying *Pitcher* in *Evans Deakin*, no liability would attach until the writ was issued. Connolly J was attracted by the proposition that s 64 only applied to render the Commonwealth liable to suit in which the cause of action had already *independently* arisen at the time when the writ was issued: (1985) 62 ALR 295 at 296. On this reasoning, there was neither charge nor cause of action until the writ was issued: see *Downs v Williams* (1971) 126 CLR 61 at 68.

58 Note 16 *supra*.

59 Note 16 *supra* at 415 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ (emphasis supplied).

invoking s 64 and becoming involved in a detailed examination of the *Judiciary Act* are two-fold. First, the effort directs attention away from the fundamental protection provided by s 75(iii) and, inferentially, contemplates the removal of liability by the repeal of s 64. Secondly, as we shall see, it caused the Court the greatest difficulty in attempting to reconcile the working of all the sections of the *Judiciary Act* and, by implications, requires the use of doctrines of waiver and submission to jurisdiction, both of which have been redundant with respect to the Commonwealth since *Farnell*.

The majority rejected any suggestions that the liability could in some way be tied to a claim in 'contract or tort' so as to fall within s 56 on the ground that this reasoning had been rejected in *Maguire*.

It will be noted that the majority's reasoning does not leave any independent rationale for s 75(v).⁶⁰

B. JUSTICE BRENNAN's DISSENT

Brennan J, dissenting, lucidly pointed out the difficulties with the majority holding but regrettably fell back on reasoning similar to that of the dissents of Higgins J in *South Australia v Victoria* and *Commonwealth v New South Wales* ie looking first to s 78 to provide a law separately enacted by the Federal parliament under which the Commonwealth might then be liable.

His Honour began by noting that, "the application of s 64 is subject to a condition precedent which is to be found in its introductory words...".⁶¹ The name of the Commonwealth or a State must appear as a party to the suit but that, by itself, is not sufficient validly to constitute a suit.

Before a suit is validly constituted, two partly coincident elements must be present: first, that the suit is brought to obtain a remedy which can be granted against the defendant if the relevant facts are established; and second, that it is brought in a court of competent jurisdiction.⁶²

His Honour distinguished between the conferring of rights to proceed against the Commonwealth and the conferring of jurisdiction to entertain a suit brought to obtain a remedy against the Commonwealth when a right to proceed is conferred.⁶³ He concluded that if no substantive right to proceed against the Commonwealth had been conferred by s 78 of the *Constitution*, then no 'suit' could arise and no opportunity for the operation of s 64 of the *Judiciary Act* would yet exist. Relying on the position of s 64 in the *Judiciary Act* (an approach similar to that of Barwick CJ in *Maguire*), Brennan J concluded that

60 Cowen and Zines note 12 *supra* do not advert to this problem. Donaldson note 1 *supra* at 145 n 42 notes the point and comments that: "in the cases upon s 75(v) of the Constitution... the High Court has consistently followed a line of reasoning similar to the majority in the *Commonwealth v New South Wales*". Surprisingly, this basic argument does not appear to have been advanced on behalf of the Commonwealth in *Evans Deakin*. If it was argued, it is inconceivable that the majority would have been able to ignore it in its judgment. Brennan J did not advert to it in his dissent.

61 Note 16 *supra* at 419.

62 *Id.*

63 *Ibid* at 420.

ss 56 to 59, supported by s 78 of the *Constitution*, imposed liability upon the Commonwealth and that "s 64 applies in a suit against the Commonwealth or a State when a right to proceed is conferred by one of those sections or by a federal law other than the *Judiciary Act*".⁶⁴

Any other view would mean that the early section of the *Judiciary Act* had little or no operation except perhaps to restrict the bringing of the claims mentioned in them to the Courts therein prescribed.⁶⁵ In the case of ss 57 and 59, such a restriction would be a worthless reiteration of limitations already imposed by ss 38(c) and (d) and 39 of the *Judiciary Act*.

Brennan J also reached the same conclusion by reasoning that only a competent Queensland court possessed jurisdiction to enforce the claim for a charge under the legislation.⁶⁶ The Queensland Act could not operate to invest jurisdiction in the High Court to grant what was a novel statutory right. Section 75(iii) of the *Constitution* conferred jurisdiction upon the High Court in every matter in which the Commonwealth is a party and this jurisdiction is inviolable. If followed that if the remedy could not be granted by the High Court, it could not be granted against the Commonwealth.⁶⁷

The majority view in *Evans Deakin* is correct. Implicit in it is the notion of exposure to liability under the *Constitution*, and 'regulated' in the usual case by s 64; but regulated only in the sense that usually there will be nothing to choose between the Commonwealth and the ordinary litigant.

C. *BREAVINGTON v GODELMAN*

The reasoning of the majority in *Evans Deakin* was hesitantly endorsed in *Breavington v Godelman*.⁶⁸ The case illustrates the extreme difficulty which

⁶⁴ *Ibid* at 422.

⁶⁵ Section 57 of the *Judiciary Act* provides that any State making a claim against the Commonwealth in contract or tort may do so in the High Court. Section 59 provides that any State making a claim against another State may do so in the High Court. The limitation on the jurisdiction of the State courts is, of course, already set out in s 38 of the *Judiciary Act* which deprives the State courts of jurisdiction in various matters including "suits against the Commonwealth".

⁶⁶ Note 16 *supra* at 423. This reasoning is, however, circular in that it depends for its validity upon his Honour's basic assumption about the ineffectiveness of s 64. It does not advance the argument to assert that "if a remedy to enforce a right cannot be granted by this court, the remedy cannot be imposed against the Commonwealth". The majority decision, as noted, relies upon the mere institution of the suit or claim to provide the basis upon which the Commonwealth liability may be based. Once this assumption is made, the question of available remedies becomes irrelevant. Unfortunately, Brennan J did not consider the fundamental issue raised in the text: how may one assess if the claim advanced is justiciable?

⁶⁷ A further argument turned on the wording of s 64 which shows that the imported rights need not be identical to the rights between party and party. But, as Brennan J said, "the elasticity of the test surely stops short of including rights which are substantially different in nature or extent from those to which the referential law would give rise in a suit between subject and subject". The operation of the State legislation did give rise to such a different operation.

⁶⁸ Note 2 *supra*. The decision also involved complex conflicts of law points discussed by Detmold note 3 *supra*.

the court will continue to experience while it attempts to give full measure to every section of the *Judiciary Act*.

In *Breavington* the High Court, relying on s 56 of the *Judiciary Act*, held the Australian Telecommunications Commission liable in tort to a plaintiff injured in one of the Commission's vehicles in the Northern Territory. The plaintiff commenced proceedings in the Supreme Court of Victoria. A question arose whether certain defences available under Northern Territory legislation could be invoked by the defendants in Victoria.

In considering the Commission's liability, Mason CJ held that it was not the function of s 56 of the *Judiciary Act* "to invest jurisdiction in the High Court or the courts of the States in action against the Commonwealth. That is the function of s 75(iii) of the Constitution and s 39(2) of the *Judiciary Act*".⁶⁹

He continued:

The presence of s 56 in Pt IX dealing with 'Suits By and Against the Commonwealth and the States' rather than in Pt VI dealing with 'Exclusive and Invested Jurisdiction' indicates that the section has a different purpose, as does the language of the provision. What it does is to confer a right to proceed against the Commonwealth in the circumstances mentioned. *Whether s 56 is the source of the Commonwealth's liability in tort, either alone or in conjunction with s 64 of the Judiciary Act and perhaps s 75(iii) and s 78 of the Constitution is a question that I put to one side.*⁷⁰

Mason CJ is still unsure of the precise source of the Commonwealth's liability. The hesitation does, however, confirm an over-reliance on the *Judiciary Act* revealed in *Evans Deakin*. The *Judiciary Act* cannot be the 'source' of liability - the Act must be based on a relevant section of the *Constitution*.

Wilson and Gaudron JJ in a joint judgment noted that the decision in *Evans Deakin* would seem to deny s 56 the function of rendering the Commonwealth liable to suit in tort or contract.⁷¹ Equally, the section may be seen as determining the courts properly invested with federal jurisdiction to entertain certain suits viz those in tort or contract, brought against the Commonwealth.⁷² As their Honours note, however, if section 56 is given this task of investiture, it is not clear how it interrelates with the task performed by s 39(2) of the *Judiciary Act*.⁷³

Wilson and Gaudron JJ in *Breavington* proceeded on the basis that s 39(2) of the *Judiciary Act* was apt to vest jurisdiction to proceed against the Commonwealth in the High Court, regardless of where the cause of action arose.⁷⁴ According to their Honours, s 56 may operate in one of two ways. It may divest state courts of jurisdiction otherwise conferred by s 39(2) or "it may

69 *Ibid* at 449 citing *Baume v Commonwealth* (1906) 4 CLR 97 at 102 and *Evans Deakin*.

70 *Id.*

71 *Ibid* at 463.

72 *Id.*

73 Section 56 was given an 'investing' function in *Johnstone v The Commonwealth* (1979) 143 CLR 398 but section 39(2) was not referred to in that case.

74 Note 2 *supra* at 464 citing *Evans Deakin* note 16 *supra* at 264 and *Baume* note 69 *supra* at 102.

curtail the invocation and exercise of that jurisdiction".⁷⁵ In their conclusion, their Honours preferred the view that s 56 does not operate to divest the state courts of jurisdiction. Instead, it imposes a condition upon the exercise of the jurisdiction. Nonetheless, this condition may be 'lawfully waived'⁷⁶ by the Commonwealth at its choice. Accordingly although under the terms of s 56 of the *Judiciary Act* the Australian Telecommunications Commission, representing the Commonwealth, was entitled to have the matter heard in the Supreme Court of the Northern Territory (the *locus delicti commissi*) it could if it chose allow the matter to proceed in the Supreme Court of Victoria. Their Honours' judgment is logically coherent but forced upon them by the need to reconcile conflicting sections of the *Judiciary Act* which cannot effectively stand together.

Brennan J agreed with this conclusion,⁷⁷ stating that s 56 was 'facultative' only. So, the Commonwealth could either invoke s 56 or it could submit to suit in a State court under s 39(2) if it so chose. Deane J, noting that the relationship between the two sections was "not without difficulty"⁷⁸ concluded that a State court could exercise jurisdiction in a matter if the Commonwealth was prepared to submit to the jurisdiction.

Dawson J adverted to the earlier view of Windeyer J in *Suehle v The Commonwealth*⁷⁹ where his Honour suggested that s 56 of the *Judiciary Act*, on its own, was the source of the Commonwealth's liability. Dawson J noted that:

there is much to be said for the view of Windeyer J, although it is not beyond controversy that the origin of Commonwealth liability in tort and in contract is s 56 of the *Judiciary Act* alone... In addition to the question whether s 75(iii) of the Constitution has a part to play in the imposition of liability, there is now the question of the effect of s 64 of the *Judiciary Act* in the light of *Maguire v Simpson* and *The Commonwealth v Evans Deakin Industries Ltd*. This is a difficult area and one upon which it is unwise to enter unless it is necessary to do so.⁸⁰

Dawson J found it impossible to reconcile the operations of ss 39 and 56 in any way which was "completely satisfying".⁸¹ In his Honour's view, s 56 subjected the Commonwealth to liability in contract or tort definitively and removed, if any such removal were required, any reliance upon Crown immunity. Whatever the effect of s 39 of the *Judiciary Act*, the Commonwealth could properly submit itself to the jurisdiction of a court which derived jurisdiction under that section. Accordingly, the Commonwealth could submit itself to the jurisdiction of the Supreme Court of Victoria.

75 *Id.*

76 *Ibid* at 465.

77 *Ibid* at 471 referring *en passant* to *Evans Deakin* and the 'vexed question' it raised.

78 *Ibid* at 480.

79 Note 37 *supra*.

80 Note 2 *supra* at 488.

81 *Id.*

Toohy J agreed that nothing prevented the Commonwealth from so submitting to jurisdiction.⁸² Relying on *Commonwealth v Baume*⁸³ Toohy J held that the Commonwealth might waive its immunity either under a statute (such as s 56) or by a simple submission to jurisdiction. His Honour felt that the existence of s 56 of the *Judiciary Act* did not prevent a submission to jurisdiction under s 39(2) by the Commonwealth.⁸⁴

The result of these two recent decisions is that the Court is only slowly groping its way once again to the original position in *Commonwealth v New South Wales*. The perceived need to show how ss 56, 64 and 39 of the *Judiciary Act* interrelate has been forced on a reluctant court which is making heavy weather in explaining the relationship. The issue will become even more confused if later cases endeavour to refine 'waiver' or 'submission' by the Commonwealth.

In *Evans Deakin* the Commonwealth was liable under s 75(iii) because there was nothing to take the case outside the realm of the usual and there was no reason why, *pace* Brennan J, the Commonwealth should be immune from the Queensland legislation because of its position. (This possible exception is discussed below.) Similarly, in *Breavington*, the Commonwealth was liable at common law for tort under s 75(iii). Any attempt to describe that liability in terms of the *Judiciary Act* will fail since the sections cannot be reconciled without dangerous consequences. In particular, to rely on s 56 potentially limits Commonwealth liability to contract or tort - that result only requires to be stated to be rejected.

It is also relevant in this discussion to note that judgment of the New South Wales Court of Appeal in *Commissioner for Railways (Qld) v Peters*.⁸⁵ *Peters* involved a claim against the Queensland Government by a resident of New South Wales for compensation under a New South Wales statute for a work-related injury. Thus State rather than Commonwealth liability was at issue. The claim arose in the federal diversity jurisdiction under s 75(iv) of the *Constitution*.

Queensland argued that the claim under the New South Wales statute was not one 'in contract or tort'.⁸⁶ Kirby P approached the problem on the basis that s 78 of the *Constitution* was relevant and that the words 'contract or tort' necessarily

82 *Ibid* at 493. His Honour noted that comments to the contrary in *Suehle* note 37 *supra* at 353, 355 per Windeyer J and *Coe v Queensland Mines* (1974) 24 FLR 459 at 466-7 were *obiter*.

83 (1905) 2 CLR 405 at 412-13 per Griffith CJ.

84 Citing *Evans Deakin* note 16 at 264.

85 Note 17 *supra* at 579.

86 Like s 56 of the *Judiciary Act*, s 58 which deals with State liability provides:

Any person making any claim against a State, whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may in respect of a claim bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court.

limited the otherwise unlimited ability to proceed against a State.⁸⁷ He also rejected an argument that the statutory claim was in some way a claim 'in contract' within the meaning of s 58.⁸⁸ Jurisdiction existed, however, because of the "consent to the proceedings in the State court of another State".⁸⁹ This resurrects the approach in *Breavington*.⁹⁰

This raised directly the operation of s 64 of the *Judiciary Act*. Kirby P noted that s 64 could be construed "as nothing more than a provision affording a facility for minor adjustments in a suit between, relevantly, a subject and a State confining the 'rights of parties' to procedural rights only".⁹¹ However, *Maguire*,⁹² and *dicta* in *Bropho v Western Australia*,⁹³ demonstrated that s 64 had a substantive as well as a procedural effect. Kirby P noted the incongruity in interpreting s 64 one way with respect to the Commonwealth and another way with respect to the States:

It would be a wholly unusual and unconventional construction of s 64 of the *Judiciary Act* to find that, where the Commonwealth is a party, the 'rights of parties' include substantive rights; but where the suit is against a State only, those 'rights of parties' are confined to procedural rights.⁹⁴

Kirby P reasoned that s 78 supported s 64 which was properly characterised as a law conferring a right to proceed against a State. The power to enact such a law could also be supported by reference to s 51(xxix). The matter was within the limits of 'judicial power' within s 78 and it was not surprising that "the Federal Parliament should have power to make laws on diversity jurisdiction...".⁹⁵

Priestley JA (with whom Waddell A-JA agreed on this point) took a different approach to s 58 to that of the President. His Honour had less difficulty relying on a combination of s 78 and 64 to confer a substantive right against the State:

In the absence of any definitive guidance from the High Court, I myself cannot see any reason the legislative competence of the Commonwealth is any the less in conferring rights to proceed against States than the Commonwealth (*Constitution* s 78) or why the words of s 64, which makes no distinction between Commonwealth and State, should not bring about the same result for them both.⁹⁶

Furthermore, Priestley JA thought that the words of s 58, 'contract or tort' were *not* words of limitation but "were used on the footing that any claim otherwise within the section could be brought".

87 Note 17 *supra* at 599. The Commonwealth Solicitor-General contended that 'contract or tort' were not words of limitation at all; rather, they merely represented the conventional categorisation of actions when the *Judiciary Act* was first passed. The President rejected this argument.

88 *Id.*

89 *Ibid* at 600.

90 Note 2 *supra*.

91 Note 17 *supra* at 600-1.

92 Note 40 *supra*.

93 (1990) 171 CLR 1 at 20 suggested that s 64, among others, was one of a number of "general legislative provisions defining the rights of subjects".

94 Note 17 *supra* at 603.

95 *Ibid* at 605.

96 *Ibid* at 613.

At first blush the decision in *Peters* suggests the wide interpretation to s 75(iii) urged earlier is mistaken; the route for imposing substantive liability for either the Commonwealth or a State is *via* s 78 and s 64, or ss 56 and 58. Logically the same reasoning must apply to both Commonwealth and State liability. The question did not arise in *Commonwealth v New South Wales* directly since there the Commonwealth was a party and s 75(iii) directly conferred jurisdiction. But it is significant that the Court there did not feel the need to discuss at all *how* New South Wales was exposed to liability. The judgments do not rely upon s 78 at all. *Commonwealth v New South Wales*, then, by its silence, suggests that there may be some flaw in the reasoning in *Peters*.

It is respectfully suggested that the result in *Peters* could more easily have been reached by applying the same reasoning to s 75(iv) as to s 75(iii). The notion of a 'matter' involving the State as a party imports with it substantive liability; although we do not really need to be told it, s 64 helpfully confirms that the same rules apply to a State as would apply to an ordinary litigant. On the reasoning in *Peters*, without such an entrenched substantive liability under s 75(iv), the Commonwealth Parliament could legislate away under s 78 any right to proceed against a State in the diversity jurisdiction under s 75(iv) ie the jurisdiction could exist as an empty shell without there being any substantive content to be exercised under it - that does not sound right.

IV. STATE LAW, SECTION 64 OF THE JUDICIARY ACT AND SECTION 109 OF THE CONSTITUTION

An obvious point flows from liability under s 75(iii); if the substantive liability is a matter of Commonwealth common law then the Federal Parliament cannot remove or limit it by legislation; on the best view, the liability is inherent in the use of the term 'matter' in s 75, a section not expressed to be subject to s 51 of the *Constitution*.

If the substantive liability arises under some *State* enactment then the position is different. Here the Commonwealth, using s 109, can control the effect of a State statute, assuming its subject falls within a placitum in s 51 since the Commonwealth can pass inconsistent legislation and override the State law under s 109.

Recent cases reveal how this is done. It will be recalled that the New South Wales Court of Appeal in *Dao* had initially decided that there was no relevant inconsistency between the Commonwealth Act and the State Anti-Discrimination legislation. The High Court could have held that *Cigamatic* operated to prevent the State Act from applying to the Commonwealth Postal Commission at all. The Court, however, did not require argument on whether "the State Act is able of its own force to bind the Commission and the bearing

on that issue of the decision in *Commonwealth v Cigamatic Pty Ltd (in Liq)*".⁹⁷ Rather, the Court determined the matter purely as one of construction.

Counsel for the appellants submitted that s 64 of the *Judiciary Act* had the effect that a conflict between a provision of a Commonwealth Act and a provision of a State Act which affects the Commonwealth by virtue of s 64 must be resolved, not as a matter of inconsistency under s 109 of the *Constitution*, but as a question of implied repeal of one Commonwealth provision ie s 64, by another later one. That is, nothing in the *Postal Services Act* 1975 (Cth) demonstrated an intention to repeal s 64 so that it could still operate to implement the State Act to control the Commission's behaviour to its staff.

To adopt this reasoning, however, would raise s 64 to the same level of constitutional importance as s 109. On a basic interpretation of s 109, the High Court rejected the argument.

That section [s 64] was intended to fill what would otherwise be lacunae or gaps in the law of the Commonwealth. It is not to be understood as intended to have the practical effect of overriding s 109 of the Constitution by indirectly applying a provision of a law of a State to circumstances to which its direct application is invalidated by reason of inconsistency with a provision of an existing law of the Commonwealth. *A fortiori*, s 64 should not be intended to manufacture a new kind of indirect inconsistency between a provision of a State law and a provision of a law of the Commonwealth by applying a provision of a State law to a situation to which it does not purport to apply in circumstances where, if rendered directly applicable, it would be relevantly inconsistent with the direct operation of the provision of the law of the Commonwealth. Rather, the section should and must be construed as intended to extend a litigant's rights in a suit in particular circumstances only if, and to the extent that, there be no directly applicable and inconsistent (in the relevant sense) Commonwealth law already regulating those circumstances.⁹⁸

Absent inconsistency between the Commonwealth's and State legislation, that is the end of the matter. After a protracted analysis of the legislation, the High Court concluded that such an inconsistency did exist. Since the Commission was specifically empowered to determine physical criteria for employment, any State legislation relied on to strike down a determination of such criteria was inconsistent and void under s 109.

Similarly, in *Deputy Commissioner of Taxation v Moorebank*,⁹⁹ the High Court had to consider a series of cases from the lower courts dealing with the applicability of various State Limitations Acts to actions by the Federal Commissioner of Taxation for the recovery of income tax. In the lower courts, the matter had been decided on an application of *Cigamatic*. If it applied, the Commonwealth could invoke a general immunity from State statute when exercising a peculiarly federal function, the collection of federal tax moneys.

97 (1987) 61 ALJR 229.

98 *Ibid* at 231.

99 (1988) 88 ATC 4443.

The High Court in *Moorebank* eschewed any discussion of *Cigamic*. Adopting the reasoning it had followed in *Dao*, the joint judgment pointed out that since the provisions of the *Limitation of Actions Act* 1974 (Qld) did not apply of its own force to the Commissioner's claim to recover additional tax, they could only operate if s 64 of the *Judiciary Act* made them applicable. Prima facie that provision did apply.

As in *Dao*, however, the provisions of the Commonwealth Act, when properly construed, precluded the operation of s 64. To begin, s 64 "enjoys no special authority among the statutes of the Commonwealth. It is neither a constitutional provision nor entrenched law". It must always succumb to subsequent, inconsistent, Commonwealth enactments. In particular:

... the provisions of s 64 of the *Judiciary Act* cannot be construed as intended indirectly to apply the provisions of a State law to circumstances where the direct application of the State law would be invalidated by operation of s 109 of the Constitution by reason of inconsistency with applicable provisions of the law of the Commonwealth.¹⁰⁰

The question in every case is: does the Commonwealth legislation purport to exclude the operation of the State legislation with respect to its subject matter? If so, s 64 will not apply. After detailed statutory analysis of the *Income Tax Assessment Act* 1936 (Cth) the Court concluded that it was, in itself, a complete code regulating the recovery of federal tax and the State Limitation Act accordingly had no application. This decision obviated any discussion of the *Cigamic* point ie whether s 64 applies a State law even where its "application would interfere with the discharge of an essentially governmental function such as the collection of taxes".

A. THE LIMITATION IN SECTION 64

As a matter of construction, the High Court has built a further safeguard into Commonwealth's possible substantive liability under State law. Section 64 only equates the rights of the Commonwealth and individual litigants 'as nearly as possible'. In *Asiatic Steam Navigation Co Ltd v Commonwealth*¹⁰¹ Kitto J suggested that the words might be paraphrased to mean 'as completely as possible'. The meaning of the phrase is important because the way in which the section is framed suggests that there may be a certain class of matters in which total equiparation between cases involving the Commonwealth and those involving private litigants cannot be made.¹⁰²

100 In *Moorebank* the High Court concluded that the *Income Tax Assessment Act* was a complete code regulating the recovery of federal tax so that the State Limitation Act had no application. This conclusion obviated any discussion of *Cigamic*.

101 (1956) 96 CLR 397 at 427. His Honour noted that the section required the Court hearing the claim "to put out of account any special position of the Crown, and as far as possible to decide all questions of right in the same way as they would have been decided if the Commonwealth or State had been a subject".

102 *Ibid* at 417 per Dixon CJ, McTiernan and Williams JJ citing *Davidson v Walker* (1901) 1 SR (NSW) 196; *Gibson v Yeung* (1900) 21 NSWLR 7. In *South Australia v Commonwealth* (1961-62) 108 CLR

In *Commonwealth v Miller* Sir Isaac Isaacs stated that the words "had the effect of excluding from application to the Crown 'all coercive action incompatible with the dignity of the Crown and unwarranted by the express words of the enactment'".¹⁰³ For example, in *Marconi's Wireless Telegraph Co Ltd v Commonwealth (No 2)*¹⁰⁴ the High Court held that s 64 did not operate to remove the traditional Crown privilege against discovery.

Subsequent decisions, and the judgment of Kitto J in *Asiatic Steam* in particular have resulted in a narrow ambit being ascribed to the words of s 64. In *Maguire v Simpson*,¹⁰⁵ Stephen J did not feel that the words operated to limit the application of the New South Wales Limitation Act in any way.

The considerations which in past cases have been suggested as guides to the content of this qualification do not suggest that such a section falls within its terms; were it otherwise the operation of s 64 would be diminished to an extent far greater than is justified by the words 'as nearly as possible'

Applying a similar approach, and putting "out of account any special position of the Crown", the majority in *Evans Deakin* held that there was nothing in the facts which required a consideration of the special position of the Crown.

Here the Commonwealth, in entering into a building contract, was not performing a function peculiar to government; it was making a contract of a kind commonly entered into by ordinary members of the public and the determination of rights and liabilities of the Commonwealth by reference to the *Subcontractors' Charges Act* would not be incompatible with the position of the Commonwealth or detrimental to the public welfare.

Less easy, however, in terms of the special position of the Commonwealth under s 64, are the cases which involve the application of a State Limitation Act to the right of the Commonwealth to recover penal tax from defaulting taxpayers. The lower court decisions on this question were reversed in the High Court *but on the basis of statutory construction only*. The only question which the High Court decided was one of inconsistency. Not every future case will be determinable on this basis so the lower court decisions are still relevant as a starting point for a discussion of s 64 and the *Cigamic* doctrine.

In *DTR Securities Pty Ltd v Deputy Commissioner of Taxation* the New South Wales Court of Appeal considered an appeal from a decision of Lee J in the Administrative Law Division. At first instance, his Honour had held that the State Limitation Act did not apply to prevent the Commonwealth from claiming back from the taxpayer an amount as a penalty for late payment. Section 207 of the *Income Tax Assessment Act* provided for the recovery of "additional tax" but the Limitation Act prevented recovery if the claim was properly characterised as a "penalty or forfeiture, or sum by way of penalty or forfeiture": s 18(1).

130 at 140-1 Dixon CJ pointed out the rather self-evident proposition that "the subject matters of private and public law are necessarily different ...".

103 (1910) 10 CLR 742 at 756.

104 (1913) 16 CLR 178 Cf. *Naismith v McGovern* (1953) 90 CLR 336 where the Commissioner of Taxation was ordered to give discovery in an action to recover penalties.

105 Note 40 *supra* at 395.

In considering the application of s 64 in 'picking up' s 18 of the State Act so as to apply it to the Commonwealth, Samuels JA said:

... the legislation intended that the assimilation of the Commonwealth as a litigant in any suit to which it was a party should be as complete as possible, that is to say, as complete as the circumstances of the particular case allow. The use of the words 'as possible' suggests ... that the section was drafted in contemplation that the inherent character of the Commonwealth as a government exercising functions and powers of a kind special to and inseparable from the role and thus unexercisable by members of the public would raise situations where the assimilation of the positions of the Commonwealth and a member of the public for the purposes of litigation would not be possible.

Evans Deakin, however, recognised the possibility that a category of action exists in which it would be incorrect to apply State law. Such a case may arise if the Commonwealth was, in relation to the matter being tried, performing a function peculiar to government. In *DTR Securities* by definition, the right asserted by the Commonwealth to recover an amount of tax by way of penalty was one which would not be exercised by a private litigant. It appears, however, that some additional factor is required over and above mere government function to take the matter outside the scope of s 64. This conclusion flows from a number of earlier decisions in which the sole fact that the Commonwealth was exercising a 'function of government' was considered insufficient to render the contemplated action 'repulsive to s 64'. Accordingly, such a function is a necessary but not a sufficient condition.

In *DTR Securities*, the function exercised was pre-eminently governmental. Samuels JA concluded that the true test involved a governmental function with an 'incompatibility' to submission to state law, or a 'detriment' arising from such submission. It followed that the Commonwealth was not bound.

McHugh JA (with whom Glass JA agreed) reached the opposite conclusion. As his Honour observed:

... the extent to which substantive and procedural law applies to the Commonwealth when it is a party to a suit is not finally settled. In particular, it is still not clear whether in determining that question it is ever possible to take into account situations arising out of purposes or functions peculiar to the Crown.

Does it matter that the suit, by its very nature, could not arise between subject and subject? Justice Kitto's approach would suggest that this is not a relevant consideration since the State law is to apply *mutatis mutandis* where its literal application is impossible.

In *DTR Securities*, McHugh JA concluded that the relevant law was determined by s 64 but its application required the Commonwealth's position to be considered. On this view, there was nothing to exclude the operation of the State Limitation Act. At first instance, Lee J had involved *Cigamatic* to show why the State Act could not limit Commonwealth recovery. McHugh JA held that *Cigamatic* was irrelevant since "the Limitation Act interferes with a Commonwealth fiscal right not because it is State law, but because the terms of s 64 make it apply as Federal law". No such intention to exclude the operation of s 64 could be gleaned from the *Income Tax Assessment Act*.

In *Deputy Federal Commissioner of Taxation v Moorebank Pty Ltd*¹⁰⁶ the Full Court of the Supreme Court of Queensland reached the same conclusion as the majority in *DTR Securities*. McPherson J distinguished *Cigamatic* saying that it "was concerned only with the prerogative or fiscal right of Government to a recognised priority in payment of its debts ...". In relation to the impossibility of a subject suing for income tax, his Honour pointed out that it was the status of the tax as a *debt* which was important and that nothing in s 64 took such a claim outside its scope.¹⁰⁷ Indeed, his Honour seemed to suggest that s 64 had an all or nothing quality since to exclude from it governmental functions in general "would leave the section with virtually no field of operation". Connolly J agreed with this conclusion.¹⁰⁸

Most recently, in *Trade Practices Commission v Manfal Pty Ltd*¹⁰⁹ the Full Federal Court¹¹⁰ allowed an appeal from Lee J which had constrained the ability of the Trade Practices Commission to take action against a company ordered to be wound up by the Supreme Court of Western Australia. Under the relevant provision of the *Companies (Western Australia) Code* 1981¹¹¹ Lee J had ordered the action stayed until leave to prosecute was obtained from the Supreme Court of Western Australia. On appeal, the respondents argued that the provision applied to the Commission (which was for this purpose the Commonwealth)¹¹² on three grounds:

- (i) it was directly applicable, as the State enjoyed the legislative competence to bind the Commonwealth;¹¹³
- (ii) s 64 of the *Judiciary Act* made the section applicable; and
- (iii) s 79 of the *Judiciary Act* made the section applicable.

In the event, the Court held that the reasoning in *Dao* applied with the result that the *Trade Practices Act* set up a scheme for enforcement which was a complete code with the result that there was no room for the operation of inconsistent State law. Furthermore, there was no scope for the operation of *Cigamatic* in the case since "the Commonwealth is not bound by State legislation which would adversely affect its property, revenue or prerogatives;

106 (1988) 165 CLR 55; most recently applied in *Deputy Commissioner of Taxation v Zarycki* (1990) ALR 146.

107 On the contrary, his Honour's view was that the legislative intention was *not* to exclude the State law since earlier legislative amendments had specifically removed the limitation period so that "since 1922, Commonwealth income tax legislation has had no specific provision excluding the operation of any general statute of limitations". To overcome the potential loss of revenue, the Commonwealth quickly introduced s 142; see DM McLean "Limitation Periods for the Recovery of Tax" (March 1987) *Australian Tax Review* 6.

108 Derrington J dissented, rejecting any notion that the *Cigamatic* doctrine applied only to the prerogative.

109 (1990) 8 ACLC 1,171.

110 Wilcox J (with whom Northrop J agreed) and French J.

111 Section 371(1).

112 Section 6A of the *Trade Practices Act* so provided; and see *Thomson Publications (Aust) Pty Ltd v Trade Practices Commission* (1979) 27 ALR 551 at 567.

113 *Bropho v Western Australia* (1990) 64 ALJR 374.

the reason being that the Constitution contains no grant of legislative power to the States, so it does not subject the Commonwealth, as a body politic, to that power".¹¹⁴

It would appear that the view of Kitto J in *Asiatic Steam* now controls. No accurate or simple description may be given to the apparent limitation implied in the operation of s 64 by the words 'as nearly as possible'. It is there as a 'fail-safe' and gives the High Court a judicial discretion to prevent the untrammelled application of some head of substantive liability arising under State Law to the Commonwealth. The section applies if the Commonwealth is exercising the defence power, attempting to recover penal tax, suing to recover the balance of a current account, resisting discovery, or being sued under a State Subcontractors' Lien Act. Apparently, however, if the Commonwealth is exercising 'a function peculiar to government' in the action against it, the State legislation will not apply. This is likely to be a very narrow category indeed given that earlier cases have already excluded its operation in situations in which it could have been invoked.

IV. COMMONWEALTH IMMUNITY AND THE *CIGAMATIC* DOCTRINE

A further and more general residual protection for the Commonwealth against liability under State law is provided by the *Cigamatic* doctrine. *Evans Deakin and Breavington v Godelman* have significantly broadened the practical application of s 64 of the *Judiciary Act* by making that provision pivotal to the imposition of liability upon the Commonwealth. The cases, however, leave unresolved whether any special immunity continues to adhere to the Commonwealth.

Although *Cigamatic* is often taken to be the leading case, discussion must commence with the judgment of Fullagar J in *Commonwealth v Bogle*.¹¹⁵ In *Bogle*, Fullagar J stated that the Commonwealth as a juristic entity was not subjected either by the State or Commonwealth Constitutions to the legislative power of any State parliament.¹¹⁶ Notwithstanding this limitation, the Commonwealth "may, of course, become affected by State laws. If, for example, it makes a contract in Victoria, the terms and effect of that contract may have to be sought in the Goods Act ...".¹¹⁷ In the absence of a federal

¹¹⁴ Note 109 at 1,179 per Wilcox J.

¹¹⁵ (1953) 89 CLR 229 at 259-60.

¹¹⁶ As MJ Detmold, *Australian Constitution* (1985) p 16 has noted, although the legislative supremacy of the Commonwealth had been expressly conceded by both s 109 of the *Constitution* and Covering Clause 5, the *Constitution* says nothing at all about the relationship between the State legislative power and the executive power of the Commonwealth, exercised under s 61 of the *Constitution* or otherwise.

¹¹⁷ Note 115 *supra* at 259-60.

common law of contract,¹¹⁸ the *Victorian Goods Act* would be the only available source of law to regulate the relationship between the Commonwealth and the other contracting party.¹¹⁹

His Honour relied on s 56 of the *Judiciary Act* to hold the Commonwealth liable in tort.¹²⁰ Earlier, in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd*¹²¹ Dixon J had suggested that, in a practical sense, the liability of the Commonwealth in contract turned less upon the 'general law of contract' than on ss 79 and 80 of the *Judiciary Act*. His Honour suggested that such a background law had to be clearly distinguished from "governmental rights and powers belonging to the Federal executive". Similarly, in *Uther's Case*,¹²² Dixon J suggested that State laws might become relevant to a matter involving the Commonwealth, but only by the operation of s 79. This same reasoning was applied in *Cigamatic*.¹²³

It is difficult to reconcile the wide view of s 64 (based on s 75(iii)) with any doctrine of immunity for the Commonwealth which arises solely from its position. Cases such as *Dao* and *Moorebank* are in narrower compass since a relevant inconsistency removes any question of Commonwealth immunity. The inconsistency provision is not concerned with any general proposition as to supremacy of the legislative power of one organ of government in Australia over any of the others.¹²⁴

While the theory that s 56 operated as a waiver of Commonwealth immunity was current, it was possible, as Evans demonstrated, to reconcile *Cigamatic* with the deprivation of Commonwealth immunity in appropriate and limited

118 As PW Hogg *Liability of the Crown* (1969) p 225 notes nothing in ss 79 or 80 of the *Judiciary Act* prevents the development of such a federal common law since 'the laws of the Commonwealth' therein referred to could be taken to include case law as well as federal statutes. Section 56, however, has been regarded as involving a choice of law directing the court to apply the law of the State in which the cause of action arose.

119 Evans note 1 *supra* at 556-7 convincingly demonstrates the impossibility of reconciling the narrow view in *Bogle* with a broad operation of s 64. At the most general level, there is nothing in theory to distinguish the Goods Act from the rent control legislation in *Bogle* which was held not to 'affect' the Commonwealth in the circumstances of that case.

120 Note 115 *supra* at 259-60. "If ... the Commonwealth Parliament had never enacted s 56 of the *Judiciary Act*, it is surely unthinkable that the Victorian Parliament could have made a law rendering the Commonwealth liable for torts committed in Victoria". Following *Evans Deakin* and *Breavington* it would seem that s 56 is not relevant for the imposition of liability - that now depends upon s 64 which results in the Commonwealth being liable in 'tort' so soon as it is sued, either under a common law claim or statute. In other words, the two latest cases seem to involve a general waiver of Commonwealth immunity without any means of determining which claims, if any, may *not* be brought against the Commonwealth. As noted, the text to notes 114-15 *supra*, the only relevant exception appears to be where 'peculiarly' governmental activities are involved. This is the (perhaps unintended) result of the majority's expansive view of s 64.

121 (1940) 63 CLR 278 at 308. Yet, as Meagher and Gummow have observed, note 1 *supra* at 29: "The reference to s 79 of the *Judiciary Act* 1903 is inapposite; all that section does is select a law for application in a federal court, as is provided for by Ch III of the *Constitution*".

122 Note 14 *supra* at 528-9.

123 Note 14 *supra*.

124 Note 97 *supra* at 231.

cases.¹²⁵ On this approach, once the immunity was removed by federal legislation (principally s 56 of the *Judiciary Act*), ss 79 and 80 directed the court to apply state law to resolve the matter; nevertheless, it is not state law which governs the action but the rules of state law incorporated by reference as federal law.

Such a view cannot be reconciled with an unvarnished application of s 64 because there is no federal law, apart from s 75(iii) and s 64, which removes the Commonwealth's immunity if such immunity exists. Section 56 plays no role (the position after *Evans Deakin* and *Breavington v Godelman*) so some other reason must be advanced to show how the 'immunity' to State law is removed.

The immunity problem arises because of a judicial reluctance to expose the Commonwealth, via s 75(iii), to substantive liability under State law. For one thing, this would expose the Commonwealth to varying liability depending upon where it did business; under the common law, the Commonwealth will be uniformly liable wherever that liability arises.

Does any such 'doctrine of immunity' still exist? The doctrine,¹²⁶ which broadly denies the ability of the state legislatures to affect the Commonwealth, has been uniformly attacked by commentators,¹²⁷ but it is difficult to attach no importance to it whatsoever. As McHugh JA pointedly noted in *Dao* "a constitutional doctrine which has the support of Dixon CJ, Fullagar, Webb, Kitto, Taylor, Menzies, Windeyer, Walsh JJ and Barwick CJ not to mention the dissenting judgments of Isaacs and Rich JJ in *Pirrie v McFarlane* ... is not likely to be erroneous".¹²⁸

The question is, perhaps, not so much whether the 'doctrine' exists, but rather its ambit. In the absence of a doctrine of immunity of some kind, "logically, the State ought ... to be able to require the Commonwealth, subject to s 109 of the *Constitution*, to perform any act in or connected with the State". No authority may be cited to support such a wide proposition. Moreover, the very narrowness of the Commonwealth's power in a legislative sense means that it could not "be required to do anything which is outside the powers conferred on it, expressly or by implication, by the *Constitution* or federal law".¹²⁹

It follows, to adopt the evocative expression of McHugh JA (as he then was), that State legislative power *qua* the Commonwealth, granted that it exists, is "qualitatively different".¹³⁰

¹²⁵ Evans note 1 *supra* at 555.

¹²⁶ It is assumed, of course, that the relevant State legislation does not discriminate against the Commonwealth. See *West's Case* (1936-37) 56 CLR 657.

¹²⁷ It is not intended to discuss all the theories advanced in the past since all turned on a narrow view of s 64. The most wide of all previous discussions is that of Evans; the others are all iconoclastic and advance rationales of the authorities which endeavour to accommodate and reconcile all extremes: this is in the nature of things impossible.

¹²⁸ Note 49 *supra* at 34.

¹²⁹ *Id.*

¹³⁰ *Ibid* at 32.

As noted, there is a tension between the notion that the Commonwealth is 'affected' by State law, and the width of s 64. The earlier cases which culminated in *Cigamatic* relied upon s 56 of the *Judiciary Act* (along with ss 79 and 80) to render the Commonwealth liable. It would seem that the enactment of ss 56, 79 and 80 were conceived of as a form of waiver of the immunity which the Commonwealth otherwise enjoyed.

In *Dao*, McHugh JA rested the immunity of the Commonwealth from State legislation on the basic inability of the States to bind the Commonwealth's legislative or executive power. Every valid activity of the Commonwealth is carried out pursuant to a power expressly or impliedly granted by the *Constitution* itself. While the argument with respect to the legislative power is impeccable, the question of executive power can only depend upon an implication.

It has been suggested by certain commentators that the Commonwealth is no different from any other litigant.¹³¹ Yet, it seems that the Commonwealth is unique with respect to the effect of State legislation upon it. The Crown in right of the States may be bound by relevant legislation.¹³² A State, however, only has legislative power to legislate for the peace, order and good government of the State; if the legislation which purports to bind the Commonwealth cannot be brought within that description then the Crown in right of the Commonwealth of Australia cannot be bound.¹³³ For a similar reason, it is not correct to ascribe any particular geographical location to the Crown in right of the Commonwealth - it is immanent in a constitutional sense.¹³⁴

In *Dao*, McHugh JA put the application of state law in terms of a 'submission' to state law.¹³⁵

Once it appears that the Commonwealth has submitted to the terms of a State statute, the obligations of the Commonwealth can be enforced under the *Judiciary Act* 1903. Indeed, the enforcement of an obligation which the Commonwealth has incurred, by reason of its express or tacit consent, may in turn attract other liabilities under s 64 of the *Judiciary Act*.

131 For example Meagher and Gummow note 1 *supra* at 28-9.

132 *Ibid* p 26 notes 14-18 cite all relevant authorities. See, too, note 113 *supra* at 377.

133 Per McHugh JA in *Dao* note 49 *supra* at 32. Meagher and Gummow make the following points:

- (i) a State law may bear two characterisations and so may both 'touch' the Commonwealth and be within the State's power;
- (ii) to argue this way overlooks the concurrent operation of State and Commonwealth power; and
- (iii) ignores that if the States could not touch the Commonwealth there would be no need for exclusive powers under s 52 of the *Constitution*. McHugh JA (in *Dao* at 32) regards State legislation which affects the Commonwealth activity authorised under the *Constitution* or the executive power, as necessarily impinging upon Commonwealth power. His Honour similarly rejected the view that s 107 of the *Constitution* in some way extended State power.

134 McHugh JA in *Dao id*: "... I think that it is a mistake to see the Commonwealth as 'resident' or existing within the territorial limits of each State. There are not six Commonwealths residing or existing in each state. There is but one Commonwealth existing throughout Australia".

135 *Ibid* at 33. His Honour explains *Bogle v The Commonwealth* in this way.

Unfortunately for the coherence of this theory, there is no explanation of how the relevant intention is evinced.¹³⁶

Most recently, in *Trade Practices Commission v Manfal*¹³⁷ Wilcox J summarised what he saw as the current position with respect to the *Cigamic* doctrine. He noted the difficulty of reconciling it with the widest view of *Pirrie v McFarlane*¹³⁸ and, after copious citation of all relevant authorities, concluded that the *Constitution* contains no implication either conferring immunity upon the Commonwealth, or upon the States, from the operation of each other's legislation. Any discriminatory Commonwealth law will fail, since it will lack a legislative basis,¹³⁹ and any State legislation which trenches upon or 'adversely affects' Commonwealth 'property, revenue or prerogatives' will be inoperative because such legislative power is not vouchsafed to the States.¹⁴⁰

French J reached a similar conclusion. As his Honour pointed out, any attempt by the State legislation to limit the operation of the *Trade Practices Act* would, in effect, deleteriously affect the working of Chapter III of the *Constitution* which exclusively confers jurisdiction upon the High Court and other federal courts.¹⁴¹ Adopting terminology of Professor Zines,¹⁴² French J recognised that the Commonwealth may, of necessity, sometimes be affected by State legislation without necessarily being bound by it.¹⁴³ In this case, whatever the reconciliation of those doctrines, it was clear that the Commonwealth was not bound by the State legislation.

The *Cigamic* doctrine should be regarded as a residual safeguard to protect the Commonwealth in the event that the Court feels that State liability otherwise engendered under statute ought not to apply to the Commonwealth. Such occasions will, it is suggested, be rare indeed.

136 McHugh JA suggested a distinction between 'a contract of employment' between the Commonwealth and an employee would be subject to the general law of the State. "On the other hand it would not be so easy to infer that the Commonwealth intended to submit to State law operating on a contract with a Commonwealth employee which exhaustively spelt out the details of their relationship".

137 Note 109 *supra* at 1,178.

138 (1925) 36 CLR 170.

139 For example *Victoria v Commonwealth* (1970-71) 122 CLR 353 at 372-3 per Barwick CJ. So, too, will the Commonwealth law fail if it prevents a State from existing and functioning as such (*Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 205-7 per Gibbs CJ). See, too, the general discussion in *Commonwealth v Tasmania (The Dams Case)* (1983) 158 CLR 1 at 128-9, 140, 213-5, 254, 280-1 in which it is made clear that the better view is that the question is now to be resolved by implied prohibition not characterisation of the relevant law.

140 Note 109 *supra* at 1,179.

141 *Ibid* at 1,185.

142 Zines, note 40 *supra* pp 321-3.

143 Note 109 *supra* at 1,193.

V. SECTION 78 OF THE CONSTITUTION

Section 78 allows Parliament to make laws "conferring rights to proceed against the Commonwealth or a State¹⁴⁴ in respect of matters within the limits of the judicial power".

The Constitutional Commission¹⁴⁵ notes with understatement that the "operation of this provision is uncertain". While it is true, as the Commission states, that s 78 permits the abrogation of Crown immunity within federal jurisdiction, actual or possible, it does not necessarily follow that s 78 is the only justification for such abrogation. A wide view, for example, of s 75(iii) and 75(iv) (as discussed above in the context of *Peters*) would have the same consequence.

Professor Zines¹⁴⁶ has expressed the view that the section's purpose is to enable the Commonwealth to deprive the Crown of its immunity, a purpose not accomplished by the conferral of jurisdiction ie the High Court may have jurisdiction over the Crown in right of the Commonwealth or a State but this does not automatically remove the immunity. The decision in *Peters* supports this view. The Commonwealth's power to deal with its own immunity would then arise from a combination of s 61 and the incidental power in s 51.¹⁴⁷ But it is odd that such a combination of general sections of the Constitution is required to carry out something so simple as allowing the central government to be impleaded in its own courts; furthermore, it appears since *Breavington* that, as a mere matter of practice, the Commonwealth may "waive" its immunity without searching for a constitutional basis for doing so.

Apart from an amendment to remove an uncertainty with respect to the concept of 'judicial power' with respect to the States¹⁴⁸ the Commission recommended no change to remove the present opacity of s 78.

VI. CONCLUSION

The present constitutional underpinnings for the liability of the Commonwealth to be sued are uncertain. The High Court could, if it wished, stipulate that ss 75(iii) (and 75(iv) in relation to States) of its own force rendered the Commonwealth liable and simultaneously incorporated a *quasi-guarantee* of a substantive right of action against the Commonwealth. To do so

144 See the discussion of *Peters* note 17 *supra* and the Report of the Constitutional Commission Vol I pp 423 *et seq.*

145 Final Report of the Constitutional Commission Vol I p 421.

146 Letter to author dated 16 July 1990.

147 See, too, the Constitutional Commission's view at Vol I p 421.

148 Constitutional Commission Vol I p 422. The problem arises because, with respect to the States, the 'judicial power' also encompasses matters of appellate jurisdiction which arose solely under State law. The Commission recommended that the operation of s 78 be limited to "matters referred to in ss 75 and 76 of this *Constitution*".

would be merely to repose a double function upon s 75(iii); it would confer both a *jurisdiction* and a *substantive right to proceed*. This view, espoused by an early majority on the Court, has much to commend it in the absence of any such entrenched specific right in the *Constitution*. Such a view would, of course, necessarily entail a restricted view being accorded to s 78. That section would then only operate when the Parliament, by express enactment, conferred a 'right to proceed' upon a litigant against either the Commonwealth or a State.

In the absence of a broad approach, the High Court has been driven back into a minute 'black letter' analysis of the various sections of the *Judiciary Act*. It is in the nature of things that any attempt to reconcile the workings *inter se* of various sections of the Act has proven impossible. Taking s 56 as a law made pursuant to s 78 of the *Constitution* has a logical symmetry but severe practical problems: why has the Commonwealth only chosen to expose itself to liability for contract and tort and in no other proceedings? There is also the still unresolved difficulty left by *Breavington* concerning the way in which ss 39 and 56 operate together. Relying solely upon s 64 leaves an indeterminate class of matters which must be interpreted on a case by case basis and, it may be felt, reposes too much authority in a generally worded section of the *Judiciary Act*.

There are theoretical difficulties with the views of the majority in *Evans Deakin* which have not yet been addressed. There is little guidance available from the authorities on the source of substantive liability of the Commonwealth and little comment on the nature of the common law of the Commonwealth which, presumably, is invoked each time the Commonwealth is sued under s 75(iii). Looming over s 64 is the constant problem of potential s 109 inconsistency with some Commonwealth enactment.

Although it appears that *Cigamatic* still has some life, it has been denatured, and the operation of the doctrine depends upon matters of mere impression. Section 78 of the *Constitution* continues to remain a mystery; it is at best an adjuvatory provision perhaps enlivening some other enactment.

All this is unsatisfactory. The simplest approach, and therefore the best and most likely, would be to treat s 75(iii) as the basis of the liability of the Commonwealth and s 75(iv) as performing a similar function with respect to the States. The Commonwealth is liable to State legislation except where s 109 inconsistency exists. *Cigamatic* and 'affected by' notions under s 64 of the *Judiciary Act* would act as a last safeguard against egregious State inference with the Commonwealth's operations.

The High Court must step back from the *minutiae* of the *Judiciary Act*. It must confront the basic issue: does the *Constitution* guarantee a substantive right against the Commonwealth? If not, why does it not do so? As a synthesis will necessarily require a statement of the various unarticulated premises in the division of State/Federal power it may be some time in coming. Those judges (Brennan, Dean and McHugh JJ) mostly likely to support a broad notion of Commonwealth immunity are, paradoxically, the very ones whom one would expect to be in the forlorn hoop if any question of entrenchment of

constitutional 'guarantees' was involved. It is that *species* of tension, to give only one example, which means that the delight and disputation about the basis of Commonwealth liability will long continue.