

LIMITING THE DOCTRINE OF INTERGOVERNMENTAL IMMUNITY

by

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Introduction

The purpose of this paper is to, firstly, explore the way in which the concept of intergovernmental immunity has developed in Australia to the point where it allows a general immunity to the Commonwealth Government's activities from State laws and, secondly, to contend that the immunity should be more limited. It will be argued that, although there is little justification for the Commonwealth Government to have a *general* implied immunity from State law, there are some instances where a case can be made out for an immunity which is confined in operation. A brief survey of the Canadian and United States position will be made in order to support the claim that a limited immunity might be allowed for activities of the federal¹ government that can be regarded as part of the "executive prerogative" or a "uniquely governmental function".²

A federal system is one where it can be readily envisaged that one level of government will pass laws which could, potentially, bind the other level of government. The issue then becomes whether or not one government can legislate so as to affect another. Unfortunately, the question was not dealt with in any of the Constitutions of the federations considered by this paper. It was therefore left for the courts to develop principles which would deal with the situation when it inevitably arose.

The doctrine of intergovernmental immunity is one of judicial creation. It denies the States' legislative competence to interfere with federal activities even where, as a matter of general statutory interpretation, the State law can be construed as intending to apply to the federal government and its activities. The implication arises, not to protect federal legislation, which will generally prevail over State legislation³, but to protect federal executive activity which has not been conferred with legislative immunity from State laws.⁴

This paper will firstly consider the general position of the Crown and the circumstances under which the Crown in right of the Commonwealth can be bound by Commonwealth legislation and by legislation of a State Parliament. With this background it is then possible to examine the High Court's development of the doctrine of intergovernmental immunity and to attempt to identify its limits.

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1 The term "federal" will be used to identify the central government body in each of the jurisdictions examined in this paper.

2 Both of these concepts will be explained and justified later in this paper.

3 *Constitution of the Commonwealth* s.109; *Constitution of the United States of America*, Art. VI. In Canada, the supremacy of federal legislation is implied by the Courts. Section 109 of the Commonwealth Constitution provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

4 In many instances Commonwealth legislation has conferred protection upon bodies it creates to carry out various administrative or executive functions eg, immunity from State taxation: *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46. See also *Davis v Commonwealth* (1988) 166 CLR 79.

The Crown

In Australia, executive power vested in Her Majesty is exercisable by the Governor-General in right of the Commonwealth⁵ and by the Governor in right of the several States.⁶ In reality, the day to day executive and administrative activities of the government are carried out by Ministers, their respective departments of State and the officers therein.

In this paper, the expression "the Crown" will be used interchangeably with "the executive" or even "the government" when describing the executive arm of the government.

The powers of the Governor-General and the Governors (and hence the executive in general) arise from three sources: the various Constitutions themselves, from statutes passed by the legislatures and from the royal prerogative. To the extent that the executive is acting in pursuit of power granted by the Constitutions and by statute, its discretion is confined by these instruments. In the case of the prerogative the only real limitation, apart from statutory abrogation, is parliamentary accountability.

The Royal Prerogative

(a) The Royal Prerogative

Originally royal prerogatives were attributes which the common law and custom recognised as inherent in the Sovereign of the realm.⁷ It has also been recognised that these prerogatives also inhere in those agents which carry out her functions.⁸ It is very difficult to expound the full extent of the royal prerogatives but the most commonly recognised include right to the treasure trove, ownership of property, entry into contracts and treaties, immunity from suit, priority of debt, power to declare war, ability to create a peerage, control and organisation of the armed forces, proroguing and dissolving Parliament, immunity from statutes which do not purport to bind the Crown and the appointment of Ministers and judges.

What is important to notice is that it is proper to confine the prerogative to "rights and capacities which the King enjoys alone"⁹, ie, matters which are peculiar to the Crown.¹⁰ Some of the above examples, such as entering into contracts, are powers and rights which the King enjoys in common with his subjects and are not strictly royal prerogatives. The looser sense of the expression may have originated in Dicey's comment that, "every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of the prerogative".¹¹ In this paper, the prerogative will be used in reference only to the narrow sense of the term.

In a federal system the several executive governments all enjoy prerogative powers and, for the most part, have concurrent claim to them. However, it would seem that there are some prerogatives that the federal government *should* exercise exclusively. These instances will be examined below.

(b) Statutes Binding the Crown

The Crown enjoys an immunity from statutory control unless the particular statute purports to bind it expressly or by necessary implication.¹²

⁵ See *Constitution of the Commonwealth*, s.61.

⁶ See s.7 *Australia Act* 1986 (Cth). Under the Canadian Constitution, the government of Canada is carried on on behalf and in the name of the Queen by the Governor-General or Chief Executive Officer or Administrator: ss.9 and 10 *Constitution Act* 1867.

⁷ CR Munro *Studies in Constitutional Law* Butterworths London 1987 at 159.

⁸ It has been clearly recognised that the Governor-General and the Governors enjoy the rights and immunities inherent in the royal prerogative: see *Barton v Commonwealth* (1974) 131 CLR 477, *Attorney-General (NSW) v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195.

⁹ *Blackstone Commentaries* 1 at 239.

¹⁰ Munro J *supra* n.7 at 160.

¹¹ AV Dicey *Law of the Constitution* 10th ed Macmillan London at 425.

¹² *Bradken Consolidated Ltd v Broken Hill Pty Ltd* (1979) 145 CLR 107 at 116; *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 at 363.

This immunity has been given statutory effect in some Australian and Canadian jurisdictions.¹³ The provisions in such enactments have been interpreted as doing no more than merely restating the common law position that the Crown can still be bound by express words or by necessary implication.¹⁴

The decision of the High Court in *Bropho v Western Australia*¹⁵ sets out the relevant principles to be applied in determining whether a particular piece of legislation should be construed so as to bind the Crown in right of the enacting legislature. The Court said that it was necessary to consider the purpose, policy and subject matter of the Act to ascertain whether it was intended that the Crown should be bound.

A reference to the Crown in a State statute is, as a matter of construction, taken to mean the Crown in right of the enacting legislature only unless the statute expressly or by necessary implication intends that the reference is to the Crown in the right of another jurisdiction. If the Act expressly or by necessary implication purports to bind the Crown in another right, then the Crown in that other right will be bound.¹⁶

Intergovernmental Immunity

Once it has been determined that, as a matter of statutory construction, an enactment does bind the Crown in the right of another jurisdiction, it would seem that the Crown is consequently bound and that this is the end of the matter. However, where a State law purports to bind the Crown in right of the Commonwealth, statutory construction is only a preliminary question. Various High Court decisions have made it necessary to then consider the *legislative competence* of the State legislature to enact a law which purports to bind the Crown in the right of the Commonwealth.¹⁷ This further step has not been taken in situations where Commonwealth legislation purports to bind the State Crown as there is no question of the Commonwealth's legislative competence to do so.¹⁸

(a) Pre-1920

Prior to the decision in the *Engineers' case*,¹⁹ the High Court had developed a broad doctrine of implied immunities. In *D'Emden v Pedder*²⁰ it denied that the States could fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, asserting that the Commonwealth was sovereign within the ambit of its authority. However, as the concept of the "federal balance" began to prevail over the earlier view of Commonwealth sovereignty, the earlier doctrine was given reciprocal operation.²¹ Thus, the doctrine eventually limited the ability of each government in the federation to control the activities and functions of other governments.²²

13 Section 13 of the *Acts Interpretation Act 1954* (Q) provides that no Act is to bind the Crown or derogate from any prerogative right of the Crown unless express words were included therein for that purpose.

14 See, eg, *Kaye v Attorney-General (Tas)* (1956) 94 CLR 193 at 204; cf *Re Silver Bros Ltd* [1932] AC 514 at 523 where the view was taken that it was narrower than common law and left less room for arguing Crown immunity. The former view would seem the most preferable.

15 (1990) 171 CLR 1.

16 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338; *Commonwealth v Rhind* (1966) 40 ALJR 407.

17 This is sometimes called "the constitutional question".

18 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the Engineer's case) (1920) 28 CLR 129 at 153.

19 *Ibid.*

20 (1904) 1 CLR 91 at 110 at 116.

21 See, eg, *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Traffic Employees Association (the Railway Servants' case)* (1906) 4 CLR 488.

22 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1078 at 1121. See also *D'Emden v Pedder* (1904) 1 CLR 91; *Federated Amalgamated Government Railway & Tramway Service Association v NSW Railway Traffic Employees Association (Railway Servants' case)* (1906) 4 CLR 488.

(b) The Engineers Principle

In the *Engineers' case* the High Court considered the argument that neither the Commonwealth nor the States could legislate so as to control the other and said that it was:

“... an interpretation of the Constitution²³ depending on an implication which is formed on a vague, individual conception of the spirit of the compact which is not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the Constitution ... This method of interpretation cannot, we think, provide any secure foundation for Commonwealth or State action ...”.²⁴

It was said that:

“...laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States - in other words, bind both Crown and subjects”.²⁵

The validity of the laws so made was to be determined by ordinary rules of construction devoid of implications drawn from notions of federalism, which the Court regarded as a vague external condition.

It could be argued that by the time *Engineers* was decided, Australia was emerging as a nation with a need to embrace national coordination and development for the economic and social good, a concept necessarily involving the federal government having the ability to bind the State governments to some extent. Thus, *Engineers* was merely marking the recognition of this need by reversing the earlier doctrines which would have impeded the Commonwealth in the exercise of its powers.²⁶

While the case paved the way for wide interpretations of Commonwealth legislative power and denied that implications could be drawn by reference to external considerations, it did not prevent later courts from, nevertheless, drawing certain implications from the federal nature of the Constitution itself.

To allow federal implications seems to expressly contradict the direct criticism of such “vague external conditions” made in *Engineers*. However, if the principle to be drawn from *Engineers* is that no implications can be read into the Constitution, this would be difficult to sustain because the construction of any instrument requires, at least, some implications to be made, particularly when dealing with a Constitution which operates against a background of federalism. In *West v Commissioner of Taxation (NSW)*²⁷ Dixon J denied that *Engineers' case* stood for such a principle and said that “of all instruments, a written constitution seems the last to which it [ie, a method of interpretation devoid of implications] could be applied”.²⁸ The real issue is, perhaps, the *extent* of such implications.

(c) Commonwealth Legislation and State Governments

It is clearly accepted that the Commonwealth can legislate to bind the governments of the several States.

23 The term “Constitution” will be used to refer to the Commonwealth Constitution throughout this paper, unless stated otherwise.

24 *Supra* n.18 at 144.

25 *Ibid* at 153.

26 See the remarks of Windeyer J in *Victoria v Commonwealth (Pay-roll Tax case)* (1971) 122 CLR 353 at 396. However, even before the apparent culmination of national consciousness, Isaacs and Higgins JJ, in particular, were critical of the intergovernmental immunities concept, eg, *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1164 per Higgins J, *Attorney-General (Qld) v Attorney-General (Cth)* (1915) 20 CLR 148 at 171-72 per Isaacs J.

27 (1937) 56 CLR 657.

28 *Ibid* at 681-82. See also Evatt J at 698-99.

In *Engineers* some exceptions to this general principle were recognised but have been since rejected by the High Court.²⁹ The Court has, however, repeatedly accepted that the Commonwealth Parliament cannot use its legislative power to discriminate against State governments and to place upon them special burdens or disabilities; it cannot single out the State governments for special treatment.³⁰ This exception emerged from the Court's decision in *Melbourne Corporation v Commonwealth*.³¹

A majority of justices found that the prohibition against discrimination was to be derived from the federal nature of the Constitution which expressly provides for the continued existence of the States.³²

Justices Rich and Starke put forward a possible alternative basis of discriminatory laws: those which prevented or impeded States or their agencies from performing the "normal and essential functions of government"³³ or destroyed or curtailed in any substantial manner, the existence of its powers.³⁴ This approach has never actually been used to strike down any Commonwealth laws, possibly because of the strict view that the High Court has taken of its application.³⁵

Subsequent decisions regarding the ability of the Commonwealth to bind the States have adopted the approach taken by Dixon J in *Melbourne Corporation* where His Honour considered whether the Commonwealth law was "aimed at the restriction or control of a State in the exercise of its executive authority".³⁶

In obiter dicta, Dixon J began to formulate a view that would form the basis of his dissenting judgment given the same year in *Uther v Federal Commissioner of Taxation*,³⁷ and would underpin the majority decision in *Commonwealth v Cigamic Pty Ltd*:³⁸

"The considerations I have just mentioned [political and legal] have been used in relation to the question what the Federal Government may do with reference to the States and the question of what a State may do with reference to the Federal Government. But these are two quite different questions and they are affected by considerations that are not the same. The position of the Federal Government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth".³⁹

29 The first was that State prerogative functions might be immune from Commonwealth legislative control (*supra* n.18 at 143) but this was discarded by the decision of the High Court in *South Australia v Commonwealth (First Uniform Tax case)* (1942) 65 CLR 373. The second exception to the general ability for the Commonwealth to legislate to bind the States was that the Commonwealth may not be able to impose a tax on State governments (*supra* n.18 at 143-4) but this was rejected in the *Pay-roll Tax case* (1971) 122 CLR 353. See also *State Chamber of Commerce and Industry v Commonwealth (Second Fringe Benefits case)* (1987) 163 CLR 329.

30 P Hanks *Constitutional Law in Australia* Butterworths Sydney 1991 at 194.

31 (1947) 74 CLR 31.

32 *Ibid* at 65 and 66 per Rich J.

33 *Ibid* at 66 per Rich J.

34 *Ibid* at 74 per Starke J.

35 See, eg, *Victoria v Commonwealth (Payroll Tax case)* (1971) 122 CLR 353; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Commonwealth v Tasmania (Tasmanian Dams case)* (1983) 158 CLR 1; *R v Coldham*; *Ex parte Social Welfare Union* (1983) 153 CLR 297 at 313; *Richardson v Forestry Commission* (1988) 164 CLR 261.

36 See *Commonwealth v Tasmania (the Tasmanian Dams case)* (1983) 158 CLR 1 and especially *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 where the entire Court adopted this test. The justices in *Queensland Electricity Commission v Commonwealth* justified their approach on implications from the federal nature of the Constitution see, eg, at 218 per Mason J and at 246 per Deane J.

37 (1947) 74 CLR 509.

38 (1962) 108 CLR 372.

39 *Supra* n.31 at 82-83.

(d) State Legislation and the Commonwealth Government

It should be mentioned at the outset that State laws which discriminate against Commonwealth functions or activities will be invalid without any need to resort to the concept of intergovernmental immunity.⁴⁰ In both *Engineers*⁴¹ and *Melbourne Corporation*⁴² members of the High Court recognised that the Commonwealth should be immune from discriminatory burdens imposed by State legislation as much as the States were immune from discriminatory Commonwealth legislation.

The majority justices in the *Engineers case* said that the principle that the Commonwealth can, by its legislative power, bind the States and the people of the States was also to apply to the power of the States to bind the Commonwealth:

“... leaving their respective acts of legislation full operation within their respective areas and subject matters but, in case of conflict, giving to valid Commonwealth legislation the supremacy declared by the Constitution [in] ... s.109”.⁴³

This statement certainly counters the suggestion made by Dixon J above⁴⁴ that Commonwealth legislative superiority gives rise to an implication of immunity from State legislation. If the Commonwealth has legislative superiority it is unclear why it needs to have immunity from State legislation. The Commonwealth has the capacity to legislate to override State laws by virtue of s 109 and to protect its functions through appropriate legislation.⁴⁵

This approach was, unfortunately, one of short duration. By 1962, the state of authority was that irrespective of the existence of s.109 the States were denied power to legislate so as to restrict the activities of the Commonwealth.

The cases of *Pirrie v McFarlane*⁴⁶ and *West v Commissioner of Taxation (NSW)*⁴⁷ reinforce the approach of the majority in *Engineers* that it is necessary to give the legislative powers of the States and the Commonwealth full ambit without resorting to implications deriving from the federal balance.

The question in *Pirrie v McFarlane* was whether a member of the RAAF driving on Victorian roads in the course of his duty was subject to that State's *Motor Traffic Act 1915* which required him to possess a licence to drive in Victoria. The Act purported to bind “persons in the public service of the Crown”. It was admitted that he had no licence to drive.

The majority⁴⁸ held that the RAAF member was bound by the State Act.

Rather than considering the issue on the basis of intergovernmental immunity, it would appear that the question could have been resolved on a threshold issue of statutory interpretation in that the Act could not be construed as binding the Crown in any other capacity than in the right of Victoria. It did not appear that the Act bound the Crown in the right of the Commonwealth either expressly or by necessary implication. The subsequent constitutional issue need never have been reached. Thus, the basis of the decision in this case is somewhat unclear as the justices appeared to confuse the two questions.⁴⁹

Justice Starke delivered a judgment of considerable persuasion and common sense. His Honour noted the rejection of the implied immunities doctrine by the Court in the *Engineers' case*

40 See, eg, *West's case*; *Shaw v Coco* (1991) 102 ALR 75.

41 *Supra* n.18 at 156 and 157.

42 *Supra* n.31 at 55 per Latham CJ and at 74 per Starke J.

43 *Supra* n.18 at 155.

44 In *Melbourne Corporation supra* n.31 at 82-83.

45 See, eg, *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46.

46 (1925) 36 CLR 170.

47 (1937) 56 CLR 657.

48 Knox CJ, Starke and Higgins JJ; contra Isaacs and Rich JJ.

49 CHH McNairn *Governmental and Intergovernmental Immunity in Australia and Canada* University of Toronto Press Canada 1977 at 28 and 94.

and said that this meant that any immunity claimed in the present case must rest upon some law enacted by the Commonwealth Parliament coupled with s.109 of the Constitution. Otherwise, there could be no express or implied limits on the States with respect to interference with persons who were federal officers.⁵⁰ Here there was no such Commonwealth law with which the *Motor Traffic Act* could be inconsistent so as to bring s 109 into operation.⁵¹

His Honour clearly recognised the ability of both governments within the federation to pass legislation which may be binding upon the other. The only restriction was that an Act passed by a State could not be aimed particularly at the Defence Force or at the Commonwealth – seeming to hint at the reverse application of the principle that later emerged in *Melbourne Corporation*. Chief Justice Knox delivered a similar judgment.

Justice Higgins was in general agreement. His Honour did, however, consider the statutory construction issue and concluded that the presumption against the Crown being bound by statute applied only to the Crown in right of the enacting legislature.⁵² If the Crown in right of the Commonwealth was bound, as was the case here, then the intention of the Victorian legislature had to be carried out “unless and until the Commonwealth Parliament say not”.⁵³

Justices Isaacs and Rich dissented on two alternative bases. First, on the legislative incompetence issue, Isaacs J said that had the State Act expressly or by necessary implication purported to bind the Crown in right of the Commonwealth, it would have been invalid because any such attempt to bind the Crown in right of the Commonwealth in respect of its “primary and inalienable functions” is beyond the range of the State Constitution.⁵⁴ However His Honour did not then proceed to resolve the threshold construction point.

His Honour said that the State cannot legislate at all to bind the Crown in right of the Commonwealth in the exercise of the very governmental functions “expressly taken from the States and exclusively vested in the Commonwealth”.⁵⁵

There is indeed room for argument that immunity may exist for functions of the Commonwealth executive which the Constitution has exclusively vested in the Commonwealth. Justice Isaacs was strongly of the opinion that defence was a particularly exclusive Commonwealth power.

In the alternative, the dissenting justices said that the operation of s.109 of the Constitution caused the State Act to give way to the Commonwealth *Air Force Act* 1923, on the assumption that the power to authorise a person to drive was lawful under the Commonwealth law.

In *West v Commissioner of Taxation (NSW)*⁵⁶ the Court held that a State Act was valid although it imposed income tax on Commonwealth superannuation pensions received by New South Wales residents formerly employed by the Commonwealth. Because the relevant Commonwealth Act conferring the pensions contained a provision which appeared to envisage the

50 *Supra* n.46 at 228-29.

51 *Ibid* at 227.

52 *Ibid* at 218. This restrictive view of the presumption is not the generally accepted one. The favoured view is that the presumption extends to the Crown in right of all jurisdictions unless the Act in question purports to bind the Crown in other rights by express words or by necessary implication.

53 *Ibid* at 219.

54 *Ibid* at 199.

55 *Ibid* at 192. It is unclear upon what basis Isaacs J was resting this exclusiveness. At one point His Honour referred to s 52 (at 192). It would appear that His Honour was referring to the exclusive power of the Commonwealth in relation to the Department of Defence: s 69. At other points in his judgment His Honour seems to regard the defence power as being exclusive to the Commonwealth. While this is true to an extent, particularly with regard to raising and maintaining a military and naval force: Constitution s 114, it would appear possible that the States have some limited ability to pass legislation dealing with ancillary defence matters. See also Rich J at 221 where he refers to “executive functions expressly and exclusively committed to [the Commonwealth] by the Constitution.”

56 *Supra* n.47.

possibility of State taxation on the pension the Court did not need to consider the question of whether the State Parliament would otherwise have had legislative capacity to impose a tax which affected federal officers. However, Rich J⁵⁷ appeared to express some reservations, referring to his dissenting view in *Pirrie v McFarlane*.

Although not in issue here Dixon J made it clear that there was room for an application of s.109 where there was a question of a State law conflicting with a provision of the Constitution.

The issue in *Essendon Corp v Criterion Theatres Ltd*⁵⁸ was resolved on the threshold point of statutory interpretation. Some reservation does appear evident in the judgment of Dixon J as to the general ability of the States to affect the Commonwealth by legislation.⁵⁹

In *Uther v Federal Commissioner of Taxation (Uther's case)*⁶⁰ Sir Owen Dixon delivered a powerful dissenting judgment denying that the States could destroy the Commonwealth's prerogative of priority for the payments of debts owed by a company. This view was to eventually prevail in *Commonwealth v Cigamic Pty Limited*.⁶¹

In *Uther's case* a company went into voluntary liquidation under the New South Wales *Companies Act* 1936 and there was a small amount available for distribution to creditors. The Commissioner lodged a claim for unpaid taxes owed by the company. At common law, the Crown had a prerogative right of priority to be paid before private individuals or corporations who were also creditors. As a matter of construction, the *Companies Act* expressly bound the Crown in right of the Commonwealth in that s.297 expressly referred to taxes payable under Commonwealth Acts as well as under State Acts. This had the effect of removing the Crown's priority of debt in this instance.

The majority justices asserted that the prerogative can be limited by a statute passed by a competent Parliament and here the prerogative was clearly abrogated by the *Companies Act* (NSW). Their Honours did not seem to regard the prerogative of priority of debt as one which belonged exclusively to the Crown in right of the Commonwealth with which the State could not interfere.

However Latham CJ said that there were indeed some subjects completely beyond State legislative power, for example, the functions of the Governor-General in relation to summoning and dissolving Parliament. Such matters are not "for the peace, order and good government of" the State.⁶² However the prerogative right of priority of debts owed is not one of these matters. Company law is part of the general law of a community and is law to which the Commonwealth can be subject just as much as other creditors. If the Commonwealth wishes it can protect its prerogative right by suitable legislation which would prevail over State legislation by virtue of s.109. However in the absence of Commonwealth legislation the State could pass a law to limit the Commonwealth prerogative. Justices Rich, Starke and Williams delivered similar judgments.

In his dissenting judgment Dixon J asserted that the State had no competence to legislate as to the rights which the Commonwealth has as against its own subjects.

Thus, here where the question was one of the fiscal and governmental rights of the Commonwealth, the State had no power. The Commonwealth had a prerogative right of prior payment and it must therefore be outside the power of a State to detract from it:⁶³

57 *Ibid* at 676.

58 (1947) 74 CLR 1.

59 *Ibid* at 17; "... the State may not levy a tax directly upon the Commonwealth in respect of the execution of its duties or the exercise of its functions."

60 (1947) 74 CLR 508.

61 *Supra* n.38.

62 *Supra* n.60 at 521.

63 *Ibid* at 531.

“The fact that the priority claimed by the Commonwealth springs from one of the prerogatives of the Crown is an *added reason*, a reason perhaps conclusive in itself, for saying that it is a matter lying completely outside State power. But there is the antecedent consideration that to define or regulate the rights or privileges, duties or disabilities of the Commonwealth in relation to the subjects of the Crown is not a matter for the States.”⁶⁴

His Honour considered that while Australia is a “dual system” supremacy belongs to the Commonwealth and not to the States.

Justice McTiernan dissented on the basis that the federal *Sales Tax Assessment Act* and the *Pay-roll Tax Assessment Act* conferred a statutory right of priority on the Commissioner of Taxation.

(e) The “Cigamatic Principle”

The facts in *The Commonwealth of Australia v Cigamatic Pty Limited (in Liq.) (Cigamatic)*⁶⁵ were similar to those in *Uther’s case*. It was claimed that the company, in liquidation owed the Commonwealth certain unpaid amounts of sales tax and amounts under the *Post and Telegraph Act 1901-1961 (Cth)*.

The majority⁶⁶ held that the Parliament of a State had no power to control or abolish the Commonwealth’s fiscal right as a government to priority of payment of debts due to it when, in an administration of assets, those debts come into competition with debts due to its subjects. The majority judgment in *Uther’s case* was overruled and the dissent of Dixon J adopted. Taylor and McTiernan JJ dissented, following the decision in *Uther’s case*.

Chief Justice Dixon delivered the leading judgment with which Kitto and Windeyer JJ concurred. His Honour’s findings were in similar terms to his dissenting judgment in *Uther’s case*:

“If you express the priority belonging to the Commonwealth as a prerogative of the Crown in right of the Commonwealth, the question is whether the legislative powers of the States could extend over one of the prerogatives of the Crown in right of the Commonwealth. If, as in modern times I think it is more correct to do, you describe it as a fiscal right⁶⁷ belonging to the Commonwealth as a government and affecting its Treasury, it is a question of State legislative power affecting to control or abolish a federal fiscal right.”⁶⁸

His Honour held that the State had no legislative power to control or abolish the federal fiscal right.

The difficulty with His Honour’s comment is that the prerogative right of priority of debt, while being a true royal prerogative in the narrow sense, is not one which is a purely “federal fiscal right”, ie, one which is exclusive to the Commonwealth. It is shared by the Crown in right of the States. This observation is important to this paper’s attempt to limit the immunities doctrine, as will be seen below.

Earlier, Dixon CJ stated that if the State legislature could directly derogate from the rights of the Commonwealth with respect to its people, that this “must go deep in the nature and operation of the federal system”.⁶⁹ It would appear that His Honour was envisaging a federal system in which the Commonwealth had supremacy, denying to the States legislative power to affect the Crown in right of the Commonwealth in the exercise of prerogative functions. In *Uther’s case* he had clearly rested the States’ incapacity on the basis of Commonwealth supremacy.

64 *Ibid* at 528-529

65 (1962) 108 CLR 372.

66 Dixon CJ, Kitto, Windeyer, Menzies, Owen JJ; contra Taylor and McTiernan JJ.

67 As His Honour appeared to do in *Uther’s case* (1947) 74 CLR 509 at 531.

68 *Supra* n.65 at 377-378.

69 *Ibid* at 377.

Chief Justice Dixon went on to assert that the question was not one which could be answered by applying the principle in *Melbourne Corporation* but it “imports a principle which if true would apply generally with respect to the legal rights of the Commonwealth in relation to its subjects”.⁷⁰

His Honour made reference to an exception from the general rule that the Commonwealth could not be bound by such State laws. This was where the State had made:

“... some general law governing the rights and duties of those who enter into some description of transaction, such as the sale of goods, and the Commonwealth, in its executive arm, choosing to enter into a transaction of that description”.⁷¹

No guidance was provided as to how such an exception would apply in practice.

Justice Menzies delivered a separate judgment with which Owen J concurred. Justice Menzies stated that the dissent of Dixon J in *Uther's case* was correct and that the Commonwealth Constitution does not permit a State to deprive the Crown in right of the Commonwealth of its prerogative rights.⁷²

The principle that emerges from the majority judgments is that State parliaments have no power to deprive the Commonwealth of a prerogative or fiscal right of government nor regulate or control legal rights and duties between the Commonwealth and its people. However, the case has been interpreted more broadly so as to give the Commonwealth Government a more general immunity from State laws. The reasons for this and the resulting confusion will be explored below.

The Existence of the Doctrine of Intergovernmental Immunity

Although there is a fundamental question as to the need for there being an intergovernmental or, more relevantly, a federal government immunity and a number of criticisms that can be made about the broad scope that has been allowed to it, it is clear that the High Court has recognised that the doctrine does indeed exist in Australia.

An examination of two other federations, the United States and Canada also reveals the presence of a concept of federal government immunity in those jurisdictions. The courts in both have allowed immunity for federal government activities, albeit uncertain in scope and extent. However, the recognition of that immunity does lend support for the argument that whatever the justification for the federal government needing this insulation from State or Provincial laws, the doctrine does have a place in a federal jurisdiction.

The following is a very brief overview of the way in which the courts in the United States and Canada have approached the question of intergovernmental immunity.

(a) United States of America

There are many similarities between the United States Constitution and that of the Commonwealth. In both countries power is specifically granted to the federal or central governments with the States retaining the undistributed residual powers.⁷³ Further, both Constitutions expressly

⁷⁰ *Ibid* at 378.

⁷¹ *Ibid* cf Fullagar J in *Bogle* (1953) 89 CLR 229 at 260.

⁷² *Ibid* at 389.

⁷³ *Constitution of the United States of America* Tenth Amendment: “... the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Constitution of the Commonwealth* ss.106 & 107 provide that the constitutions of each State shall continue to operate, subject to the Commonwealth Constitution and that every power of a State Parliament shall continue unless exclusively vested in the Commonwealth or withdrawn from the State.

provide for supremacy of federal legislation in the face of a conflicting State law.⁷⁴

The basic doctrine of implied governmental immunities in the United States was set out by Marshall CJ in *McCulloch v Maryland*⁷⁵ where it was broadly stated that the various States had no power or authority to tax the instrumentalities of the federal government.⁷⁶ Chief Justice Marshall regarded the issue as one of supremacy.⁷⁷

In the case of *ordinary* State regulation or control⁷⁸ of federal government activities the scope of the federal government's immunity is unclear. The United States Supreme Court has not shown any consistency in approach and has sometimes taken a broad view of the doctrine.⁷⁹ It appears that federal activities have been given immunity from State laws unless the State law concerns a mere "incidental matter".⁸⁰ The doctrine cannot, therefore, be easily confined to federal activities that are exclusive to the government or which are "uniquely governmental".⁸¹ Sackville does point to some decisions of the Supreme Court which can be rationalised on the basis of the State legislation being inconsistent with a particular exercise of federal power or federal legislation.⁸²

The doctrine has been tempered considerably by an increasing tendency of the Supreme Court to refrain from striking down legislation without first examining its practical implications. Sackville regards this as a "willingness of the Supreme Court to allocate law-making competence rationally between the federal government and the States according to their legitimate spheres of interest".⁸³ The Court using this approach decides if the activity is predominantly one of State concern or federal concern. In addition, it will apparently examine the practical effect of the State legislation to determine its impact on the federal activity.⁸⁴

74 *Constitution of the United States of America* Art. VI provides specifically that the Constitution and the laws of the United States in pursuance thereof shall be the *supreme* law of the land; and that the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Constitution of the Commonwealth s.109 provides expressly that in the event of a conflict between a law of a State and a law of the Commonwealth, the law of the Commonwealth shall prevail and the law of the State will become inoperative.

75 (1919) 4 Wheat 316 at 42-30.

76 (1919) 4 Wheat 316 at 428-430.

77 *Ibid* at 433.

78 The broad doctrine of intergovernmental *tax* immunity in favour of the federal government was cut down during the 1930s and 1940s so that the only real limit upon State taxing power was that it could not levy a tax actually upon federal government activities or property it owns and occupies. See, eg, *Graves v New York ex rel O'Keefe* (1939) 306 US 466 concerning a State tax on salary of a Federal governmental employee; *Helvering v Mountain Producer Corp* (1938) 303 US 376 concerning a lessee of government land; *Alabama v King & Boozer* (1941) 314 US 1 concerning a federal contractor.

79 *Mayo v United States* (1943) 319 US 441 (distribution of fertiliser by the federal government as part of a national fertilisation program found to be immune from State inspection requirements); *Commonwealth of Kentucky ex rel Hancock v Train* (1975) 426 US 167 (federal government agency did not have to obtain permits required by a State law for persons in control of air contaminant sources).

80 See *Johnson v Maryland* (1920) 254 US 51, where the Court reversed the conviction of a Post Office employee for driving a mail truck without possessing a State licence. This should be contrasted with the decision in *Pirrie v McFarlane supra* n.46. See also *James Stewart & Co v Sandrakula* (1940) 309 US 94. This is similar to the exception developed by Fullagar and Dixon JJ.

81 This term will be explained below.

82 R Sackville 'The Doctrine of Immunity of Instrumentalities in the United States and in Australia: A Comparative Analysis' (1969) 7 *MULR* 15 at 34. See, eg, *Ohio v Thomas* (1899) 173 US 270. Much of the material on the United States in this paper is drawn from Sackville's detailed analysis and should be referred to for more information. That material is, unfortunately, somewhat dated but appears to still largely represent the current position in relation to intergovernmental immunities.

83 *Ibid* at 63.

84 See, eg, *City of Dubuque Bridge Commission v Board of Review for City of Dubuque* 317 US 686.

Due to the many exceptions that have been made to the federal immunity concept and the pragmatic approach of the Court in recent times, it has never become an absolute doctrine in the United States.⁸⁵

(b) Canada

The mutually exclusive powers contained in the Canadian Constitution are distributed between the Dominion Parliament and the Provinces.⁸⁶ In Australia the Commonwealth is assigned a list of powers, largely contained in s.51, which are concurrent with State power. Justices in each jurisdiction have been prompted to explain the respective decline in State power and continuance of relatively wide Provincial power on the basis of the concurrent power between the federal and State parliaments in Australia and lack thereof in Canada.⁸⁷

The Canadian Constitution has no equivalent to s.109 of the Commonwealth Constitution. If a conflict occurs between Dominion and Provincial laws the courts have tended to give preference to the Dominion Parliament by resorting to implications drawn from certain constitutional provisions. When doing so, however, the Supreme Court of Canada has been mindful to ensure the greatest possible scope to laws of the Provinces so that few will be overridden by Dominion laws.

The first major Canadian decision to assert federal immunity was the Supreme Court of Canada's decision in *Gauthier v The King*⁸⁸ where it was found that the section of the provincial Act attempting to bind the Crown was not, as a matter of construction, intended to restrict the Crown in right of the Dominion. The case could therefore have been decided on this threshold point of statutory construction. However, there is some dicta to the effect that apart from the question of construction provincial legislation could not bind the Dominion government.⁸⁹

Since this decision the Canadian Courts have been somewhat inconsistent in their treatment of the issue. Most of the decisions have come from Provincial courts. There has been a wavering between allowing a broad immunity to the federal government⁹⁰ while, on other occasions, restricting the immunity to the federal government's prerogative rights.⁹¹ On the other hand, the Privy Council's decision in *Dominion Building Corporation v The King*⁹² seems inconsistent with the whole concept of there being any intergovernmental immunity.⁹³ Further, in a more recent case involving a federal banking instrumentality it was held that the Bank was bound by a lien established by the Provincial legislation in favour of the Workers' Compensation Board.⁹⁴

85 K Murchison 'Waivers of Intergovernmental Immunity in Federal Environmental Statutes' 62 (1976) *Virginia Law Review* 1177 at 1181.

86 These powers are contained in ss 91 and 92 respectively.

87 See, eg, Stephen J in *Actors and Announcers Equity Association v Fontana Films* (1982) 150 CLR 169 at 191-92; Rand J in *Murphy v Canadian Pacific Railway Co* [1958] SCR 626 at 640-41. See esp Higgins J on this point in *Pirrie v McFarlane* (1925) 36 CLR 171 at 215-216 where His Honour sought to draw support from various decisions of the Privy Council refusing to allow the claim for Dominion immunity.

88 (1919) 40 DLR 353 (SCC).

89 *Ibid* at 356 per Fitzpatrick CJ, at 365 per Anglin J.

90 See, eg, *Bowers v Hollinger et al* [1946] 4 DLR 186 (Ontario High Court) at 196 per Urquhart J: "... there is no power in the Province by any of its enactments to bind the Crown in right of the Dominion." See also *A G of Canada v Rhode* (1957) 8 DLR (2d) 89 (Sask. District Court).

91 See, eg, *Ottawa Public School Board v Ottawa* [1953] 1 DLR 692 at 695 citing *The King v Lithwick* (1921) 57 DLR 1 20 and *Re Adams Shoe Co* [1923] 4 DLR 927, 54 OLR 625: "the Province has no jurisdiction to deal with the prerogative of the Crown in right of the Dominion."

92 [1933] AC 533.

93 The Privy Council held, as a matter of statutory construction, that the relevant provincial legislation applied to the federal Crown and gave no consideration as to whether there was room for an implication of intergovernmental immunity. Nor was there any mention of Crown rights, privileges or prerogatives although that point was not argued before the Privy Council.

94 *Federal Business Development Bank v Hillcrest Motor Inn Inc* (1989) 51 DLR (4th) 464.

Overall, the approach of the courts has appeared somewhat inconsistent. Nevertheless, there does appear to be a general recognition by the Canadian courts of there being an immunity for activities of the federal government, although the extent of that immunity is unclear, particularly when considering government instrumentalities and enterprises.

Criticisms of the Doctrine of Intergovernmental Immunity

(a) Legitimacy of the Doctrine

An important issue that should now be addressed, before exploring the difficulties with the doctrine of intergovernmental immunity, is the justification for there being such an immunity accorded to the activities of the Commonwealth Government.

One can no doubt recognise the force of the argument of the majority in *Pirrie v McFarlane*. Even if a narrow view of the doctrine is taken so as to encompass the Commonwealth engaged in prerogative functions or in, what will be described later as, “uniquely governmental” functions, why should the Commonwealth enjoy protection from State laws? The Commonwealth Parliament has clear ability to legislate to protect such activities by passing inconsistent legislation so as to bring s.109 into operation. The States do not possess this legislative capacity.

Further, it is arguable that if the Constitution has expressly made provision to resolve a conflict in *legislation*, there is an implication that in instances where the Commonwealth *executive* is engaged in some activity in the absence of legislation, the two governments are on an equal footing.

On the same basis, it could be said that because the Constitution has enumerated certain subjects as ones from which the Commonwealth is immune from State laws⁹⁵ or in respect of which legislative power is exclusive to the Commonwealth,⁹⁶ no other areas of immunity or exclusivity are to be implied.

The scope of activities in which the Commonwealth can engage and, consequently protect from State legislation, has significantly expanded with the increasingly liberal approach to Commonwealth legislative powers taken by the High Court during recent years. The *Uniform Tax cases*⁹⁷ demonstrate the potential power of the Commonwealth to control the States by virtue of the Court’s broad interpretation of the Commonwealth’s fiscal powers in the areas of taxation and tied grants under s.96. The implications of the approach seen in these cases give even less credence to the necessity of any immunity favouring the Commonwealth. The States’ legislative capacity has been significantly eroded by the growth in Commonwealth power and their position within the federation subsequently diminished. To deny the States the ability to bind the Commonwealth by a general non-discriminatory law would appear to undermine their position further.

Sir Owen Dixon was unequivocal in asserting that the basis for the immunity was the legislative supremacy of the Commonwealth.

In *Essendon Corp v Criterion Theatres Ltd*⁹⁸ Dixon J listed the considerations which he believed made it impossible that the States should impose taxes upon the Commonwealth. These were:

“... the nature of the Federal Government, its supremacy, the exclusiveness or paramountcy of its legislative powers, the independence of its fiscal system and the elaborate provisions of the Constitution governing the financial relations of the central government to the Constituent States”.⁹⁹

95 See, eg, s.114.

96 See, eg, s.90.

97 *South Australia v Cth* (1942) 65 CLR 373; *Victoria v The Commonwealth* (1957) 99 CLR 575.

98 (1947) 74 CLR 1.

99 *Ibid* at 22.

The difficulty with this argument is that surely the “exclusiveness and paramountcy” of the Commonwealth’s legislative powers would detract from rather than lend support for the need to imply an immunity from State laws. All the Commonwealth has to do is pass protective legislation¹⁰⁰ or legislation which overrides the State law.

In *Uther’s case*¹⁰¹ His Honour also relied upon the supremacy of the Commonwealth as reason for it enjoying immunity from State laws. He stated that the content and strength of the power of the States to make laws for peace, welfare and good government of the State was diminished and controlled by the Commonwealth Constitution.¹⁰²

It is apparent that His Honour was not envisaging a federal system in which the Commonwealth and the States have an even balance of power, ie, a “federal balance.” The notion of balance appeared to be fundamental to the decision in *Melbourne Corporation*.¹⁰³

The justification for an immunities doctrine would appear to be the argument that the Commonwealth Parliament may not always be able to anticipate in advance the type or extent of protection its activities may require given the diverse subjects over which the States have legislative power. Sometimes those activities may be such that they will be severely hampered if they have to be delayed awaiting legislation to protect those activities or to override the State law. In addition, in a federal system there is always the possibility of the Commonwealth legislation being blocked in the Senate.

In respect of certain Commonwealth activities and functions, it could be argued that there is a good case for there being an immunity from State interference, especially where that interference will have a severe impact on the execution of those activities or functions. However, those instances will be few and any immunity should be restricted to particular types of federal executive activities or functions. The situations in which that limited immunity might arise will be further explored below.

(b) What is the Scope of the Doctrine in Australia?

The doctrine of intergovernmental immunity has suffered a great deal of criticism because of the broad scope that has been given to it. In addition to this, there has been a degree of confusion regarding the vague exceptions that have been created to confine the extent of the immunity in particular instances.

(i) Basis for the Broad Interpretation of the Doctrine

A strict reading of the judgments of Dixon CJ and Menzies J in *Cigamatic* does seem to produce the narrow principle that the States cannot deprive the Commonwealth of a prerogative power or a fiscal right or government nor may they regulate or control legal rights and duties between the Commonwealth and its people. However, the case has been interpreted more broadly so as to give the Commonwealth Government a more general immunity from State laws.

The broader view of intergovernmental immunities would provide the federal government with immunity from State laws in respect of its general “governmental activities.” The Commonwealth would be immune from State legislation no matter how far removed the activity may be from its own prerogative powers and from, what will later be called, its “uniquely governmental”

¹⁰⁰ As was done in, eg, *Australian Coastal Shipping Commission v O’Reilly* (1962) 107 CLR 46.

¹⁰¹ (1947) 74 CLR 508.

¹⁰² *Ibid* at 529-30.

¹⁰³ Although, Dixon J did not adopt that view, see (1947) 74 CLR 31 at 82-83.

functions.

Many academics and judges have interpreted *Cigamatic* as re-establishing inter-governmental immunity in favour of the Commonwealth.¹⁰⁴ Unless Sir Owen Dixon's references to the control of the prerogative rights exercised by the Commonwealth government or the Commonwealth's legal rights in relation to its subjects can be regarded as creating a general immunity, subject to some nebulous exceptions, it could be argued that His Honour's judgment, in *Cigamatic* at least, has been too widely interpreted. So, how could it be said that the doctrine implies a wide immunity for the activities of government?

Hanks suggests¹⁰⁵ that the wider interpretation of intergovernmental immunity can be supported by a comment made by Dixon J in *Essendon Corporation v Criterion Theatres and The Commonwealth*.¹⁰⁶ His Honour sought support for his dissenting view that the State cannot directly tax the Commonwealth from a United States Supreme Court decision in *SRA (Inc) v Minnesota*¹⁰⁷ that

"... under an implied constitutional immunity, its [the Federal Government] property and operations must be exempt from State control in tax, *as in other matters*."

Thus, it is arguable that this comment reveals that Sir Owen Dixon did intend to extend the concept of intergovernmental immunity beyond mere prerogative and fiscal rights.

Indeed, in *Uther's case* Dixon J said:

"It is a question of the fiscal and *governmental rights of the Commonwealth* and, as such, is one over which the State has no power."¹⁰⁸

Hanks notes that, in *Uther's case* also, Dixon J regarded the fact that a prerogative was involved (priority of payment) as an *added reason* for saying that the matter lay completely outside State power.¹⁰⁹ This comment certainly appears to indicate that His Honour was not intending to limit the immunity to prerogative or fiscal rights only. However, in *Cigamatic* His Honour did not seem to make any similar sweeping references. This may be because it was not necessary to the actual decision.

The Dixon viewpoint appeared to gain support in the rather broad dictum of Fullagar J in *Commonwealth v Bogle*.¹¹⁰ It is submitted that this decision may have paved the way for the wider interpretation of intergovernmental immunities often regarded as deriving solely from *Cigamatic*.

The activity with which the Court in *Bogle* was concerned did not concern prerogative or fiscal rights of the Commonwealth. The question was whether the Commonwealth could successfully sue Bogle for unpaid accommodation charges at a hostel run by a Commonwealth company when Victorian legislation limited the charges which could be made for accommodation.

It was held that as a matter of statutory construction the company was not an agent of the Commonwealth Crown so as to claim the "shield of the Crown" and that the State Act applied. Thus, the company could not demand the increased charges. The comments made on the constitutional aspect of the capacity of State legislation to bind the Crown in right of the Commonwealth were purely obiter dicta.

¹⁰⁴ See, eg, P Hogg *Liability of the Crown* (Law Book Co. 1971); C Howard *Australian Federal Constitutional Law* (Law Book Co 3rd ed 1985). There has not been any case before the High Court on the same point as argued in *Cigamatic* but some justices have, in obiter, referred to that decision in these broad terms, eg, Barwick CJ in *Victoria v Commonwealth (The Payroll Tax Case)* (1971) 122 CLR 353 at 379: "... the inability of a State to make a law binding on the Commonwealth ... derives from the fact that the Crown has not by the Constitution submitted itself to the legislatures of the States."

This comment appears to be similar to the dictum of Fullagar J in *Commonwealth v Bogle* (1953) 89 CLR 229 at 259.

¹⁰⁵ P Hanks *Australian Constitutional Law: Cases and Commentary* 5th ed Butterworths Sydney 1994 at 464.

¹⁰⁶ (1947) 74 CLR 1 at 22.

¹⁰⁷ (1946) 327 US 558 at 561, emphasis added.

¹⁰⁸ (1947) 74 CLR 509 at 531, emphasis added.

¹⁰⁹ *Ibid* at 528.

¹¹⁰ (1953) 89 CLR 229.

Justice Fullagar delivered the main judgment which Dixon CJ, Webb and Kitto J adopted. Rather than considering the issue from the point of view of Commonwealth supremacy, Fullagar J saw the issue as one of assent:

“If [a State statute] does purport to bind the Crown in right of the Commonwealth, then a constitutional question arises. The Crown in right of the State has assented to the statute, by the Crown in right of the Commonwealth has not, and the constitutional question, to my mind, is susceptible of only one answer, and that is that the State Parliament has no power over the Commonwealth.”¹¹¹

It appears that this dictum of Fullagar J gives a wider scope to Commonwealth immunity than the mere exercise of fiscal or prerogative rights by the Commonwealth executive. In this case the activity in question was the operation of a hostel. Property rights are not a strict Crown prerogative and are certainly capable of being shared by ordinary subjects. Nor could that activity constitute a function of a “uniquely governmental” kind. Yet, it was believed that the State legislature lacked the capacity to bind the Commonwealth in such activity.

Evans suggests that this question is not resolved by the Fullagar J solution that a State cannot bind the Crown in right of the Commonwealth because the latter has not assented to such State legislation.¹¹² He points out that such reasoning would, in fact, work reciprocally to protect the Crown in right of a State from Commonwealth legislation to which it has not assented. He states what appears to be the true position – that where a construction of particular legislation indicates that it was intended to bind the Crown in right of another jurisdiction, the Crown’s assent may be implied as extending to that other government.¹¹³

As a consequence of adopting the wider interpretation of the immunity, considerable confusion has developed as to the scope of exceptions to that general immunity. Zines states that many of the grounds on which the Commonwealth immunity rests are not entirely satisfactory¹¹⁴ and does not believe that it is an “inevitable nor a desirable doctrine”.¹¹⁵

(ii) The “Exceptions”

An unsatisfactory aspect of the wider view of the doctrine is, indeed, the exceptions that various justices have felt it necessary to make. The two main exceptions appear to be as follows:¹¹⁶

1. that general laws made by a State may affix legal consequences to a given description of transactions and the Commonwealth may be bound by such if it chooses to enter into the transaction: per Dixon J in *Uther’s case*;

2. section 64 of the *Judiciary Act* 1903 (Cth) when the Commonwealth is a party to a suit.¹¹⁷

The first exception has possibly produced the most confusion and, consequently, a body of academic criticism. It emerged in the dissenting judgment of Dixon J in *Uther’s case* where, after denying the States legislative competence to regulate the rights, duties and privileges of the Commonwealth in relation to its subjects, His Honour added a qualification:

¹¹¹ *Ibid* at 259. See also Barwick CJ in *the Payroll Tax case* (1971) 122 CLR 353 at 379, who made a similar comment.

¹¹² G Evans ‘Rethinking Commonwealth Immunity’ (1972) 8 *MULR* 521 at 527-8.

¹¹³ See *Minister for Works (WA) v Gulson* (1944) 69 CLR 338; *Essendon Corporation v Criterion Theatres Limited* (1947) 74 CLR 1; *Bropho v Western Australia* (1990) 171 CLR 1.

¹¹⁴ L Zines *The High Court and the Constitution* 3rd ed Butterworths Sydney 1992 at 313. Zines particularly examines the Dixon CJ explanation that laws dealing with relations of the Commonwealth and its people are not for the peace, order and Good government of the State: *Uther’s case* (1947) 74 CLR 508 at 530-1; and the Barwick CJ view that the Crown does not submit itself to State legislation except in respect of its local agents: *Payroll Tax Case* (1971) 122 CLR 353 at 379.

¹¹⁵ Zines *ibid* at 315.

¹¹⁶ P Hanks *Constitutional Law in Australia supra* n.30 at 204-207.

¹¹⁷ Section 64 provides:

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

“General laws made by a State may affix legal consequences to given descriptions of transaction and the Commonwealth, if it enters into such a transaction, may be bound by the rule laid down. For instance, if the Commonwealth contracts with a company the form of the contract will be governed by s 348 of the *Companies Act*. Further, a State law is made applicable to matters in which the Commonwealth is a party by s 79 of the *Judiciary Act*. But these applications of State law, though they may perhaps be a source of confusion, stand altogether apart from the regulation of the legal situation which the Commonwealth, as a government, shall occupy with reference to private rights...”¹¹⁸

Then in *Bogle Fullagar J* discovered a similar exception to his proposition of a broad immunity for the Commonwealth. He said that if, for example, the Commonwealth makes a contract in Victoria, the terms and effect of that contract may have to be sought in the Victorian legislation. Victoria could not, however, tell the Commonwealth the uses to which its own property may be put.¹¹⁹

Again, in *Cigamatic* itself, Dixon CJ referred to the situation where the Commonwealth chooses to enter some transaction governed by a general law of a State and would thereby be bound by such a law.¹²⁰ His Honour provided no real assistance as to when and in what circumstances such a situation would arise.

This so-called exception is fraught with difficulty if any attempt is made to actually apply it. As Hanks states, it assumes that one can distinguish between situations where the Commonwealth makes use of its own property (when it is given immunity from State law) and where it “makes a contract” (where it is subject to State law). In practice, this is extremely difficult to determine.¹²¹

The difficulty over whether s.64 of the *Judiciary Act* is an actual exception to the doctrine has caused much interest. Various High Court decisions show that the effect of s.64 is that it picks up relevant State laws and applies them to civil suits to which the State or Commonwealth Crown is a party.¹²² If one considers that the doctrine of immunity would normally prevent the Commonwealth from being affected by such State laws, how then does s.64 fit in? Is it a legislative exception to the doctrine? The problem is that in none of the cases regarding the application of s 64 has the application of the immunities doctrine been considered. Conversely, in decisions involving the immunities doctrine, the effect of s.64 has not been dealt with.

In *Cigamatic* the s.64 point was not even raised in argument and the High Court therefore did not consider the important relationship between intergovernmental immunity and the operation of s.64. Surely it was a case where s.64 could have applied.

The operation of s.64 has been discussed by the High Court on several occasions.¹²³ In *Maguire v Simpson*¹²⁴ the Court did not refer to the decision in *Cigamatic* except to note that no mention had been made of s.64 in that case although s.64 could have been applied there.¹²⁵ The

118 (1947) 74 CLR 508 at 528.

119 *Supra* n.110 at 260.

120 (1962) 108 CLR 372 at 378.

121 P Hanks *Australian Constitutional Law supra* n.105 at 466.

122 P Hanks *Constitutional Law in Australia supra* n.30 at 205 points out that sections 64, 79 and 80 could be regarded as assimilative provisions which enact, as Commonwealth law, the applicable State law. Evans *supra* n.112 at 556 regards s 64 as constituting a generalised waiver of immunity from suit. It is not that the States are legislatively incompetent to remove the Commonwealth’s immunity [he argued strongly, in his paper, that the States are generally able to legislate to bind the Cth in all but limited circumstances such as where an exclusive power or prerogative was involved] but where there is uncertainty as to whether this was the intention of the State legislation, s 64 will nevertheless operate to ensure that the Commonwealth is bound.

123 *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, esp at 427 per Kitto J; *Maguire v Simpson* (1977) 139 CLR 362; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; *Deputy Commissioner of Taxation v Moorebank* (1988) 165 CLR 55.

124 (1977) 139 CLR 362.

125 *Ibid* at 402 per Mason J, at 404 per Jacobs J.

broad operation of s.64 was confirmed in *Commonwealth v Evans Deakin Industries Ltd.*¹²⁶ Once again the Court did not consider the decision in *Cigamatic* as the correctness of that decision had not been raised in argument before it.¹²⁷

It is suggested that the Commonwealth Parliament contemplated that s.64 would remove the Commonwealth Crown's prerogative immunity from suit in most cases where it is performing its general activities. It is submitted that the application of s.64 would conflict with the broad application of the *Cigamatic* principle which allows a general immunity because, wherever the Commonwealth is involved in a suit, s.64 would apply that State law from which, under the broad doctrine, the Commonwealth would be immune. There is room for argument that s.64 is merely a legislative exception to the doctrine of immunity but it is the writer's view that the doctrine can be narrowly confined so that most activities of the Commonwealth government are not immune from State laws and that s.64 merely has the effect of making it clear that in performing those activities the Commonwealth cannot rely upon the old prerogative immunity from suit.

There may be circumstances where the Crown is performing a "function peculiar to government"¹²⁸ and entitled to retain that immunity because, in the words of s.64, it will not be a case where the position of the Commonwealth is "as nearly as possible" the same as an ordinary subject. An example is where the contract into which the federal government enters is, in essence, an intergovernmental political agreement.¹²⁹

At present, however, one is left with the unhappy position of there being inconsistency between the cases on the application of s.64, such as *Maguire v Simpson*, and the earlier intergovernmental immunities cases such as *Cigamatic* and *Bogle*.

However, s.64 will only apply where there is a suit, ie, a civil proceeding. It will not apply in the case of a criminal prosecution, for example as in *Pirrie v McFarlane*. It is in an area such as this that the problems created by the *Cigamatic* decision must be confronted.

(iii) Conclusion

However, despite the fact that the Commonwealth possesses sufficient power to protect its activities from State laws and that, as seen above, there is considerable criticism regarding the scope of the intergovernmental immunities doctrine, there are varying degrees of support for the existence of a federal government immunity in the courts of both Canada and the United States. This indicates that other federations have found it necessary to immunise at least *some* federal government activities from State laws. If it is accepted that there exists a concept of intergovernmental immunity in favour of the federal government, the objections to its existence should have some bearing on the limits which should be drawn on the scope of that immunity. It is the writer's view that its scope should be necessarily confined. The balance of this paper endeavours to develop a narrow principle within which the doctrine can operate.

Confining the *Cigamatic* Doctrine

It is submitted that the only areas of governmental activity for which any intergovernmental immunity is warranted are in respect of activities involving "executive prerogatives" and of those functions that could be described as "uniquely governmental" functions of the Commonwealth. These concepts will now be explained.

(a) "Executive Prerogatives"

It is arguable that the majority judgment in *Cigamatic* does not, of itself, create a blanket immunity for all of the Commonwealth's governmental activities. Indeed, the majority justices who delivered a judgment, arguably including Dixon CJ, confined themselves to the fact that a

¹²⁶ (1986) 161 CLR 254.

¹²⁷ *Ibid* at 267.

¹²⁸ See *Evans Deakin supra* n.126 at 265.

¹²⁹ Such as in *South Australia v Cth* (1961) 108 CLR 130 at 140.

Commonwealth prerogative was involved.¹³⁰ Justice Menzies, with whom Owen J agreed, relied solely on the presence of the prerogative pertaining to the Crown in right of the Commonwealth. Thus the case could in fact support the narrow principle that the State legislature cannot bind the Crown in right of the Commonwealth when acting in pursuit of a fiscal right or a prerogative.¹³¹

It has been noted previously that many Crown prerogatives have been abrogated or partially modified by statute and there are few that remain in their original form. No problem arises where the *Commonwealth* has abrogated or modified a prerogative exercisable by the Commonwealth executive.¹³² But what of the case where the State legislature seeks to abrogate or modify a prerogative exercisable not by the State executive but by the Commonwealth executive?

The majority judgment in *Uther's case* indicated that the State legislatures have power to abrogate a prerogative right exercisable by the Crown in right of the Commonwealth provided that the State Act can be construed to have such effect and that it is an Act for peace, order and good government of the State.

However, in *Cigamic*, the Court denied that the States had the capacity to abrogate Commonwealth prerogatives. It does not appear that the majority considered it necessary to determine whether this immunity applied to *all* prerogatives exercisable by the Commonwealth or those which Evatt J¹³³ would regard as "executive prerogatives" - those which are exercisable *only* by the Commonwealth.

In *Federal Commissioner of Taxation v E O Farley*¹³⁴ Evatt J attempted to divide the prerogative power contained in s.61 of the Constitution into three classes with an underlying recognition that prerogative power is exercisable by both the Crown in right of the State and the Crown in right of the Commonwealth:

1. **Executive prerogatives** - eg, declaring war, making peace, signing treaties which are of such nature that they should be exercisable by the Crown in right of the Commonwealth rather than in right of the States;

2. **Common Law prerogatives** - eg, priority of payment of debts, immunity from suit which the Commonwealth shares with the States;

3. **Proprietary prerogatives** which partake of the nature of property, eg, the right to escheats, the right in relation to royal metals, the treasure trove, the ownership of the foreshore and of the bed of ocean within territorial limits. These can be enjoyed by the States in respect of each of their territories and by the Commonwealth in respect of its territories, eg, ACT and territorial waters.

In the case of the "executive prerogatives," which were appropriately exercised exclusively by the Commonwealth, Evatt J said:

"... the division of subject matters suggested by secs, 51 and 52 of our Constitution affords a guide analogous to that provided by secs 91 and 92 of the *British North America Act*
..."¹³⁵

These exclusive prerogatives seem to follow the legislative distribution of power in the Commonwealth Constitution to the extent that certain powers are made exclusive to the Commonwealth either expressly, eg, s.52, or by necessity, eg, s.51(vi) combined with ss.68, 114

¹³⁰ (1962) 108 CLR 372 per Menzies J at 389; Dixon CJ referred to the prerogative right of the Crown in right of the Commonwealth or, in modern times a fiscal right belonging to the Commonwealth at 377 and 378 and, as an attempt by the State to control the legal rights of the Commonwealth in relation to its subjects at 377, 378.

¹³¹ Evans *supra* n.112 at 548 ff regards the latter as providing a rationale for the principle in *Cigamic*, ie, that the State legislatures cannot interfere with prerogative rights of the Cth; see also McNairn *supra* n.49, eg, at 38.

¹³² As in *Barton v Commonwealth* (1974) 131 CLR 477.

¹³³ In *Federal Commissioner of Taxation v E O Farley* (1940) 63 CLR 278 at 320-322.

¹³⁴ *Ibid* at 320-21.

¹³⁵ *Ibid* at 321-322.

and 119; s.51(xxix) [external affairs power]. Evatt J made particular reference to the prerogative as to war and the “exclusive character of the Commonwealth defence power”.¹³⁶ The same immunity could be argued in respect of the Governor-General’s functions in relation to the summoning and dissolving of Parliament¹³⁷ and matters such as the appointment of Ministers.

His Honour was of the view that where certain matters were made exclusive to the Commonwealth under the Constitution, this was a good indication of whether a particular prerogative was vested exclusively in the Crown in right of the Commonwealth.

Over these “exclusive” matters the Commonwealth has immunity and States would appear to have no legislative competence. Otherwise, where the particular prerogative is shared by the States,¹³⁸ it is argued that it is permissible for the States to abrogate or modify the prerogative exercised by the Crown in right of the Commonwealth within the territorial limitations of the State legislature. The immunity should not apply to those prerogatives which the Commonwealth shares equally with the Crown in right of the various States.

However, the decision in *Cigamic* appears to extend this immunity to prerogatives exercisable by the Commonwealth government whether having this exclusiveness or not so as to remove the States’ capacity to abrogate or modify *any* Crown prerogatives exercised by the Commonwealth government. The prerogative involved in that case was not an “executive prerogative” but one which was shared by the Crown in right of the States.

In an attempt to reconcile the decision in that case with his premise that the doctrine can be rationalised on the basis of the prerogative, Evans argues that where the activity involves the legal relationship between the Commonwealth and its subjects,¹³⁹ such activity does not have anything to do with the good government of the State. Rather it has to do with the good government of the Commonwealth as a whole and is not therefore referable to the territorial confines of the State. He notes, however, the force of the alternative argument - that the legislation in that case could have answered the description of being for the peace, welfare and good government of the State given that it was a general company law and would, on that basis, have the appropriate territorial connection.¹⁴⁰

As no “executive prerogative” was involved it is submitted that the conclusion of the majority in *Cigamic* that the State could not affect the Commonwealth is incorrect. Thus, the actual conclusion in *Cigamic* cannot be supported unless Evans’ proposition that such activity was not one within the territorial competence of the State is correct. However, the circumstances in which State legislation would be found to be beyond territorial competence would now be few, having regard to recent High Court decisions on that point.¹⁴¹

(b) “Uniquely Governmental” Functions

Apart from the exercise of the royal prerogative there are a number of functions which, like the prerogative in its true sense, are not capable of being or are not properly exercised by ordinary subjects. These powers, rights and functions may derive from the prerogative but can also be regarded as having their source from express or implied provisions in the Constitution.

This basis for rationalising the doctrine of intergovernmental immunities is offered because the concept “executive prerogatives” does not really provide an adequate basis for the existence of an immunities doctrine in other federal jurisdictions where there is no Crown representative, and therefore, no Crown prerogatives. In the United States, for example, the courts have

¹³⁶ *Ibid* at 320.

¹³⁷ As stated by Latham CJ in *Uther v FCT* (1947) 74 CLR 509 at 521.

¹³⁸ Eg, priority of debt as in *Uther’s case* and in *Cigamic*.

¹³⁹ As occurred in *Uther’s case* and in *Cigamic*.

¹⁴⁰ Evans *supra* n.112 at 552.

¹⁴¹ *Pearce v Florenca* (1976) 135 CLR 507; *Union Steamship Co of Australia Pty Ltd v King* (1988) 82 ALR 43; *Port MacDonnell Professional Fishermen’s Association Inc v South Australia* (1989) 168 CLR 340.

developed an immunities doctrine, albeit of uncertain scope. The doctrine there cannot be rationalised on the basis of royal prerogative but it has been recognised that there are particular activities of the federal government that do enjoy immunity from State legislation. It is interesting to ascertain the nature and extent of those activities.

If there is to be some doctrine of intergovernmental immunity, then it is submitted that, apart from immunising the Commonwealth in respect of its “exclusive prerogatives,” the Commonwealth should enjoy immunity where it is engaged in activities which could be described as “uniquely governmental.”

(i) The Concept

A “uniquely governmental” function is the ability to control and regulate society and provide for the administration of civil order. Obviously it is possible to point to many governmental activities in which the government has traditionally been involved and contend that such could equally or even more effectively be carried on by the private sector; road and bridge building being an example.¹⁴²

Many of the criticisms relating to the artificiality of the distinction between “essential” and “non-essential” functions of government arose in cases concerning the applicability of the “shield of the Crown” to a particular statutory public authority¹⁴³ or whether employees are engaged in an “industrial dispute”.¹⁴⁴ Indeed, the distinction has no place in determining those questions but, it will be argued, may have a role in determining what functions of government should enjoy some immunity from laws of other jurisdictions.

Whilst it is inherently difficult to determine which are the “essential functions of government,” as was attempted to be done in some earlier cases,¹⁴⁵ room does exist for isolating certain governmental activities which, apart from the prerogative, could be described as “unique.” The functions envisaged are of a type that only the government can or should pursue. Examples of such include activities connected with maintaining a defence force and with naval and military defence (although this arguably overlaps with the prerogative power of the Governor-General), implementing treaties, taxation, registration of land titles, administration of justice and the court

¹⁴² In *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 274-75 Windeyer J said:

“The functions which government in fact undertakes vary with the time in history and the country concerned and the nature of its polity. If what is meant is what should be the functions of government and the sphere of the state, the answer will reflect political philosophy current at a particular time or an individual predilection. Disciples of Herbert Spencer and of Karl Marx would give very different answers. The maintenance of the Post-Office is today an established function of government in most countries....But before the reign of Charles I, the provision of postal services was not a function of government in Britain....Yet in 1857 the Post-Office was for rating purposes taken to be in exactly the same position as the great departments of State. Its functions were governmental-regal.”

¹⁴³ See, eg, *Townsville Hospitals Board* (1982) 149 CLR 373.

¹⁴⁴ *Ex Parte Professional Engineers' Association supra n.142; Re Lee; Ex parte Harper* (1986) 160 CLR 430 at 452-53.

¹⁴⁵ Eg, *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 where Rich J at 67, Starke J at 74, 75, Dixon J at 83, 84 and Williams J at 99, 100 appeared to take the view that if the Commonwealth legislation interfered with the States in the exercise of their governmental functions, it would be invalid. This was severely criticised by some of the Justices in *Victoria v The Cth (the Payroll Tax case)* (1971) 122 CLR 353 per Barwick CJ at 383, per Windeyer J at 398 on the basis that the government now engages in many activities, including commercial ventures, (per Gibbs J at 424) that it is difficult to draw a distinction between essential and inessential functions of government in modern conditions. See also *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association (the Railway Servants case)* (1906) 4 CLR 488, 538-39; *South Australia v Commonwealth (the First Uniform Tax case)* (1942) 65 CLR 373 per Latham CJ at 423; *Ex parte Professional Engineers' Association* (1959) 107 CLR 208, 272-276; *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 per Gibbs CJ at 288-289. In the United States context see eg *Ohio v Helvering* (1934) 292 US 360, 366 criticised in *New York v United States of America* (1946) 326 US 572.

system, maintaining a police force, administering environmental protection legislation, regulating and maintaining the provision of social services such as pensions and benefits,¹⁴⁶ measures to preserve public health and the regulation of banking and corporate activities. These activities are examples of the government's control and regulation of society.

Further, there are a number of government functions that are internal in nature and would seem to be beyond the interference of other legislatures.¹⁴⁷ These include the function of the Governor or Governor-General of summoning, proroguing and dissolving Parliament, providing for the election of the Upper House or members of the Lower House, issue of writs for a general election, privileges and immunities of the Parliament and members of Parliament, appointment by the Governor or Governor-General of Ministers and Judges, command of naval and military forces and the appropriation of moneys.

In addition, the Commonwealth enjoys the ability to pursue the various activities derived from the inherent nationhood status of the Commonwealth government.¹⁴⁸ The CSIRO is an example of a Commonwealth activity engaged in by virtue of its status as a national government.¹⁴⁹ It is possible that other matters of national cultural, historical and artistic importance would also fall within this power.

It is argued that the States would not be able to control or regulate these matters enumerated in the preceding paragraphs.

The crucial point is that when it is determined as a matter of statutory construction that the Crown is bound by State legislation, the Constitutional question as to whether immunity is attracted should depend upon whether the particular entity is acting in pursuit of an "executive prerogative" or is executing some "uniquely governmental" function. It would follow that the "particular entity" would generally be the executive arm of the government itself. Very few statutory corporations of a commercial nature could be said to be engaging in unique governmental activities even though their object may be the pursuit of some significant social responsibility. It is not suggested that these activities are not governmental, the point is that they are not a unique feature of government, ie, activities which are only appropriate to the government. These activities could therefore be subject to State regulation.

Many commercial activities engaged in by the Commonwealth, even where operated as a monopoly for the "public good," are not "uniquely governmental" and should not attract the immunity doctrine. However, where the commercial activity is ancillary or *incidental* to the pursuit of the "uniquely governmental" function, such as contracting to purchase supplies for the armed forces, those activities could be given the cloak of immunity if the overall function would be severely burdened in the manner described below.

¹⁴⁶ As was in question in *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657.

¹⁴⁷ See, eg, Latham CJ in *Uther's case* (1947) 74 CLR 509 at 521.

¹⁴⁸ See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; *R v Sharkey* (1949) 79 CLR 121 esp at 148-49. See esp *Victoria v Commonwealth (the Australian Assistance Plan case)* (1975) 134 CLR 338:

".....powers legislative and executive, may come from the very formation of the Cth as a polity and its emergence as an international state." per Barwick CJ at 362;

"... the Cth enjoys, apart from its specific and enumerated powers, certain implied powers which stem from its existence and its character as a polity.....from the existence and character of the Cth as a national government and from the presence of ss.51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation." per Mason J at 397;

"The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour." per Jacobs J at 412.

See also *Davis v Cth* (1988) 166 CLR 79.

¹⁴⁹ In the *Australian Assistance Plan case supra* n.148, three justices referred to scientific research as pertinent to the national status of the Commonwealth government: see Barwick CJ at 362, Mason J at 397, and Jacobs J at 412-13.

Many activities undertaken by the Commonwealth in reliance upon the implied nationhood power are not necessarily “uniquely governmental” in that ordinary persons and corporations are equally able to engage in such activities, eg, establishing and maintaining an art gallery or museum or engaging in scientific research. It appears that in respect of those activities which are not “uniquely governmental” the States should be able to legislate to control or regulate the Commonwealth activity.

(c) Should the Scope be Further Limited?

Once it is found that an activity or function in which the Commonwealth is engaging is within the “executive prerogative” or is of a “uniquely governmental” nature, it appears that a further relevant question is, surely, whether the State law *does* prevent or impede those activities or destroy or curtail in a substantial manner, the exercise of its powers.

The limitation proposed is based on the alternative principle of Rich and Starke JJ in *Melbourne Corporation*¹⁵⁰ where they said that the Commonwealth could not prevent or impede the States from performing their normal or essential functions or to substantially destroy or curtail them in the exercise of their powers. Their Honours seemed to regard this principle as having reciprocal application. While this approach did not seem to find favour with some justices in *Re Lee; Ex parte Harper*,¹⁵¹ those same justices in later cases¹⁵² appeared to accept the principle and found it to either apply or not to apply to the particular situation under consideration. Thus, the proposition does seem to be one which is accepted although of quite narrow application. This is no doubt due to fact that very few laws can be regarded as having the significant impact required.

Therefore, it is necessary to determine whether the Commonwealth is engaged in an exercise of the “executive prerogative” or in a “uniquely governmental” function and, if so, whether the relevant State law does or has the potential to prevent or impede that function or to substantially destroy or curtail it.

The concept of “uniquely governmental functions” and the need to consider degree of interference finds support in some of the decisions of the United States Supreme Court. Despite the confusion that has been seen in the approach of the courts in the United States, there has been an increasing tendency to restrict the immunity to governmental functions so that it would not apply, for example, to bridge building.¹⁵³ Further, the United States courts appear to examine the impact which the State legislation has upon the federal activity to determine whether it imposes any great burden on the federal activity.¹⁵⁴ It has also been held that persons who are dealing with the government or rendering services to it who are not “agencies of the United States” can be amenable to State regulations.¹⁵⁵

In Canada, the scope of the immunity is also unclear. However, many of the decisions in which an immunity has been found do appear to relate to activities of the government which are concerned with the executive prerogative or are functions which can be regarded as “uniquely governmental.”

¹⁵⁰ (1947) 74 CLR 31 at 66 and 74.

¹⁵¹ (1986) 160 CLR 430 at 452-53 per Mason, Brennan and Deane JJ.

¹⁵² Eg, *State Chamber of Commerce and Industry v Commonwealth* (1987) 73 ALR 161 at 177 and 181.

¹⁵³ Eg, *City of Dubuque Bridge Commission v Board of Review for City of Dubuque* 317 US 686, where it was held that immunity from taxation did not extend to anything lying outside or beyond governmental functions. In any event, it was said, the immunity does not exist unless there is a direct burden on the instrumentality. See also *US v State Corp Commission of the Commonwealth of Virginia* (1972) 409 US 1094.

¹⁵⁴ *Pennsylvania Dairies v Milk Control Commission of Pennsylvania* (1942) 318 US 261.

¹⁵⁵ Eg, in *Pennsylvania Dairies v Milk Control Commission of Pennsylvania* (1942) 318 US 261 it was held that a dealer delivering milk to the Army camp within the State could be subject to a State price control legislation. Compliance would not impose any great burden or impairment on federal government functions, cf. *US v Pennsylvania Environmental Hearing Board* (1978) 584 F 2d 1273.

In *McKay v R*¹⁵⁶ it was held, by a narrow majority, that a municipal by-law prohibiting the display of signs on residential property did not include federal election signs. The provincial legislature, which authorised the by-law, had no power to prohibit a political activity in a federal field.¹⁵⁷ The provincial legislation was regarded as exceeding its proper field of authority although the majority did not explain why the “pith and substance” doctrine would not apply.¹⁵⁸ The decision can be rationalised on the basis that the display of election signs are part of the process of an election campaign for the choosing of a government and are therefore conducive to a “uniquely governmental” function that should not be prevented or impeded by the provincial law.¹⁵⁹

It has further been held that federal undertakings in transportation or communication are immune from provincial legislation which would have the effect of “sterilising” or “mutilating” the undertaking. For example, immunity was found for the operations of an international bus line from provincial regulations as to routes, rates etc.¹⁶⁰ The requirement of sterilisation and mutilation was relaxed in a later case to something which “affects a vital part of the management and operation of the undertaking”.¹⁶¹

Some recent cases have denied immunity to federal undertakings using the “pith and substance” approach. The courts have upheld provincial legislation prohibiting certain types of advertising on television (which was a federally regulated medium),¹⁶² a provincial minimum wage Act which applied to a contractor building a runway for a federally undertaken airport construction¹⁶³ and provincial legislation in relation to labour relations to a business owned by Indians on a federal reserve.¹⁶⁴ Indeed, even if one was to apply the restricted approach proposed in this paper, the activities involved in these cases do not appear to fall within the area of the “executive prerogative” or of a “uniquely governmental” function and, in any event, could not be said to be prejudiced in the requisite degree by the provincial laws.

Should there be a further limit so that the immunity provided for the Commonwealth government’s “uniquely governmental” functions can apply only to those which are not only unique to the government but unique to the Commonwealth?¹⁶⁵ There is some argument for this: it would be consistent with the concept of “executive prerogatives”. However, it is submitted that this step is not necessary, given the narrow scope of functions which could be described as “uniquely governmental”.

It is submitted that beyond “executive prerogatives” and “uniquely governmental” functions the immunity should not exist so as to prevent non-discriminatory State laws from applying to the general activities of the federal government.

¹⁵⁶ [1965] SCE 798.

¹⁵⁷ *Ibid* at 804.

¹⁵⁸ Hogg *Constitutional Law of Canada* (The Carswell Company Limited 2nd ed 1985) at 329. Because the legislative powers given to the federal and provincial governments are mutually exclusive, the Court must consider what is the “pith and substance” of the statute, ie, its dominant feature, in order to categorise it as one belonging to the federal government or to the provinces. This can often be difficult as the matter may cross the powers of both governments. It does not matter that it may have another feature provided that that other feature is merely incidental. The Court is not limited to the legal operation of the statute but may inquire into the purpose of the legislation and the rights and liabilities to be affected by it.

¹⁵⁹ See also *R v Anderson* (1930) 54 CCC 321 (Man. CA) where a provincial driving licence requirement was held not to apply to a member of the federal armed forces. The situation should be contrasted with *Pirrie v McFarlane*. The member of the forces was engaged in duties which were required of him by his employer as part of a “uniquely governmental” function - the maintenance of a defence force.

¹⁶⁰ *A-G Ontario v Winner* [1954] AC 541.

¹⁶¹ See, eg, *Commission du Salaire Minimum v Bell Telephone Co* [1966] SCR 767 at 774 per Martland J.

¹⁶² *A-G of Quebec v Kellogg's of Canada* [1978] 2 SCR 211.

¹⁶³ *Construction Moncalm v Minimum Wage Commission* [1979] 1 SCR 754.

¹⁶⁴ *Four B Manufacturing v United Garment Workers* [1980] 1 SCR 1031.

¹⁶⁵ There would be very few of these. A possible example is power over external affairs but it is likely that there will already be legislation in existence which deals with relevant matters that may arise.

(d) Application of the Narrow Principle

If the immunity is confined in the manner suggested the issue becomes, firstly, whether the activity being performed is either within an “executive prerogative” or is “uniquely governmental” and, secondly, whether the federal government would be prevented or impeded in performing such a function or whether the law destroys or curtails in any substantial manner the exercise of that function.

Sometimes the Commonwealth activity in question may be of a purely commercial nature and would not *prima facie* give rise to the narrow immunity. However, it is submitted that the court should determine whether this commercial activity is one which is ancillary to some “executive prerogative” or “uniquely governmental” function.¹⁶⁶ If so, then it will be entitled to the immunity if it is being interfered with to the requisite degree.

If, for example, the federal government is entering into a contract for the purchase of military equipment or food for its defence requirements then the activity of entering into a contract, although one that ordinary subjects can perform, is incidental to its “executive prerogative” or its “uniquely governmental” functions. One must then consider whether the State law attempting to regulate the activity prevents or impedes the defence function or substantially destroys or curtails the exercise of that function.

If the Commonwealth wishes to use its fleet of Commonwealth cars in private hiring activities this is not an activity that is of itself within the “executive prerogative” or is “uniquely governmental”. It is necessary to consider the activity as a whole (the carriage of executives and public servants on official duties) to determine if it is “uniquely governmental” rather than that part being regulated (the private hiring activities) and to then decide whether the private hiring business is ancillary or incidental to that main activity. However, it is arguable that the activity of carrying executives and public servants on official duties is not within the “executive prerogative” or “uniquely governmental” sphere either.

If the State were to impose a non-discriminatory licence fee upon the operation of the hiring business it is submitted that it could validly do so. Even if the activity of carrying executives was “uniquely governmental” such licensing requirements would not appear to be a significant interference with the activity and would merely place the government on an equal footing with ordinary subjects.¹⁶⁷

The above facts were the subject of a dispute between the New South Wales and Federal governments and proceedings were issued out of the High Court. However, the matter has since been settled and the opportunity for re-examination of this difficult area by the High Court is left for another day.

(e) Application To Previous Decisions

It is interesting to determine whether previous decisions of the High Court on the issue of intergovernmental immunity can be reconciled with the narrower approach of confining that immunity to “executive prerogatives” and “uniquely governmental” functions.

(i) *Pirrie v McFarlane*

Previous attempts have been made to resolve the conflict between *Cigamic* and the decision in *Pirrie v McFarlane*.¹⁶⁸

¹⁶⁶ See below the approach of the Supreme Court of Queensland in *Shaw v Coco* (1991) 102 ALR 75 where it is submitted that this mistake may have been made.

¹⁶⁷ See *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 217 per Mason J.

¹⁶⁸ Eg, G Sawyer *Australian Federalism in the Courts* Melbourne University Press 1967 at 138; C Howard ‘Some Problems of Commonwealth Immunity and Exclusive Legislative Powers’ (1972) *Federal Law Review* 31 at 35 and 53-55.

Evans argues¹⁶⁹ that *Pirrie v McFarlane* raises an exclusive power issue in that the Victorian legislation in question interfered with the Commonwealth's exclusive defence power. As noted earlier, many commentators¹⁷⁰ and justices¹⁷¹ have regarded the defence power as exclusive to the Commonwealth when considered together with ss 69, 114 and 52(2) or, at least, by implication from the nature of the defence power itself.¹⁷²

On the exclusive power argument coupled with the argument above as to the suggested limits of Commonwealth immunity, the actual decision in *Pirrie v McFarlane* appears to be insupportable. The fact that the member of the Air Force was complying with a direct order to drive on Victorian roads in pursuit of his military duties suggests that, as a servant of the Crown in right of the Commonwealth, he was entitled to an immunity given to the Commonwealth in exercising its "uniquely governmental" or, alternatively, its exclusive, defence power.¹⁷³ Even if it is not the case that the defence of the Commonwealth is an exclusive power, it is one that is "uniquely governmental" and should not be interfered with by the laws of a State. On this basis, the dissenting views of Isaacs and Rich JJ appear to be correct.

While this conclusion might be seen as leading to the result where a soldier might be ordered to "dash into traffic regardless of property and life"¹⁷⁴ in defiance of State regulations, Isaacs J said that the possibility of abuse is no argument against the existence of a power and, may indeed sometimes be required as part of an emergency with which that soldier is required to deal.¹⁷⁵

(ii) *Commonwealth v Bogle*

The actual decision that the corporation in *Bogle* was not an agent of the Crown is correct. However, the dicta indicating that had it been a Crown agency the State law could not have applied is inconsistent with the narrow application of the doctrine that has been proposed in this paper. The activity engaged in was running a hostel. It was not part of the Commonwealth's "executive prerogative" nor was it "uniquely governmental." Ordinary subjects can engage in such an activity.

On this basis, the dicta in this case cannot be accommodated within the narrow view of the doctrine.

(f) Recent Cases

There have been some recent decisions of the Federal Court of Australia and the Queensland Supreme Court in which the intergovernmental immunity concept has arisen for consideration.

In *Trade Practices Commission v Manfal Pty Ltd*¹⁷⁶ the Full Federal Court took the opportunity to reconsider the issue.

Section 371(2) of the Companies (Western Australia) Code 1981 (the Code) prohibited the commencement and maintenance of an action against a company in liquidation without leave of the Supreme Court of Western Australia. The Code purported to bind the Crown in all its capacities,"so far as the legislative power of the [Western Australian] Parliament permits."

The Commission commenced proceedings against Manfal in the Federal Court under the *Trade Practices Act 1974* (Cth) prior to the company going into liquidation. The primary judge

169 Evans *supra* n.112 at 540.

170 Eg, C Howard *Australian Federal Constitutional Law* 3rd ed Law Book Co Sydney 1985 at 325-6; Evans *supra* n.112 at 540.

171 Eg, Isaacs and Rich JJ in their dissenting judgment in *Pirrie* (1925) 36 CLR 170 at 200 and 221; Evatt J in *Farley* (1940) 63 CLR 278 at 320-21.

172 This view is, however, not absolutely correct. It would seem that the States can enact at least some minor defence laws.

173 See also McNairn *supra* n.49 at 94-95 on this point.

174 (1925) 36 CLR 170 at 210 per Isaacs J.

175 *Ibid* at 210.

176 (1990) 97 ALR 231.

ordered a stay of the Federal Court proceedings until leave to proceed was obtained pursuant to s 371(2) of the Code.

The Full Court¹⁷⁷ held that s 371(2) of the Code had no application to the Federal Court proceedings because it was rendered invalid by the operation of s.109 of the Constitution to the extent that it would impede the functions of the Commission and of the Federal Court under the *Trade Practices Act*. The latter Act set up a scheme for the enforcement of its terms including provision for the commencement of actions by the Trade Practices Commission.

Section 64 of the *Judiciary Act* was of no assistance because there was an inconsistent and directly applicable Commonwealth law, ie, the *Trade Practices Act*, governing the situation. This brought s.109 of the Constitution into operation leaving no room for the application of the Code by virtue of s.64 of the *Judiciary Act*.¹⁷⁸ Section 79 of the *Judiciary Act* was inapplicable also because its effect was only to pick up State laws with their meaning unchanged and only if the State law could have otherwise affected the Commonwealth. This was not the position here.

A further basis of the decision was that the State cannot limit the procedure or jurisdiction of a federal Court because such courts rely for their validity upon the Constitution of the Commonwealth. Justice French said that the authority of a federal court conferred by federal legislation to adjudicate upon a matter arising under federal law cannot be limited by a State statute as it would qualify the "obviously exclusive power conferred on the Parliament of the Commonwealth to define the jurisdiction... of such other federal courts as it creates: Constitution ss 71, 76 and 77".¹⁷⁹

These findings seem incontrovertible. The conferring of jurisdiction upon and regulating the procedure of federal courts is clearly an exclusive function of the Commonwealth government and, being a legislative function, one which is "uniquely governmental".

Both Wilcox and French JJ made some general observations on Commonwealth immunity. Their Honours appeared to support a somewhat narrower reading of the doctrine.¹⁸⁰

Justice Wilcox concluded that the Commonwealth was not bound by State laws which would adversely affect its property, revenue or prerogatives or which would impede performance by its instrumentalities of their statutory functions.¹⁸¹ Here, the Commission was performing a function conferred by the *Trade Practices Act* and it was "not to be defeated or frustrated by State legislation which imposes restrictions or conditions on such actions".¹⁸²

Justice French considered the scope of the ability of the States to legislate to bind the Crown in right of the Commonwealth on the assumption that s.371 did not operate as a qualification upon the Court's jurisdiction but could validly apply to litigants. After examining the existing authorities he concluded that the Commission, as an instrumentality of the Crown in right of the Commonwealth, cannot be prevented by a State law from enforcing a federal law in a federal court.¹⁸³

When the Commission is engaged in prosecutions under the Act, then it is apparently performing a "uniquely governmental function". However, on the factual situation here, the Commission was seeking certain compensatory orders which, it could be argued, are orders which

177 Northrop, Wilcox and French JJ.

178 See *Dao v Australian Postal Commission* (1987) 162 CLR 317.

179 *Supra* n.176 at 248.

180 *Ibid* at 240 per Wilcox J; at 258 per French J.

181 *Ibid* at 240.

182 *Ibid*.

183 *Ibid* at 258.

could be obtained by ordinary companies and individuals. It is possible, however, that to the extent that the compensatory orders were merely ancillary or incidental to the Commission's main "uniquely governmental" function of enjoining the alleged unconscionable conduct, their Honours' observations can be supported.

In addition, it is worthwhile considering two Supreme Court decisions from Queensland. The first is Byrne J's decision in *Re Commissioner of Water Resources and Leighton Contractors Pty Ltd*.¹⁸⁴

The issue was whether s.18(4) of the *Arbitration Act 1973 (Q)*, applied to various Commonwealth departments which were subpoenaed to produce documents in relation to an arbitration. The documents related to Commonwealth financial assistance and supervision of the construction of a dam.

His Honour considered the broad principle of *Cigamic* and *Bogle*, that the State has no power over the Commonwealth but held that it was inconsistent with the reasoning in *Pirrie v McFarlane*. He restricted the doctrine to the narrower principle that the State cannot affect the prerogative rights of the Commonwealth, as Menzies J had held in *Cigamic*.¹⁸⁵

Justice Byrne held that s.18(4) could apply to the documents held by the departments. The section was intended to assist references to arbitration and the resolution of disputes outside the court process. It did not derogate from the rights of the Commonwealth with respect to its people nor specially affect any governmental functions of the Commonwealth or its prerogatives. Nor was it of a class of law which was within the exclusive competence of the Commonwealth.¹⁸⁶ His Honour also placed importance upon the fact that the Act did not "act on or discriminate against the Commonwealth".

It is submitted that the actual decision accords with the narrower principle developed in this paper. The State law authorising the subpoena did not affect prerogative rights or interfere with any "uniquely governmental" functions. It is interesting to note that Byrne J addressed the question of whether the law affected "governmental functions". This gives some support to the fact that there do seem to be functions which the government can perform which are similar to but not part of the prerogative.

*Shaw v Coco*¹⁸⁷ was a decision of the Full Court of the Supreme Court of Queensland. The appellant, a member of the Australian Federal Police, used a listening device to record a private conversation said to have taken place between the respondent and another person. Section 43 of the *Invasion of Privacy Act 1971 (Q)* made the use of listening devices illegal unless the person was "a member of the police force acting in performance of his duty," and authorised to use the device by certain specified persons.

Section 12 of the *Australian Federal Police Act 1979 (Cth)* provided that a member was not required to obtain permission to do anything in the performance of his duties even if required to do so by a law of a State.

It was held¹⁸⁸ that the *Invasion of Privacy Act* validly applied to members of the Australian Police Force. However, the appeal was upheld, McPherson SPJ holding that s.12 of the *Australian Federal Police Act* dispensed with the s.43(2) requirement of obtaining permission to use the device and Dowsett J finding that the appropriate authorisation had been obtained.¹⁸⁹

184 (1990) 96 ALR 242. This case preceded the decision in *Manfal*.

185 (1962) 108 CLR 372 at 389.

186 *Supra* n.184 at 249.

187 (1991) 102 ALR 75.

188 McPherson SPJ and Dowsett J; contra Ryan J.

189 The HC has since held that s.12 of the *AFPA* did not dispense with the necessity to seek approval under the State Act and thereby quashed the conviction: *Coco v. R* (1994) 120 ALR 415.

In considering whether the State legislation could bind the Commonwealth, McPherson SPJ expressly, and Ryan J¹⁹⁰ by implication, considered themselves bound by *Pirrie v McFarlane* so that a servant of the Commonwealth, acting in the course of their duty, is subject to State legislation that would apply to them were he or she not acting as a Commonwealth officer. McPherson SPJ said that even on a narrow view of *Cigamic*, “eavesdropping” was not a Crown prerogative nor did it affect rights or duties between the Commonwealth and its people.

It had been argued by the appellant that the State could not limit the exercise of a “peculiarly or characteristically governmental function as Commonwealth law enforcement”.¹⁹¹ The Court rejected that argument on the basis that “intelligence-gathering” did not bear this description. What is interesting, however, is that the justices, particularly McPherson SPJ,¹⁹² did consider this point. Thus, the case appears to lend support for the narrow view of the doctrine; that the immunity is limited to the prerogative or to “uniquely governmental” functions.

However, while their Honours appear to be correct in concluding that there was no prerogative involved, their finding that a “peculiar” or “characteristic” governmental function was not in issue is difficult to justify. The finding may have been a result of the Court adopting a narrow focus on the function being affected – intelligence-gathering or “eavesdropping” – rather than looking at what that function ultimately achieved, ie, the facilitation of law enforcement. It appears that intelligence gathering is an integral part of this unique function of government and should be free from interference by State laws which prevent or impede its operation.

However, it could be argued that a law requiring a member of the Australian Federal Police to obtain authorisation in order to proceed with such intelligence gathering cannot readily be perceived as one which would prevent or impede the enforcement of law nor substantially destroy or curtail it. In this way the decision itself might be accommodated within the narrow basis of the doctrine. The justices did not, however, address that issue.

The comments of the justices in relation to the immunity point do, at least, reveal a tendency to confine its scope even if it is difficult to accommodate many of their conclusions on this issue within the propositions put forward in this paper.

Conclusion

It has been the writer’s view throughout that the doctrine of intergovernmental immunities in favour of the federal government is difficult to justify. The only argument to support the existence of the doctrine is that the executive may engage in activities which may become subject to State laws that the Commonwealth has not anticipated and which cannot be delayed while the Commonwealth Parliament is enacting protective legislation.

However, the approach of various justices on the High Court, particularly Sir Owen Dixon, and of courts in both the United States and Canada leads to the conclusion that the doctrine does exist, at least to some extent. The issue that has been dealt with in this paper is the scope or extent of the doctrine.

In Australia, the decision in *Cigamic* appears to have opened the way for an unnecessarily expansive scope being given to the doctrine. There have been relatively few High Court decisions on this issue since 1962. Unlike the United States Supreme Court, the High Court has not tended to examine the practical effect of the State legislation or made any other attempt to confine it. The

190 Ryan J would have dismissed the appeal on the basis that the *Invasion of Privacy Act* (Q) applied to the Australian Federal Police and the ability to seek authorisation was relevant only to a member of the Queensland Police Force. His Honour did, however, make some observations on the immunities point.

191 *Supra* n.187 at 98 per Ryan J.

192 *Ibid* at 81.

presence of s.64 of the *Judiciary Act* has not been reconciled with the doctrine but has enabled the courts, in civil actions, to find that the federal Crown is bound by a relevant State law.

The wide interpretation would allow the federal government and its agencies to pursue any activity, no matter how remote from functions which could be seen as a traditional part of the royal prerogative or to functions which could be described as "uniquely governmental." Many commercial activities of government, while entered into for ultimate social benefit, are activities which can equally be carried on by ordinary subjects and should not enjoy any greater privilege or immunity from non-discriminatory laws of a State than would apply to those subjects. This appears to be the approach of the United States Supreme Court, although it has, on some occasions, allowed a wide scope to the immunity. The Canadian position is less easily rationalised but the courts there have recently appeared to adopt a more discerning approach to the question.

The preferred view of the doctrine would confine the immunity to where the federal executive is acting in pursuance of its "executive prerogatives" or engaged in activities which are "uniquely governmental".

Confining the doctrine to "executive prerogatives" and "uniquely governmental" functions will, undoubtedly, cause some problems in application. As shown above, it does not appear that the dicta in *Bogle* or the actual decision in *Cigamic* can be accommodated within this more limited doctrine. Some of the decisions examined in the United States¹⁹³ and Canadian¹⁹⁴ context do not appear to fit neatly within this narrow approach either. There is also the possibility of criticism being levelled at the "uniquely governmental" concept. However, it is argued that it does appear to go some way towards providing a rational basis for the existence of intergovernmental immunities.

Given the restrictions which have been recognised in some of the decisions in the courts in the United States and Canada and the confusion which the doctrine has caused, it would seem a worthwhile exercise for the High Court to seize upon an opportunity to re-examine the law in relation to intergovernmental immunities.

¹⁹³ Eg, *Mayo v United States* (1943) 319 US 441.

¹⁹⁴ Eg, *The Queen v City of Montreal* (1972) 27 DLR (3d) 349.