COMMONWEALTH LIABILITY TO STATE LAW

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In all federal systems, the question as to the competence of one tier of government to legislatively bind another is one of obvious and great importance. The Australian experience is a clear illustration of this.

This paper enquires into one aspect of this broad question — the circumstances in which legislation enacted by State parliaments applies to and binds the Commonwealth.

It has been traditional to analyse this question from the viewpoint of the *immunity* of the Commonwealth from "State law" rather than from Commonwealth *liability*. Prevailing High Court doctrine provides that the Commonwealth is totally immune from "State law", and areas of State law within which the Commonwealth is liable have been seen very much as exceptions to this general rule.

This approach derives unquestionably from Sir Owen Dixon. Initially in dissent[1], his honour repeatedly stressed the view, that irrespective of the general competence of the Commonwealth to legislatively bind the States, the Commonwealth is totally immune from "State law". It is the exception which his honour admitted to this total Commonwealth immunity with which this paper deals.

The "Affected By" Doctrine

The exception to total Commonwealth immunity has come to be known as the "Affected By" doctrine. Owing to the vagueness of of its judicial exposition it is necessary, as a preliminary, to consider definition of the doctrine.

* B Juris (Hons) LL B (Hons)

1 In Re Richard Foreman and Sons Pty Ltd, Uther v Commonwealth ("Uther's Case") (1947) 74 C L R 508, West v Commissioner of Taxation (N S W) (1937) 56 C L R 657, Essendon Corporation v Criterion Theatres ("Essendon Corporation Case") (1947) 74 C L R 1

1 Definition

Elaboration of the "Affected By" doctrine is to be found in a number of judgments of Sir Owen Dixon,[2] though its most oft quoted statement appears in the judgment of Fullagar J. in *Bogle's Case*[3]. After emphasizing the total immunity of the Commonwealth from State law, his honour sought to qualify this by adding:

> If...the Commonwealth Parliament had never enacted s.56 of the *Judiciary Act* 1903, it is surely unthinkable that the Victorian Parliament could have made a law rendering the Commonwealth liable for torts committed in Victoria. The Commonwealth may, of course become affected by State laws. If, for example, it makes a contract in Victoria, the terms and effects of that contract may have to be sought in the *Goods Act 1928 (Vict.)*. But I should think it impossible to hold that the Parliament of Victoria could lawfully prescribe the uses which might be made by the Commonwealth of its own property, the terms upon which that property might be let to tenants, or the terms upon which the Commonwealth might provide accommodation for immigrants introduced into Australia.[4]

The difficulty with the "Affected By" doctrine, and that with which the passage from *Bogle's Case* only briefly deals, is identifying the mechanism by which the Commonwealth has come to be affected by those "State laws" which actually do affect it. This question has divided both judges and academic commentators and comes down principally to a separation between those who insist that, in certain areas, "State law" applies to the Commonwealth of its own force, and those who deny this, asserting that no State laws apply to the Commonwealth in the absence of Commonwealth "enabling" legislation.

Both views purport to truly represent the "Affected By" doctrine as developed in the cases by Sir Owen Dixon. To determine which is correct — in the sense of truly reflecting Sir Owen Dixon's conception of the doctrine — it is necessary to consider the cases in which allusion to it was made.

In *Farley's Case*[5] Sir Owen Dixon observed that :

> In many respects the executive government of the Commonwealth is affected by the condition of general law. For instance, the general law of contract may regulate the formation, performance and

2 Official Liquidator of E O Farley Ltd v Federal Commissioner of Taxation (1940) 63 C L R 278 at 308, Uther's Case, at 528, Essendon Corporation Case, at 24

3 Commonwealth v Bogle (1953) 89 C L R 229 (a judgment with which Dixon C J concurred "both in the conclusions and the reasons it expresses")

4 Id at 259-260

5 Official Liquidator of E O Farley Ltd v F C T (1940) 63 C L R 278 at 308

> discharge of the contracts which the Commonwealth finds it necessary to make in the course of the ordinary administration of government. Where there is no Federal statute affecting the matter, an exercise of the legislative power of the State over the general law of contract might incidentally apply in the case of the Commonwealth alike with the citizen. In the practical administration of law, the decision of questions of that sort depends less upon constitutional analysis than on s.80 and perhaps s.79 of the *Judiciary Act 1903-1939.*

This dicta would seem to suggest that his honour considered the application of State legislation to Commonwealth contracts to be purely legislatively based, i.e. dependant upon *ss79* and *80* of the *Judiciary Act* . The case would thus seem to rebut the proposition that "State law", at least State law dealing with contract liability, applies to the Commonwealth of its own force.

It is suggested, however, that *Farley's Case* is inconclusive. Later cases treat the question far more directly.

A case of great importance to this question is *Uther's Case.* It has been greatly relied upon by those academic commentators who have denied the exclusivity of the legislative basis of Commonwealth susceptibility to State law. In his judgment in the case, Sir Owen Dixon observed:

> General laws made by a State may affix legal consequences to give description of transactions 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*, State law is made applicable to matters in which the Commonwealth is a party by *s.79* of the *Judiciary Act.*[6]

Certain academic commentators have interpreted this passage as evincing the proposition that State legislation which bears upon Commonwealth contracts, apply to these contracts of their own force.[7] The *Judiciary Act* has been viewed as simply a "further" or an "additional"[8] reason for the application to the Commonwealth of these State laws.

Further suggestion of such a proposition may be seen in *Bogle's Case.* In the passage already quoted from Fullagar J's judgment, his honour juxtaposes the effect of State legislation upon Commonwealth contract liability and Commonwealth tort liability. The effect of State legislation

6 Uther v Commonwealth (1947) 74 C L R 508 (emphasis added)

7 See L Zines *The High Court and the Constitution* (1981) 272, J I Fajgenbaum and P Hanks, *Australian Constitutional Law* 2nd ed (1980) 530-532

8 Zines, id , at 272

upon the latter is expressed to be wholly dependent upon the *Judiciary Act* whereas, with respect to the former, no mention is made of the *Judiciary Act* or any other "enabling" Commonwealth legislation.

(a) The Distinction Between Tort and Contract

It is suggested that these cases clearly establish that Sir Owen Dixon recognized a distinction between the bases of Commonwealth liability under State law in contract and Commonwealth liability in tort. Thus commentators such as Howard[9], and in this respect probably also Evans[10] and Lane,[11] who have not recognized this distinction are wrong. An example of this confusion is Professor Lane's treatment of Sir Owen Dixon's judgment in *Shaw, Savill and Albion Co. Ltd.* v. *Commonwealth*.[12] In the case itself, his honour, is commenting upon the effect of s56 of the *Judiciary Act*,[13] observed that: the provision, though procedural in form of expression, casts upon the Executive a liability for tort from which at common law the Crown was immune.[14]

Professor Lane in quoting this passage has added to it significantly:

> [T]he provisions, though procedural in form of expression, casts upon the Executive a liabilty for tort (or contract) from which at common law the Crown was immune.[15]

As will be presently discussed, it is not the case that the Crown is immune at common law in contract, but more significantly, Professor Lane's addition distorts the distinction between Commonwealth tort and contract liability which Sir Owen Dixon clearly recognized.

Yet although the distinction between tort and contract as regards the "Affected By" doctrine is deeply rooted in the cases, its actual significance is not at all clear. In no case to which reference has been made, nor indeed in any other case is any explanation proferred as to why the bases of Commonealth susceptibility to State law in tort and in contract is different. The question has thus been left to academic speculation. Yet amongst those who have recognized the tort/contract dichotomy, only Professor Zines has suggested a possible explanation.[16] Others who have

9 Howard 'Some Problems of Commonwealth Immunity and Exclusive Legislative Powers' (1972) 5 *F L Rev* 31 (substantially reproduced in *Australian Federal Constitutional Law* 2nd ed (1972) 102-103)

10 Evans, 'Rethinking Commonwealth Immunity' (1972) 8 *M U L R* 521

11 P H Lane, *The Australian Federal System* 2nd ed (1979) 530-535

12 (1940) 66 C L R 344

13 The relevance of s 56 of the Judiciary Act (Cth) will be considered in detail below

14 Shaw, Savill and Albian Co Ltd v Commonwealth (1940) 66 C L R 344 at 357-358

15 Lane, supra n 11, at 532

16 Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *F L Rev* 221, substantially reproduced in this respect in *The High Court and the Constitution* (1981) Chapter 14

similarly appreciated the dichotomy have gone no further than to simply identifiy its existence.[17]

the Zines approach

Professor Zines' suggestion is that State legislation which affects the tort liability of the Commonwealth applies to the Commonwealth solely by force of the *Judiciary Act*. As to contract the *Judiciary Act* is simply a "further" reason for the application of State law to the Commonwealth. The difficulty is of course to identify the "initial" reason, i.e. the reason other than the *Judiciary Act* for the application of State law to Commonwealth contracts.

For this "initial" reason Professor Zines relies upon H.L.A. Hart's distinction between "primary rules" of law — such as rules of criminal law and tort, where the law directs or orders that a certain activity be prohibited — and "secondary rules" of law — such as those of contract, succession to property, trusts etc. where the raison d'etre of the particular legal rule is not to prohibit a particular activity, but rather to provide a facility within which a legal relation may take place.[18]

Professor Zines insists that this distinction between different "kinds" of legal rule lies at the root of Sir Owen Dixon's view of the "Affected By" doctrine. State law which purports to prohibit an acitivty of the Commonwealth does not apply to the Commonwealth independently of enabling Commonwealth legislation. Thus State "tort" law requires enabling Commonwealth legislation before it can affect the Commonwealth, whereas State law which merely provides a facility without which certain actions and relations would have no legal significance, affect the Commonwealth of their own force.

As Zines concedes, there would be obvious difficulties in determining in certain cases whether a particular rule of State law was primary or secondary,[19] and as his rather tortuous characterization of the *Prices Regulation Act (S.A.)*, considered in *Bogle's Case* exemplifies, the distinction is at times tenuous.[20]

Professor Zines' analysis leads to the rather curious result that both the *Judiciary Act* and the "facilitative mechanism" have precisely the same effect with respect to Commonwealth contract liability. Both independently establish that State legislation applies to Commonwealth contracts. Such

17 Sawer, 'State Statutes and the Commonwealth' (1958-1963) 1 *Tas U L Rev* 580 at 582, Fajgenbaum and Hanks, supra n 7, at 530-532

18 See H L A Hart, *The Concept of Law* (1961) 77-79

19 See Zines, supra n 7, at 273

20 Id at 274-75

legislation applies because of the *Judiciary Act* and because of the "facilitative mechanism".

This analysis is based entirely upon Professor Zines' interpretation of the word "further" in the passage previously quoted from *Uther's Case* :[21]

> [I]f the Commonwealth contracts with a company the form of the contract will be governed by s.348 of the *Companies Act* (*N.S.W.*). Further, State law is made applicable to matters in which the Commonwealth is a party by s.79 of the *Judiciary Act*.

"Further" is interpreted as meaning "additional".[22]. Thus, the *Judiciary Act* becomes for Professor Zines a reason additional to the "facilitative mechanism" to explain the application of State laws to Commonwealth contracts.

To give such an interpretation to the word "further", leading ultimately to this dual, over-lapping basis of Commonwealth contract liability, is however fundamentally incorrect.

the crown immunity approach

The true basis of the distinction between Commonwealth tort and contract liability under State law is not to be found in Professor Hart's distinction between primary and secondary rules of law. Rather it is to be explained by the notion of Crown Immunity. Brief mention was made of this earlier with respect to Sir Owen Dixon's judgment in the *Shaw, Savill and Albion Case.*

It is proposed to consider the Crown Immunity argument in some detail, firstly in a unitary state where the Crown is represented by only one government so that the signifaicance of this argument in the Australian federal system — where the Crown is manifest in both the Commonwealth and States — can be fully appreciated.

At common law the Crown is totally immune from suit.[23] By a Petition of Right, however, a subject wishing to sue the Crown could have this immunity revoked in certain matters and the action heard. Although the Petition was initially discretionary and formally remained so, the procedure developed to a point where the petition was granted automatically for certain actions.

It is perhaps strictly incorrect to speak of the Petition being available for various "actions". It developed at a time when the law concerned itself

21 Supra n 6

22 Zines, supra n 7, at 272

23 See *Blackstone's Commentaries on the Laws of England* 18th ed (1829) Vol 3 chapter 17, W S Holdsworth, *A History of English Law* 3rd ed (1944) vol 9 at 18, G L Williams, *Crown Proceedings* (1947) 2, P W Hogg, *Liability of the Crown* (1971) 2-3, M Aranson and H Whitmore, *Public Torts and Contracts* (1983) 1

essentially with the provision of remedies[24] and it was the appropriateness of a particular remedy, rather than a particular action, which determined its application.

The remedy for which the Petition was originally available, and which conditioned its availability until the very end, was restitution of property. Property whether real or personal, wrongfully seized or possessed by the Crown could be recovered by a Petition of Right. The law relating to the availability of the Petition developed gradually until, by the twentieth century, it was obtainable for recovery of; debts due under a contract or by statute; damages for breach of contract; unliquidated sums due by force of statute; and for the return of property wrongully in the hands of the Crown.[25]

Thus in contract, Crown immunity could be, and was, overcome at common law. However, the Petition, linked as it was to wrongful possession of property, was not available for suits against the Crown in most areas of tort,[26] and thus at common law, although the Crown was amenable to the general law of contract, it was immune from a wide range of tort actions.

The concept of the "general law of contract" encompasses both common law rules and any legislation which amends, codifies or in any way affects these common law rules.[27] Consequently, any legislation of this nature would apply to Crown contracts as long as the intention to bind the Crown was stated expressly in the statute or deducible from it by necessary implication.[28]

Thus it can be seen that at common law in a unitary system, the Crown enjoys no immunity from legislation which affects its contracts and such legislation applies to Crown contracts of its own force.

It is to be observed that two distinct processes have been identified; firstly, the revocation of Crown immunity in contract; and secondly, the application of law to this area of non-immunity. This distinction is a very important one. In unitary states, such as the United Kingdom, the distinction is somewhat artificial for once the immunity of the Crown is revok-

24 For an account of the early development of the Petition of Right see Holdsworth, id at 7-45

25 Williams, supra n 23, at 2

26 The Petition of Right was available for some actions in tort, though authority exists limiting this to actual wrongful possession of property Thus a mere "interference with the use or enjoyment of property" was considered insufficient, see Tobin v R (1864) 16 C B N S 310 (143 E R 1148), Williams, supra n 23, at 17 It should be noted that Holdsworth has questioned this kind of limitation, asserting that the petition was available for nuisance as well as 'mere trespasses', see Holdsworth, supra n 23, at 42-43

27 Uther v Commonwealth (1947) 74 C L R 508 at 528

28 As to this rule of statutory interpretation see Province of Bombay v Bombay Municipal Corporation [1947] A C 58, D C Pearce, *Statutory Interpretation in Australia* 2nd ed (1981) 84, Hogg, supra n 23 Chapter 7, Williams, supra n 23, at 52

ed, questions as to the application and choice of law become straightforward. However, with respect to the contract liability of the Commonwealth, the question is far more complicated.

Since the enactment of the various Crown proceedings legislation in Australia[29] the Petition of Right has become obsolete. These Acts, as well as exposing the Crown to liability in tort within their particular jurisdictions, legislatively revoke Crown immunity in contract. This revocation of immunity, as has already been seen, is also effected at common law by the Petition of Right. Of what consequence is this legislative revocation? Hogg, in discussing the Crown in right of the Commonwealth, has summarized the effect of the *Judiciary Act* as being to, "preserve the Crown's liability in contract while simplifying the procedure for suit."[30]

It can be seen therefore, that the immunity of the Crown in right of the Commonwealth in contract is revoked at common law, and thus independent of the *Judiciary Act*. Yet the common law is silent as to the choice of law that is to apply to this area of "no-immunity". The *Judiciary Act* determines this choice of law. Sections *79* and *80* direct that State law, a concept which we have seen[31] includes both common law and State legislation, is to apply to those areas in which the Crown in right of the Commonwealth enjoys no immunity.

(b) The Two Approaches Compared

The inconsistency of the Crown immunity approach and the approach of Professor Zines is patent. Zines does not recognize the distinction between the revocation of Commonwealth immunity in contract and the application of law within this area of liability. His analysis would insist that the Commonwealth is not immune and that State law necessarily applies in areas of laws such as contract and trusts simply because it is State law which creates the facility into which the Commonwealth freely enters and accepts liability. The *Judiciary Act* is seen merely as a "further" through independent reasons for the non-immunity of the Commonwealth and the application to the Commonwealth of State law.

Both Professor Zines' view and the other, based upon the notion of Crown immunity, purport to reflect Sir Owen Dixon's conception of the "Affected By" doctrine. It is suggested that the Crown immunity explanation is in fact "correct". In both *Farley's Case* and *Uther's Case*, Sir Owen Dixon's reference to the *Judiciary Act* with respect to Commonwealth con-

29 Claims against the Government and Crown Suits Act 1912 (N S W), Claims against the Government Act 1886 (Qld), Supreme Court Act 1935-1969 (S A), Supreme Court Civil Procedure Act 1932 (Tas), Crown Proceedings Act 1958 (Vic), Crown Suits Act 1947-1954 (W A), Judiciary Act 1903-1969 (Cth)

30 Hogg, supra n 23, at 118

31 Supra n 27

tract liability relates only to *ss. 79* and *80*. In other judgments his honour clearly expressed the view that these provisions were merely choice of law rules. Once the Commonwealth was found to be liable within a certain area of law, *ss. 79* and *80* apply State law to the Commonwealth "where federal law is itself insufficient"[32]. In neither *Farley's Case* nor *Uther's Case* is mention made of the *Judiciary Act* as to the revocation of Commonwealth immunity in contract. This is because the problem is dealt with independently of the *Judiciary Act*; at common law by the Petition of Right. This argument is quite clearly contrary to Professor Zines' view which sees the *Judiciary Act* as both revoking the immunity of the Commonwealth in contract and applying State law to Commonwealth contracts.

This interpretation of Sir Owen Dixon's conception of the basis of Commonwealth contract liability is reinforced by his honour's treatment of Commonwealth tort liability. As will be presently discussed, his honour recognized the distinction between revocation of immunity and choice of law with respect to Commonealth torts. No reason in logic exists why this distinction would not be uniform throughout the "Affected By" doctrine.

2 Criticism

To this point, consideration of the "Affected By" doctrine has been concerned principally with its definition. It is necessary now to critically consider the doctrine as properly understood.

(a) The Constitutional Argument

Before considering the Dixonion notion of the "Affected By" doctrine, it is necessary to deal with the suggestion that has been made in a number of cases that the Constitution itself exposes the Commonwealth to liability under certain State laws.

Certain High Court Justices have considered that *s75(iii)* of the Constitution, though expressed to be merely jurisdictional, imposes substantative liability upon the Commonwealth. Thus, in all matters in which the Commonwealth is a party, not only does the High Court have original jurisdiction but the Commonwealth is susceptible to State law. The most important of these cases is *The Commonwealth* v. *New South Wales*[33] in which three, and probably four, Justices[34] ascribed to this view of *s. 75(iii)*. Later Evatt J. was to adopt the same construction of *s. 75(iii)*[35]

32 Musgrave v Commonwealth (1937) 57 C L R 514 at 547
33 (1923) 32 C L R 200
34 Knox C J , Isaacs, Rich, Starke JJ (Higgins J dissenting)
35 Heiman v Commonwealth (1935) 54 C L R 126

and reason from it by analogy in interpreting *s. 75(iv)* of the Constituion[36]. In recent dicta it would seem as though Murphy J. may also have expressed some approval of it[37], though his honour's reasoning on this point is equivocal.

By interpreting *s. 75(iii)* in this way, it was seemingly assumed by all of these Justices that it is the Constitution itself which exposes the Commonwealth to liability under State law. The only question upon which their honours exercised their minds was to identify the particular section of the Constitution which effects this. This was certainly the emphasis of the Court in the *Commonwealth* v. *New South Wales*. Yet by reasoning in this way these members of the Court have assumed, without any real question, what is perhaps the most contentious premise in their whole argument, i.e. that it is the Constitution which exposes the Commonwealth to liability under State law. *Section 75(iii)* was found to apply by a process almost of default. *Section 78* of the Constituion, which primae facie creates a power in the Commonwealth to determine its own substantive liabilty, was read down for fear of the Commonwealth abusing such a power. Thus, *s. 75* of the Constitution was, by itself, found to expose the Commonwealth to substantive liabilty in the matters variously listed and thus, by *s. 75(iii)*, to liability "in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party."

It is to be noted that by interpreting *s. 78* "down" in this way, an accepted rule of Australian constitutional interpretation has been contravened, for "as a general rule, a legislative power is not to be given a restricted construction for fear that it may be abused."[38]

There are however more substantial objections to the suggestion of a constitutional basis of Commonwealth susceptibility to State law.

Firstly, there is no indication of what is encompassed by the term "matters" in *s. 75(iii)*. Does it include all matters, i.e. is the immunity of the Commonwealth revoked as to all matters of State law? If the liability imposed by *s. 75(iii)* is a less expansive one, upon what basis is any such limitation founded? None of these questions have been adequately dealt with in the cases.

Secondly, a substantive, expositive interpretation of *s. 75(iii)* would leave the scope of s.56 of the *Judiciary Act* in great doubt. It is not proposed

36 New South Wales v Bardolph (1934) 52 C L R 455 at 458

37 Johnstone v Commonwealth (1978) 23 A L R 385 at 391

38 Western Australia v Commonwealth ("The First Territorial Senators Case") (1975) 134 C L R 201 at 248 (per Gibbs J), see also Melbourne Corporation v Commonwealth ("The State Banking Case") (1947) 74 C L R 31 at 82 (per Dixon J)

to pursue this point now, but as will be seen when *s.56* is considered in detail, the cases would seem to suggest an operation for *s.56* which is inconsistent with a substantive interpretation of *s.75(iii)*.

Thirdly, and most significantly, an interpretation of *s.75(iii)* which would provide a constitutional basis for Commonwealth liability under State law is contrary to an overwhelming body of High Court and State Supreme Court authority[39] and has been criticized in numerous academic writings.[40] The approach would, for instance logically insist, and the majority judges in *Commonwealth v New South Wales* concede, that Commonwealth liability, derived as it is from the Constitution, could not be altered other than by the *s.128* mechanism. Yet the High Court has upheld legislation enacted by the Commonwealth Parliament which clearly alters the liability of the Commonwealth.[41]

It is suggested that the approach to Commonwealth liability based directly upon the Constitution will not be followed and that the body of authority contrary to it is so overwhelming that it has effectively been over-ruled.[42]

(b) The Petition of Right and the Judiciary Act

The broad outline of this particular approach to Commonwealth liability was previously, though only partially, described. Its origin can be traced with a certain degree of directness to Sir Owen Dixon. It provides that the immunity from suit which the Crown in right of the Commonwealth enjoyed at common law is revoked, in certain actions by the common law mechanism of the Petition of Right, and with certain other actions, the immunity from which was not revoked at common law, by *s.56* of the *Judiciary Act*. State law is then applied to these areas of "non-immunity" by ss.79 and 80 of the *Judiciary Act*. These latter provisions

39 Commonwealth v New South Wales (per Higgins J), Musgrave v Commonwealth (1937) 57 C L R 514, Werrin v Commonwealth (1938) 59 C L R 150, Baume v Commonwealth (1907) 4 C L R 97, Shaw, Savill and Albion Co Ltd v Commonwealth (1940) 66 C L R 344, Suele v Commonwealth (1967) 116 C L R 353, Asiatic Steam Navigation Co Ltd v Commonwealth (1956) 96 C L R 397, Johnstone v Commonwealth (1978) 23 A L R 385, Maguire v Simpson (1977) 139 C L R 362, Washington v Commonwealth (1939) 39 S R (N S W) 133, Froelich v Howard [1965] A L R 1117

40 Renard, 'Australian Interstate Common Law' (1970) 4 *F L Rev* 87, Lane, supra n 11, at 531, E Campbell, 'Federal Contract Law' (1970) 44 *A L J* 580, Hogg, 'Suits Against the Commonwealth and the States in Federal Jurisdiction' (1970) 44 *A L J* 425, Aranson and Whitmore, supra n 23, Chapter 1, R D Lumb and K W Ryan, *Constitution of the Commonwealth of Australia Annotated* 2nd ed (1977) 286-287, M Pryles and P Hanks, *Federal Conflict of Laws* (1974) 184-209, Sawer, 'Judicial Power Under the Constitution' in R Else-Mitchell (ed), *Essays on the Australian Constitution* 2nd ed (1961) Professor Sawer (at 82), in his typically pugnacious style, labelled the Isaacs Rich Starke interpretation of *s 75(iii)* "absurd"

41 Werrin v Commonwealth (1938) 59 C L R 150

42 In the cases upon s 75(v) of the Constitution it should be noted that the High Court has consistently followed a line of reasoning similar to that of the majority in Commonwealth v New South Wales – see Renard, supra n 40, at 88 fn 6, Lumb and Ryan, supra n 40, at 289 It is suggested, however, that this does not bear upon the inadequacy of the *s 75(iii)* approach

are, however, simply choice of law rules[43] and by definition do not alter the substantive effect of the law which they direct to be chosen.[44] It is unquestioned that only State laws which either expressly or by necessary implication refer to the Crown in right of the Commonwealth, have the capacity to bind the Commonwealth[45]. Consequently, ss.79 and 80, standing alone, would only pick up and apply to the Commonwealth State laws which had such a capacity.

Yet for the "Affected By" doctrine to retain any real significance, the broad spectrum of State law which would apply to the Commonwealth but for this principle of statutory construction, must apply to the Commonwealth.

The application of such laws to the Commonwealth is the function of s.64 of the *Judiciary Act*. Section 64 provides that in suits to which the Commonwealth is a party, the rights of the Commonwealth shall "as nearly as possible be the same... as in a suit between subject and subject." For this to be the case, all State law relevant to the particular suit must apply. The interpretative principle — or presumption — against State laws which do not expressly or by implication necessarily refer to the Commonwealth, is not a right upon which a subject may rely and thus, by force of s.64, is not a right upon which the Commonwealth may rely.[46]

As was discussed in the first part of this paper, there are two steps to this analysis; revocation of Commonwealth immunity and application of State law to the Commonwealth. Difficulties, however, inhere in this approach. As to the revocation of Commonwealth immunity, it was seen to depend upon the Petition of Right mechanism and s.56 of the Act. The difficulty with the Petition of Right mechanism is the imprecision of the definition of the areas of Commonwealth liability. The four areas previously identified, extracted from Williams "Crown Proceedings", are insufficiently particular. As to s.56, the difficulties must be enumerated in considerably more detail.

Section 56 of the Act is, in form of expression, procedural, granting jurisdiction to various named courts over claims against the Commonwealth in "contract or tort." A preliminary problem is whether, by

43 See Parker v Commonwealth (1965) 112 C L R 295, Evans, supra n 10, at 534-535, Hogg, supra n 40, at 428-430, Phillips 'Choice of Law in Federal Jurisdiction' (1961) 3 *M U L R* 170

44 John Robertson and Co Pty Ltd v Ferguson Transformers (1973) 129 C L R 65

45 Municipal Council of Sydney v Commonwealth (1904) 1 C L R 208, R v Registrar of Titles (Vic) Ex parte Commonwealth (1915) 20 C L R 379, Pirrie v McFarlane (1925) 36 C L R 170 (per Isaacs J), Gauthier v K (1918) 56 Can S C R 176, Essendon Corporation v Criterion Theatres (1947) 74 C L R 1

46 See Hogg, supra n 40, at 432-34, Asiatic Steam Navigation Co Ltd v Commonwealth, (1956) 96 C L R 397, at 427 (per Kitto J) Such a view of s 64 has received considerable judicial support, see Shaw, Savill and Albion Co Ltd v Commonwealth (19340) 66 C L R 344, at 352 (per Starke J), Pitcher v Federal Capital Commission (1928) 41 C L R 385, Washington v Commonwealth (1939) 39 S R (NSW) 133 See also Asiatic Steam Navigation Co Ltd at 416 (per Dixon C J)

placing the revocation of Commonwealth immunity in contract on a legislative basis, yet not mentioning other areas of law within which the Commonwealth was similarly not immune because of the Petition of Right, s.56 has impliedly repealed the effect of the Petition of Right mechanism in these other areas. Though there has been no consideration of this matter in any of the cases, it is suggested that such an interpretation of s.56 would be exceptional. The concept of "preservation" which was earlier said to encapsulate the effect of the *Judiciary Act* upon Commonwealth contract liability,[47] would hardly suggest such a result.

There are however greater difficulties with s.56. The section is expressed to be simply procedural, investing various Courts with jurisdiction over the various matters mentioned. Thus, a substantive interpretation of s.56 can not be based upon a literal reading of it. Gibbs J., in dismissing the importance of s.56 to the question of Commonwealth liability under State law, placed considerable reliance upon the unlikelihood of such a substantive interpretation resulting from a literal reading of the section.[48] In other circumstances this objection may have been of some consequence. However, in this area of the law, its importance is not great. If literalism was to be resorted to with all of the relevant sections of the *Judiciary Act*, no provision would be found to expose the Commonwealth to liability under State law.

A more important objection to a substantive reading of s.56 of the Act derives from a premise upon which such an interpretation of the provision is necessarily based; that is, that a grant of jurisdiction to a Court over certain matters either presupposes or *uno actu* revokes an immunity which the Crown may have enjoyed in those matters. It is difficult to comprehend how this proposition could be limited to s.56 and not applied to *s.75* of the Constitution. If it could not be so limited the anomaly would emerge of two separate provisions revoking Commonwealth immunity, if not in totally identical fields, then at least in fields which substantially overlap; s.56 in tort and *s.75(iii)* in "all matters in which the Commonwealth is a party."

This anomaly highlights what certain academic commentators have considered to be the inherent terminological contradiction of s.56 of the *Judiciary Act* and *s.75(iii)* of the Constitution. Lane for example,[49] after interpreting *s.75(iii)* to be simply jurisdictional, considered s.56 of the Act:

> True s.56 is procedural in form of expression — that is, it literally speaks only of bringing a suit in prescribed courts — nevertheless,

47 Hogg, supra n 23, at 118

48 See Maguire v Simpson (1977) 139 C L R 362, at 381

49 Lane, supra n 11, at 532-533

> s.56 by exposure to suit casts upon the Executive a liability for tort (or contract) from which at common law the Crown was immune. Besides if s.56 was a procedural or jurisdictional provision, then it would be pointless so far as it purported to grant High Court jurisdiction in a claim against the Commonwealth. For that jurisdiction is already available in *s.75(iii)* of the Constitution.

Thus Lane reasons that, because s.56 and *s.75(iii)* are mutually exclusive, and, as *s.75(iii)* is unquestionably jurisdictional, s.56 cannot be jurisdictional and must therefore be substantive.

An unavoidable step in Lane's reasoning, and in the reasoning of those who interpret s.56 of the Act as revoking Commonwealth Crown immunity in tort, is to characterize the provision as deriving its constitutional authority from *s.78* of the Constitution. Section *78* authorizes the Commonwealth Parliament to "make laws conferring rights to proceed against the Commonwealth". It is clearly the constitutional provision upon which that provision of the *Judiciary Act* which revokes Commonwealth Crown immunity in tort — whether it be s.56 or, as will later be discussed, s.64 — derives.

It is questionable whether this characterization of s.56 is so free from doubt as to warrant the unreasoned acceptance of it that has occurred. It would seem at least arguable that s.56 of the Act derives its authority, not from *s.78*, but from *s.77(iii)* of the Constitution. This latter provision empowers the Commonwealth Parliament to invest State Courts with federal jurisdiction over matters mentioned in *ss.75* and *76* of the Constitution. Such a characterization of s.56 would result in it having an exclusively jurisdictional operation owing to the prevailing interpretation of *s.77(iii)*.[50] Yet such a characterization of s.56 would not, contrary to Lane's thesis, clash with a jurisdictional interpretation of *s.75(iii)*. Section *75(iii)* of the Constitution relates to the original jurisdiction of the High Court, whereas s.56 of the Act would deal with the investiture of State Courts with federal jurisdiction.

Such a characterization of s.56 is open to no real objections based upon a literal interpretation, though difficulties with it do exist. Principal among them is the difficulty in reconciling this interpretation of s.56 with ss.39 and 39A of the *Judiciary Act* which deal more generally with the question of the federal jurisdiction of State Supreme Courts. These latter two sections would seem to subsume within their parameters the more specific provision of s.56 if interpreted in the way suggested. A procedural inter-

50 See Queen Victoria Memorial Hospital v Thornton (1952) 87 C L R 144, Comınos v Comınos (1972) C L R 588, Pearce v Cocchiaro (1976) 14 A L R 440, see also Lumb and Ryan, supra n 40, at 302-304

pretation of s.56 would also, of course, require that some other basis for the revocation of Commonwealth tort immunity be found.

(c) Section 64 of the Judiciary Act

As can be seen there are considerable difficulties with the Dixonian notion of the 'Affected By' doctrine. It is due principally to these difficulties that firstly Kitto J.[51] and more recently Gibbs J.[52], have reacted against the Dixonian view of the doctrine and departed from it radically. Sir Owen Dixon saw the 'Affected By' doctrine as being of a rather limited nature. The Kitto/Gibbs approach expands the scope of Commonwealth liability considerably and is based upon reasoning very different from that relied upon by Dixon.

The Kitto/Gibbs approach insists that Commonwealth liability under State law is determined exclusively by s.64 of the *Judiciary Act*. This insistence is synthesized most succinctly in Kitto J's judgment in the *Asiatic Steam Navigation Case*:

> [T]he rights referred to in s.64 include the substantive rights to be given effect to in the suit. If that be so, it follows that s.64 must be interpreted as taking up and enacting as the law to be applied in every suit to which the Commonwealth or a State is a party, the whole body of the law, statutory or not, by which the rights of the parties would be governed if the Commonwealth or State were a subject instead of being the Crown.[53]

Section 56 is ascribed no role in this process. Similarly Gibbs J. in *Maguire* v. *Simpson*[54] after discussing the authorities exhaustively, concluded that in his opinion "it was s.64, unaided by s.56, that rendered the Commonwealth subject to the State legislation considered in those cases".

This approach then insists that it is s.64 of the Act alone which both revokes Commonwealth immunity to suit and applies State law to this area of liability. In fact the distinction between these two processes, which is integral to the Dixonian analysis, is otiose in the Kitto/Gibbs approach. Section 64 simply makes the Commonwealth liable under State law.

Section 64 speaks, however, simply as a direction to a Court hearing an action to which the Commonwealth — or a State — is a party directing that the rights of the Commonwealth are to be "as nearly as possible" the same as those of a subject.

51 Asiatic Steam Navigation Case (1956) 96 C L R 397
52 Maguire v Simpson (1977) 139 C L R 362
53 (1956) 96 C L R 397 at 427
54 (1977) 139 C L R 362 at 381

To base Commonwealth susceptibility to State law exclusively upon such a provision leads to considerable difficulties. Firstly, it is to be observed that s.64 of the Act construed literally would seem unable to fulfill this role. The section speaks of the rights of the Commonwealth in suits to which the Commonwealth is a party. Section 64 thus presupposes that the Commonwealth may be a party to a suit without being expositive of such liability itself. Yet there are problems with the Kitto/Gibbs approach of far greater consequence.

It was seen when discussing the Dixonian notion of the 'Affected By' doctrine that it was possible to reconcile and meaningfully interpret all of the relevant provisions of the *Judiciary Act*, that is, ss.56, 64, 79 and 80. However, on the Kitto/Gibbs approach, with s.64 being seen as exclusively determinitive of Commonwealth exposure to State law, it becomes rather difficult to ascribe any realistic function to ss.56, 79 or 80, the latter two provisions in particular, as s.64 is seen to make its own choice of law. As to s.56, however, the position is more complicated.

On the Kitto/Gibbs approach, for s.56 of the Act to have any meaningful content, it would necessarily have to be jurisdictional, being read simply as granting jurisdiction to the various Courts listed in actions against the Commonwealth in tort or contract. But even this limited interpretation of s.56 leads to considerable difficulties. As will be discussed later, if s.64 is interpreted in such a way as to be determinitive of Commonwealth susceptibility to State law, the areas of State law to which the Commonwealth would consequently be exposed is considerably greater than merely tort and contract. If s.56 of the Act is construed as being jurisdictional, it can obviously only grant jurisdiction in actions of tort and contract, and even then, only in actions brought "against" the Commonwealth. From where then do Courts derive their jurisdiction to hear actions, other than those of tort or contract, to which the Commonwealth is party? From where, for instance, did the High Court derive its authority to hear *Maguire* v. *Simpson*, involving, as it did, neither an action in tort or contract? Similarly, from where did the High Court derive its authority to hear the *Asiatic Steam Navigation Case*, which involved a tort action brought by the Commonwealth? Obviously the jurisdiction in both cases derived from *s. 75(iii)* of the Constitution, which provides that "in all matters in which the Commonwealth is a party" the High Court shall have original jurisdiction. Yet even this creates difficulties. If *s. 75(iii)* creates jurisdiction in these non-tort/contract 'matters', why not over tort and contract as well? There would seem to be no justification for reading the word 'matters' in *s. 75(iii)* as; 'matters excluding actions of contract or tort brought against the Commonwealth'. To counter this it could be argued that *s. 75(iii)* and s.56 do not cover

the same ground — the former being concerned only with the original jurisdiction of the High Court, while the latter involves the vesting of federal jurisdiction in Courts other than the High Court. This is of course perfectly true. However, the difficulty then becomes in deciding why, as a matter of legislative intent, Parliament would choose to vest jurisdiction with respect to Commonwealth tort and contract liability in these other Courts, while leaving other areas of liability to which the Commonwealth is exposed by s.64 of the Act, to be determined by the High Court in its original jurisdiction.

Another difficulty with this jurisdictional interpretation of s.56 of the *Judiciary Act* is to reconcile such an interpretation with ss.38, 38A and 39 of that Act. These latter provisions provide two things of relevance. Firstly, in suits to which the Commonwealth is a party by s.64, where the Commonwealth is being sued by a State Government, the jurisdiction of the High Court is exclusive.[55] Secondly, where in a 's.64 suit' the parties are the Commonwealth and a private litigant, "the several Courts of the States shall ... be invested with federal jurisdiction".[56] Thus, jurisdiction over contract and tort suits to which the Commonwealth is a party is, by ss.38 and 39, either exclusively vested in the High Court or, in other circumstances, vested in State Courts. Thus ss.38 and 39 would seem to make the 'jurisdiction vesting' of s.56 totally unnecessary.

This indeterminancy of the function of ss.56, 79 and 80 is a very real problem for the Kitto/Gibbs approach, for as a matter of legislative intent, it must be presumed that the provisions have some meaning.

Yet perhaps an even greater difficulty with the Kitto/Gibbs approach concerns the constitutional validity of s.64 of the Act if interpreted 'expansively'. A peculiar feature of the case of *Maguire* v. *Simpson* is that, although recognized by two Justices,[57] the problems associated with the constitutional validity of s.64, when given such a broad interpretation, were not considered in any detail.[58] Clearly s.64 was enacted under the purported authority of *s. 78* of the Constitution. Yet, as Jacobs J. points out in *Maguire* v. *Simpson*,[59] it is doubtful whether the full extent of such an interpretation of s.64 is authorized by *s. 78*:

> It is true that *s. 78* of the Constitution deals only with rights to proceed against the Commonwealth or a State whilst s.64 of the *Judiciary*

55 Re s 38 of the Judiciary Act

56 Re s 39 of the Judiciary Act

57 Gibbs & Jacobs JJ

58 This problem was observed by O'Connor J in Baume v Commonwealth (1907) 4 C L R 97 who, however, interpreted s 64 as referring only to procedural "rights" and not substantive "rights" an interpretation which subsequently has been discredited Owing to this, his Honour's observations on the constitutional question are no longer authoritative

59 (1977) 139 C L R 362 at 404-05

> *Act* deals with rights of the Commonwealth or a State in all suits where the Commonwealth or a State is a party, plaintiff or defendant. The source of the power to prescribe the rights of a State (or the Commonwealth) when that State (or the Commonwealth) is seeking relief rather than the subject of proceedings against it is not clear to me...

Clearly from the terms of *s. 78* of the Constitution, s.64 of the Act is, at least in part, invalid. Section *78* only authorizes Commonwealth legislation which grants "rights to proceed against the Commonwealth". Section 64 of the Act, by dealing with actions to which the Commonwealth is a party, irrespective of whether the action was brought by or against the Commonwealth, clearly exceeds the constitutional mandate. This being the case, doubts must be expressed as to the result reached in cases such as the *Asiatic Steam Navigation Case* and *Maguire* v. *Simpson* where, in both cases, standing was recognized in the Commonwealth to bring an action under State Government legislation.

One final observation on the Kitto/Gibbs approach; if s.64 is read as exhaustively determining the areas of State law within which the Commonwealth is liable, State law applies to the Commonwealth in 'any suit' to which the Commonwealth is a party. No limitation as to the nature of suits or the areas of State law within which actions may be brought can be discerned from s.64 itself. To found Commonwealth liability upon such a basis would be tantamount to abolishing Commonwealth immunity from State law for it would seem that under s.64 there would be no area of State law from which the Commonwealth was immune, that is from which it had not become affected.

Conclusion

It has been argued in this paper that neither explanation of the 'Affected By' doctrine is compelling and that both are in fact open to a variety of objections. The purpose of this has not been to salvage one view or the other or to reconcile all or any of the disparate authorities that exist. It is doubted whether such is achievable. A thorough reconsideration of this matter by the High Court is required. Yet perhaps of even greater need is a more fundamental reconsideration of the whole question of Commonwealth immunity from State law, and the authority of the decision in the *Cigamatic Case*. Recent indications in the case of *Maguire* v. *Simpson*[60] suggest that perhaps the High Court awaits such an opportunity.

60 Id at 404 per Jacobs J