The Legal Personality of the Commonwealth of Australia

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Thesis resubmitted towards the degree of

Doctor of Philosophy in Law

University of Oxford

Hilary Term, 2016

Supervisor: Professor Joshua Getzler

Word count: 99,984 words

ABSTRACT

Sebastian H. Hartford Davis, New College, *The Legal Personality of the Commonwealth of Australia* (DPhil Thesis, Hilary Term 2016)

The thesis explores the legal personality of the Commonwealth of Australia under the *Constitution of the Commonwealth of Australia*, against the background of constitutional litigation in the High Court of Australia, current to 1 February 2016. It assesses that jurisprudence alongside a wider enquiry into state and corporate personality, with some relevant comparative analysis of UK, Imperial, Canadian and New Zealand materials.

The thesis advances the positive claim that the *Constitution* created a legal person, called the 'Commonwealth'. In order properly to understand the nature of this legal person, as a matter of domestic law, it is necessary to discriminate between the legal or 'constitutional person' formally constituted by the *Constitution*, and the Commonwealth of Australia conceived more widely as a 'government', or as a 'nation'/'political community'. There is a recent tendency in judgments of the High Court of Australia to suppose either that the Commonwealth (government), or the Commonwealth (nation), is a legal person. This thesis argues that both notions are wrong.

The theory that the Commonwealth (government) is a legal person forms a primary focus in this regard. Primary governmental institutions in Australia are constituted by law as entities or groups, which perform functions of importance to the legal system but which do not have and cannot form legal relations. Such institutions are sometimes described as 'organs', 'branches', 'aspects' or 'facets' of a 'polity' or 'body politic', which is a legal person. These are words of fluid meaning, but which carry the flavour of the Hobbesian state: a sense that the 'Commonwealth' is a legal person incorporating every aspect of 'its' power and authority, and embracing all those who act on 'its' behalf. The thesis argues that this theory and its associated terminology misrepresent the nature and extent of the Commonwealth's legal personality. The thesis advances correlative negative claims: the Commonwealth (government) is not a legal person, and the Commonwealth (constitutional person) is not the government. The terms 'polity' and 'body politic' are often also used to describe the Commonwealth (nation), as distinct from the Commonwealth (government), sometimes with the implication that the Commonwealth (nation) is a legal person. The thesis advances reasons for rejecting this theory, whilst acknowledging that any such theory depends to a significant degree on what definition is adopted of the concept of 'nation'.

Thus, the thesis argues that the legal person known as the 'Commonwealth' must not be confused with other significations of the word. The thesis contends for a narrower theory: the government and the nation are not legal persons, and must be distinguished from the Commonwealth (constitutional person). The narrow theory aligns with English antecedents, and avoids the conceptual

problems otherwise thrown up by the need to explain how the amorphous interests, natural and artificial persons, offices, institutions and powers that are identified with the government or nation of Australia could rationally be understood as emanating from a single legal person. For legal purposes, neither the government nor the nation is treated as a unified legal personality. Rather, in different ways, both the government and the nation are constructed or comprised of a multitude of legal persons, one of which is the Commonwealth (constitutional person).

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TABLE OF ABBREVIATIONS

ACTSC	Supreme Court of the Australian Capital Territory
Adm	High Court of Admiralty
CA	Court of Appeal of England and Wales
CCJAJ	Appellate Jurisdiction of the Caribbean Court of Justice
Ch	Court of Chancery
CP	Court of Common Pleas
Cth	Commonwealth of Australia
CUP	Cambridge University Press
Exch	Court of Exchequer
FCA	Federal Court of Australia
FCAFC	Full Court of the Federal Court of Australia
HCA	High Court of Australia
HL	House of Lords
Imp	Imperial (Parliament)
Ireland SC	Supreme Court of Ireland
KB	Court of King's Bench; King's Bench Division of the High Court of England and Wales
NFSC	Supreme Court of Norfolk Island
NSW	New South Wales
NSWCA	Court of Appeal of New South Wales
NSWCCA	Court of Criminal Appeal of New South Wales
NSWIndCmn	New South Wales Industrial Commission
NSWSC	Supreme Court of New South Wales
NT	Northern Territory
NYCA	New York Court of Appeals
NZ	New Zealand
OUP	Oxford University Press
PC	Privy Council
PDA	Probate, Divorce and Admiralty Division of the High Court of England and Wales
QB	Court of Queen's Bench; Queen's Bench Division of the High Court of England and Wales
Qld	Queensland
QSC	Supreme Court of Queensland
RSACC	Constitutional Court of South Africa
RSASCA	Supreme Court of Appeal of South Africa
SA	South Australia
SASCB	Supreme Court of South Australia in Banco
SASCFC	Full Court of the Supreme Court of South Australia
SCC	Supreme Court of Canada
Tas	Tasmania
UK	United Kingdom
VCA	Court of Appeal of Victoria
Vic	Victoria
VSCFC	Full Court of the Supreme Court of Victoria
WA	Western Australia
WASC	Supreme Court of Western Australia
WASCFC	Full Court of the Supreme Court of Western Australia

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TABLE OF DEFINED TERMS

body politic; ALSO polity; political entity; political unit; political organism; politically organised body; body corporate	This term has multiple, overlapping significations and is, for this reason, generally eschewed in this thesis. Among its principal uses are signifying a *nation*, *government*, *political community*, *legal (constitutional) person*, and a body constituted for public purposes (that may or may not be a *legal person*). SEE: 5, 16, 109, 116; and, generally, Introduction, §(1)(c) and chapter I, §(3)(d).
broad theories	The theories of *government (constitutional person)* and *nation (constitutional person)*; theories according to which the *legal (constitutional) person* implied by a constitution is identified with the broad concepts of the *government* or the *nation*. SEE: 24, 29.
capacity	An ability to have, create, modify or terminate legal relations with other *legal persons*; an ability to enjoy legal rights, duties, powers, privileges or immunities; a legally recognised ability to do or refrain from doing something. Examples of capacities include the abilities to exercise a right of payment, hold a right in respect of real property, accept a gift, and to contract. The existence of capacities entails *legal personality*. SEE: 1, 2, 5, 50, 338.
Commonwealth (constitutional person); ALSO: theory of Commonwealth (constitutional person)	The *legal (constitutional) person* identified according to the theory according to which the *Constitution* establishes a *legal (constitutional) person* known as 'the Commonwealth' with certain *capacities*, separate from other manifestations of, and concepts signified by, 'the Commonwealth' (such as the *Commonwealth (government)* and the *Commonwealth (nation)*). This thesis advocates this theory. SEE: 1, 10, 12, 23, 24, 30, 136; and, generally, chapter II, §§(3)(a)-(3)(b).
Commonwealth (geographical area)	The geographical area administered by the *government* of the Australian Federation and occupied by that *nation*; one signification of the constitutional term 'Commonwealth'. SEE: 175, 181, 184, 192, 236; and, generally, chapter II, §(2)(b).
Commonwealth (government)	The central *government* of the Australian Federation (including legislative, executive and judicial elements); one signification of the constitutional term 'Commonwealth'. This thesis contends that that *government* is not a *legal (constitutional) person*. SEE: 10, 11, 24.
Commonwealth (nation)	The *nation* known as the Commonwealth of Australia (including its central [federal] and State people, territory and *governments*); one signification of the constitutional term 'Commonwealth'. This thesis contends that that *nation* is not a *legal (constitutional) person*, though it has international *legal personality*. SEE: 10, 10, 136, 161, 163; and, generally, chapter II, §(2)(a)

constitutional agency	The relationship between the *Commonwealth (constitutional person)* and the *Executive Government* of the Commonwealth, according to which the former is represented by, acts through and in the person of, or has legal responsibility for the actions of, members of the latter. SEE: 28, 239, 240.
constitutional person	SEE: *legal (constitutional) person*.
executive government; ALSO: Executive Government	The executive (as distinct from the legislative or judicial) element of a *government*, including the officers and institutions comprising the ministry and administrative bureaucracy; in particular, the 'Executive Government' of the Commonwealth of Australia. This thesis contends that that Executive Government is not a *legal (constitutional) person*, though such a person—the Commonwealth (Constitutional person)—may act through the Executive Government by reason of *constitutional agency*. SEE: 11, 19, 23, 27, 28, 52; and, generally, chapter III, §(2).
government (constitutional person); ALSO: theory of government (constitutional person)	The *legal (constitutional) person* identified according to the theory according to which the *Constitution* establishes the *Commonwealth (government)* as a *legal (constitutional) person* (distinct from the *Commonwealth (nation)*). This thesis rejects that theory. SEE: 19, 20; and, generally, chapter II, §(3) and chapter III.
government; ALSO: governmental power	An abstraction encompassing the totality of officers and institutions established by a constitution for the control and administration of a people and a territory, often subdivided into legislative, executive and judicial elements. 'Governmental power' refers to the whole power of the community administered by the government so established. SEE: 11, 30, 120.
legal (constitutional) person; ALSO: legal (constitutional) personality	An artificial *legal person*, whose existence is derived (expressly or impliedly) from a constitution (written or unwritten), that is associated, in a general sense, with a *government*. The existence of a legal (constitutional) person signifies existence within the legal system of a recognised unit, in respect of which *capacities* have been provided by the system's constitution in connection with its governance. SEE: 2, 7, 9.
legal person; ALSO: artificial legal person; legal personality; legal personhood;	A unit—an individual human being, a group of individuals or an entity (for example, a corporation)—that enjoys one or more *capacities* and, in the case of a group or entity, does so independently of the individuals that comprise it. An artificial legal person is a legal person other than a human being. Legal personality is entailed by the existence of *capacities* and *rules of attribution*. A unit either is, or is not, a legal person: while legal persons may have or not have particular capacities, legal personality itself is not a matter of degree. SEE: 5, 8, 22.
narrow theory	The theory of *Commonwealth (constitutional person)*; a theory according to which the *legal (constitutional) person* implied by a constitution is identified only as a construct of its *capacities* and is not identified with the broad concepts of the *government* or the *nation*. SEE: 24, 30, 193.

nation (constitutional person); ALSO: theory of nation (constitutional person)	The *legal (constitutional) person* identified according to the theory according to which the *Constitution* establishes the *Commonwealth (nation)* as a *legal (constitutional) person*. This thesis rejects that theory. SEE: 21, 22, 127.
nation; ALSO 'nation/political community'	A *political community* incorporating a *government* recognised in the international community of states. The language of 'body politic' and 'state' sometimes articulates this concept of the nation. Accordingly, in this thesis, 'nation/political community' is sometimes used to indicate this concept of the nation. SEE: 11, 21, 128.
political community; ALSO body politic	An abstraction encompassing the totality of a united political community, including its people, territory, and *government*. Political communities may exist at a subnational level (including, in one sense, the States within the Australian Federation); those existing at a national level, the *governments* of which are recognised in the international community of states, are *nations*. The language of 'body politic' sometimes refers to this concept of a political community. SEE: 11, 21, 117, 161.
rules of attribution	Rules by which the actions of individuals (and, in some cases, groups or institutions) are counted as, influence, or affect actions of a legal person; rules determining how a legal person exercises its *capacities*. Since rules of attribution make it possible for a legal person to act independently of the individuals, groups and institutions through whom it must necessarily act, the legal personality of a *legal person* is a shorthand for such rules. SEE: 9, 24, 27, 195.

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INTRODUCTION

To understand the legal personality of the Commonwealth of Australia, as a matter of domestic law, it is necessary to discriminate between the legal or 'constitutional person' formally constituted by the *Commonwealth Constitution*,[1] and two broader denotations of the Commonwealth: as a 'government,' having legislative, judicial and executive authority; and as an evolving 'nation' or 'political community,' bound together by constitutional principles and having a collective social and political life within defined geographical borders. The 'constitutional personality' of the Commonwealth is difficult to establish from positive legal materials, and these distinctions are not always clearly drawn or maintained. Some might decry the absence of a stronger 'state' concept in the Australian legal order. The concept of the 'state', uncertain in meaning and extent, is both unnecessary and ahistorical. The distinctions between 'constitutional person', 'government' and 'nation' cohere with the history of Australian constitutionalism, and best explain the cases in which constitutional personality has been explored in over a century of legal history.

The starting point for analysis is that the Commonwealth is a legal person created by provisions of the *Constitution* implying that something termed the 'Commonwealth' has 'capacity' for rights and duties. This legal person is described here as the Commonwealth (constitutional person), which serves both to emphasise its constitutional genesis and to distinguish other senses of the

[1] The *Commonwealth Constitution* (*Constitution*) was enacted in Commonwealth of Australia Constitution Act 1900 (Imp) (Constitution Act), s 9.

term 'Commonwealth' to which it will be necessary to refer. The expression 'constitutional person' describes, within the category of legal persons, one that derives its existence from a constitution (written or unwritten) and whose 'capacities' are exercised, and liabilities impacted and accrued, by persons, officers or institutions forming part of the 'government' (predominantly the Executive Government).

The unadorned proposition that the Commonwealth is a legal (constitutional) person is functionally indisputable. There are many statements in the *Commonwealth Law Reports* to substantiate it,[2] and still more authorities assuming or confirming that the Commonwealth has 'capacity'; for example, to exercise a right of payment,[3] to hold a right in respect of real property,[4] to accept a gift,[5] and to contract.[6] However, expressed in those terms, the proposition (that the 'Commonwealth' has 'legal personality'), suppresses a number of disputable

[2] eg *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 (*Municipal Council Case*) 231 (Griffith CJ); *Commonwealth v Baume* (1905) 2 CLR 405, 418 (O'Connor J); *R v Sutton* (1908) 5 CLR 789 (*Wire Netting Case*) 797 (Griffith CJ), 805 (O'Connor J), 813 (Isaacs J); *Commonwealth v Bogle* (1953) 89 CLR 229, 259 (Fullagar J); *South Australia v Commonwealth* (1962) 108 CLR 130 (*Railway Standardisation Case*) 154 (Windeyer J); *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No 1)*) 184 [21] (French CJ), 237 [154] (Gummow and Bell JJ), 253 [205] (Hayne J).

[3] *Re KL Tractors Ltd* (1961) 106 CLR 318, 334-335 (Dixon CJ, McTiernan and Kitto JJ).

[4] eg *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397, 414 (Fullagar J); and *Commonwealth v Anderson* (1960) 105 CLR 303, 313 (Fullagar J); *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262, 288 (Walsh J); *Sydney Training Dept Snapper Island Ltd v Brown* (1987) 14 ALD 464 (FCA) 465 (Wilcox J), saying that issuing a notice to quit was the 'exercise by the Commonwealth of a private property right vested in it'; *Clamback v Coombes* (1986) 13 FCR 55 (FCA) 64 (Evatt J), holding that the decision of an officer of the Department of Civil Aviation to erect a fence on land comprising the Bankstown Airport in Sydney was a decision 'on behalf of the Commonwealth of Australia to exercise its common law rights to fence its own land'.

[5] *Worthing v Rowell and Muston Pty Ltd* (1970) 122 CLR 89, 125 (Windeyer J), saying that the Commonwealth could 'accept a gift from a landowner by his deed or will of land' and 'could become by gift possessed of pictures or books for public use and enjoyment'.

[6] See *Williams (No 1)* (n 2) 252 [201] (Hayne J).

premises. The topic is underexplored, such that the premises have remained mostly unstated and the disputes unventilated. There is now a particular need for exploration. That is because the recent demise of the 'Crown', as a rubric for analysing constitutional personality, has engendered new idioms, which suppress what may be different theories. As Gageler J said in a recent case, the particular position of the Commonwealth as legal person is 'incompletely theorized even today'.[7] Certain judgments[8] create the impression that the Commonwealth has been reinvented in the image of the continental '"state" as legal person'; an image to which allusions are occasionally made in Australian legal discourse, but which proves historically obscure,[9] politically coloured,[10] and legally inexact.[11]

(1) Definitions

The topic lacks a vocabulary of technical terms possessing precise and settled connotations.[12] Indeed, in some cases the imprecision of the key terms appears to

7 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11 (*Queensland Rail*) [53] (Gageler J).

8 The cases are surveyed in chapter I, §(3)(d)(iv) at 127ff.

9 Quentin Skinner, 'A Genealogy of the Modern State' (2009) 162 *Proceedings of the British Academy* 325, 326, saying that to 'investigate the genealogy of the state is to discover that there has never been any agreed concept to which the word *state* has answered.' See also Quentin Skinner, *Visions of Politics* (CUP 2002) vol II, 406, saying that the 'Hobbesian conception of the state' established itself at the heart of political discourse throughout Western Europe without always being well understood by those using it. The 'chief architects of the confusion', according to Skinner, were the 'self-consciously common sensical writers who reduced the "powers of the state" into some identified "person or apparatus of government".'

10 David Runciman, *Pluralism and the Personality of the State* (CUP 1997) 69-70.

11 See, eg, Gustav Boehmer, *Grundlagen der Bürgerlichen Rechtsordnung* (Mohr 1950) 182 [S Kraus tr, 19 September 2013].

12 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*Melbourne Corporation Case*) 83 (Dixon J); and cf David M Walker, 'The Legal Theory of the State' (1955) 65 *Juridical Review* 255, 255, saying that the subject 'is bedeviled with faulty terminology.'

be quite deliberate.[13] The term 'Crown', for example, remains in use to describe constitutional personality in the United Kingdom,[14] Canada,[15] New Zealand,[16] the Caribbean Community,[17] and (less so) in Australia,[18] notwithstanding that it is openly acknowledged as having multiple distinct but closely related meanings. It is unnecessary to elaborate the distinct meanings of the 'Crown',[19] save to the extent necessary to explore the notion of the ''Crown' as corporation'. Countries

13 cf Frederic W Maitland, *The Constitutional History of England* (CUP 1908) 418, saying that the term 'Crown' was a '*convenient* cover for ignorance', which 'save[d] us from asking difficult questions' (emphasis added).

14 The use of the 'Crown' in the United Kingdom is discussed at chapter I, §(1) at 34ff.

15 See, eg, *Wells v Newfoundland* [1999] 3 SCR 199, discussed as part of chapter III, §(1)(b)(i) at 221ff.

16 cf DL Mathieson, 'Does the Crown have Human Powers' (1992) 15 *New Zealand Universities Law Review* 117; Phillip A Joseph, 'The Crown as a Legal Concept' [Part I] (1993) *New Zealand Law Journal* 126 and 'The Crown as a Legal Concept' [Part II] (1993) *New Zealand Law Journal* 179.

17 See, eg, *Campbell v Attorney-General* [2009] CariCJ 6 (CCJAJ).

18 See, eg, *New South Wales Rifle Association v Commonwealth* (2012) 266 FLR 12 (NSWSC).

19 cf *Sue v Hill* (1999) 199 CLR 462, 497 [83]ff (Gleeson CJ, Gummow and Hayne JJ). The term has been said to mean the Queen: eg Sir William Wade, 'Crown, Ministers and Officials: Legal Status and Liability' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (OUP 1999) 24, and Christopher Forsyth, *Administrative Law* (10th edn, OUP 2009) 39; to symbolise government power: eg Stanley De Smith, Jeffrey Jowell, Andrew Le Sueur, Catherine Donnelly and Ivan Hare, *De Smith's Judicial Review* (7th edn, Sweet & Maxwell 2013) 204; *Town Investments Ltd v Department of the Environment* [1978] AC 359 (HL) (*Town Investments (HL)*) 397 (Lord Simon); to mean the 'Government' in the sense of the executive branch: see ibid, 381B-D (Lord Diplock), 395E (Lord Morris), 398G (Lord Simon); and, finally, to express the relationship between the UK and its dependent territories: see *Halsbury's Laws* (5th edn, 2009) vol 13, para 717; *R (on the Application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 (HL) 485-486 [47] (Lord Hoffmann); Anne Twomey, 'Responsible Government and the Divisibility of the Crown' [2008] *Public Law* 742, 743 and 747-752, discussing the different meanings of the 'Crown'. Additionally, the 'Crown' is the name given to a 'corporation sole' or a 'corporation aggregate', which may be bound by or take advantage of statutes, and which has various capacities. The last concept is explored in chapter I, §(1) at 34ff. The apparently interchangeable senses of the word led Mr GL Haggen to say in 1925 that the term means 'all things to all men': 'The Function of the Crown' (1925) 41 *Law Quarterly Review* 182, 186. Whilst that no doubt overstates the matter, it emphasises the need for caution in any attempt to isolate just one of its different senses. See also Ernst H Kantorowicz, *The King's Two Bodies* (Princeton University Press 1997) 381-382, summarising the 'tangle of intersecting, overlapping and contradictory strands of political thought' that converged in the notion of the 'Crown'.

departing from the language of the 'Crown', such as Ireland,[20] South Africa[21] (and, as will be seen, Australia[22]), have come to depend instead upon equally ambiguous terms, like 'the state', which are openly recognised as lacking a universal meaning.[23] This is an unsatisfactory state of affairs. The explanatory power of any particular theory of constitutional personality depends to a great extent on the definitions given to key concepts. The absence of a settled vocabulary perpetuates and reflects the absence of proper theorisation. This thesis will entirely avoid terms like 'Crown', 'state', 'body politic', 'polity' and the like, save where they are necessary in the interpretation of particular usages.[24]

(a) The Concept of Legal Personality

This thesis defines a 'legal person', in accordance with Australian law, as a group[25] or entity with 'capacity' to be in a legal relationship.[26] 'Capacity' assumes the ability to have legal relations with other legal persons; to create, modify or

20 eg *Byrne v Ireland* [1972] 1 IR 241 (Ireland SC).

21 cf *Minister of Defence and Military Veterans* [2015] ZACC 26, [17]-[19] (RSACC).

22 The rejection of the 'Crown' in Australia is explored in chapter I, §(3) at 96ff.

23 *Holeni v Land and Agricultural Development Bank of South Africa* (2009) 4 SA 437 (RSASCA) [11].

24 In such cases, inverted commas signify the absence of a concrete understanding of what is meant by these terms.

25 In the sense of a number of human beings coordinating activity with a view to a shared obligation: John Finnis, 'The Priority of Persons' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP 2000) 6-9, 10 fn 55.

26 This formulation resembles the definition given in Albert Kocourek, *Jural Relations* (2nd edn, Bobbs Merrill 1927) 291-292, but represents the law of Australia as established in: *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309, 360 (O'Connor J); *Chaff and Hay Acquisition Committee v JA Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 (*Chaff and Hay Acquisition Committee Case*) 385 (Latham CJ); *Williams v Hursey* (1959) 103 CLR 30, 52 (Fullagar J); *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620, 639-640 (Brennan CJ, Deane and Dawson JJ), 659-661 (Toohey, McHugh and Gummow JJ); and, most recently, *Queensland Rail* (n 7) [16] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ), [53] (Gageler J).

terminate legal relations.[27] This is a functional definition, in that what really matters is not the inner nature of legal personality, per se, but rather the specified consequences of having legal personality:[28] the capacity for mutual legal relations. To that extent, the definition avoids historic, Aristotelian debates[29] about the essence or inhering nature of legal personality, per se.[30]

[27] cf David Campbell and Phillip Thomas (eds), *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld* (Dartmouth 2001) 9, 11 and 21-22, where 'capacity' is described as the '(legal) power to effect … change in legal relations'; Herbert LA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 96, speaking of 'power-conferring rules', which 'confer on individuals power to vary their initial positions under the primary rules'; Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans, first published 1945, Lawbook Exchange 2007) 90-91, speaking of 'competence'. Points of agreement in the literature on this topic are identified in Torben Spaak, 'Norms that Confer Competence' (2003) 16 *Ratio Juris* 89, 91. The preference for the term 'capacity' in this thesis follows *Re KL Tractors* (n 3) 334-335 (Dixon CJ, McTiernan and Kitto JJ), rejecting the language of 'power' used by Aicken QC (argument reported at 328); and *Re Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte the Defence Housing Authority* (1997) 190 CLR 410 (*Henderson's Case*) 454 (McHugh J), defining 'capacity' as the 'legal right or power to do or refrain to do something'; and see *Williams (No 1)* (n 2) 252-253 [200]-[204] (Hayne J), noting the importance of distinguishing 'capacity' from 'power', a point made in general terms by Anne Davies, *The Public Law of Government Contracts* (OUP 2008) 88.

[28] John Dewey, 'The Historical Background of Corporate Legal Personality' (1926) 35 *Yale Law Journal* 655, 661.

[29] In 1938, Professor Wolff said that continental jurists could be divided into two groups: those who had written on the nature of legal persons, and those who had not yet done so: Martin Wolff, 'On the Nature of Legal Persons' (1938) 54 *Law Quarterly Review* 494, 494.

[30] See Dewey (n 28) 661. There were three main theories: Wolff (n 29) 496ff. The 'fiction' theory was that only human beings can be persons, therefore all non-human legal persons were *fictions* of the law. The 'concession' theory insisted that legal personality is derived or conceded from the sovereign power. The 'organic' theory was that legal persons have a real and not merely a fictional existence, because groups have a mind and will of their own, independently of the human beings comprising them.

The common law recognised as legal persons only human beings, who are legal persons from birth until death,[31] and various types of corporation.[32] Statute has expanded that dichotomy. The thesis assumes that it is legitimate to apply to the text of the *Constitution* the principle that the legislature is free to create any legal person it desires, with any capacities it thinks fit.[33] According to Australian law, a statute that assumes that an entity or group has 'capacity', independently of the human beings comprising it, will have created a separate legal person.[34] Assuming that this principle also holds true of the *Constitution*, the term 'constitutional person' might then be used to describe a legal person that derives its existence, explicitly or implicitly, from a constitution (written or unwritten). This assumption is an important methodological premise, because the *Constitution* does not expressly create the Commonwealth as a body corporate (or 'body politic').

31 *Yunghanns v Candoora No 19 Pty Ltd* [1999] VSC 524, [82] (Gillard J). Australian courts have followed *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276 (QB) 279 (Sir George Baker P) in holding that a foetus is not a legal person: *K v T* [1983] 1 Qd R 396 (QSC) 400 (Williams J); aff'd *Attorney-General (Qld); Ex rel Kerr v T* (1983) 46 ALR 275 (HCA) 277 (Gibbs CJ); *Lynch v Lynch* (1991) 25 NSWLR 411 (NSWCA) 416 (Gleeson CJ, Clarke and Hope JJA); *Watt v Rama* [1972] VR 353 (VSCFC) 360 (Winneke CJ and Pape J); *R v King* (2003) 59 NSWLR 472 (NSWCCA) 486 [73] (Spigelman CJ). In a different age, it was possible in some legal systems for a human being not to be a legal person, eg, slaves: see Patrick W Duff, *Personality in Roman Private Law* (The University Press 1938) 16; Kocourek (n 26) 293; see also Finnis (n 25) 6-9.

32 *Queensland Rail* (n 7) [17] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ). By 2007, Professor Armour was able to record seventeen forms of legal person currently recognised by English law: John Armour, 'Companies and Other Associations' in Andrew Burrows (ed), *English Private Law* (2nd edn, OUP 2007) 152 [3.07].

33 *National Union of General and Municipal Workers v Gillian* [1946] KB 81 (CA) 85 (Scott LJ); cited with approval in *Chaff and Hay Acquisition Committee Case* (n 26) 391 (McTiernan J). See also Patrick J Fitzgerald, *Salmond on Jurisprudence* (12th edn, Sweet & Maxwell 1966) 308. The twelfth edition reproduces with very few changes Sir John's Salmond's original text, and was described as 'illuminating' by the Court of Appeal in *Bumper Corporation v Commissioner of Police of Metropolis* [1991] 1 WLR 1362, 1371H (Purchas LJ).

34 See *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL) (*Taff Vale Case*); and *Chaff and Hay Acquisition Committee Case* (n 26) 384-386 (Latham CJ), 390 (Starke J), 396 and 397 (Williams J); *Church of Scientology v Woodward* (1982) 154 CLR 25, 56 (Mason J).

Legal personality is traditionally understood as being unitary,[35] in the sense that a group or entity either is, or is not, a legal person.[36] In *Williams v Hursey*, Fullagar J rejected a submission that a statute conferring legal personality upon a trade union 'for the purposes of the Act'[37] had, to that extent, qualified the trade union's legal personality. In a passage approved subsequently,[38] Fullagar J said that the 'notion of qualified legal capacity is intelligible, but the notion of qualified legal personality is not'.[39] This reflects the essentially functional definition of legal personality, embodied in Maitland's oft-repeated notion that legal persons are 'right-and-duty-bearing units'.[40] The language of 'units' reflects the unitary and irreducible nature of legal personality. To refer to a group or entity as having capacities necessarily means that it is a legal person; to refer to an artificial legal person necessarily implies no more than the existence of a unit having capacities.

This definition of legal personality has significant methodological consequences for theories of constitutional personality. If legal personality implies no more than the existence of capacities, and if legal personality is

35 *Queensland Rail* (n 7) [53] (Gageler J).

36 cf Kocourek (n 26) 292.

37 *Conciliation and Arbitration Act 1904* (Cth), s 136.

38 *McJannet* (n 26) 659-661 (Toohey, McHugh and Gummow JJ); *Queensland Rail* (n 7) [36] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ), [53] (Gageler J). See also *Frizziero v Rice* (1992) 110 ALR 549 (FCAFC) 562 (Gray J).

39 *Williams v Hursey* (n 26) 52 (Fullagar J), 45 (Dixon CJ agreeing), 86 (Kitto J agreeing), and 108 (Taylor J agreeing).

40 The language of 'units' was explained by Harold AJ Ford, *Unincorporated Non-Profit Associations* (Clarendon Press 1959) xx-xxi, in a passage extracted with approval in *McJannet* (n 26) 659-661 (Toohey, McHugh and Gummow JJ). See also Frederic W Maitland, 'Moral Personality and Legal Personality' in David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (CUP 2003) 63.

unitary, then it follows that the *nature* of a legal person (regarded as a subject) can be deduced from its capacities, and from relevant 'rules of attribution' by which those capacities are exercised or influenced. Thus, the proposition that the Commonwealth is a legal (constitutional) person establishes *only* the existence of a unit within the legal system (called the 'Commonwealth'), in respect of which capacities have been constitutionally conferred and legally recognised.[41] The thesis begins with this self-contained conception of legal personality, and proceeds to test whether and how that conception has been embellished or elaborated by the *Constitution*, by judicial interpretation of the capacities of the Commonwealth (constitutional person), and by the operation of rules of attribution. The explanatory power of particular theories of constitutional personality can be tested by assessing how they correspond to, accord with and make sense of the legal relations that the Commonwealth (constitutional person) is permitted to have, or is recognised as having.[42]

(b) The Different 'Commonwealths'[43]

The term 'Commonwealth' is used in several different senses, some of them 'connected so closely that it is peculiarly important to distinguish them.'[44] The

41 cf *Queensland Rail* (n 7) [53] (Gageler J).

42 cf Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (6th edn, Macmillian 1929) 118: 'it depends on the legal institutions and forms of every commonwealth *whether and how far* the State or its titular head is officially treated as an artificial person' (emphasis added). In this expression of method, I have borrowed from Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Hart 2015) 2.

43 The term 'Commonwealth' bears additional meanings, not explored in this thesis, when used to describe the body of independent sovereign states, including Australia, which mutually recognise the Queen as the symbol of their free association: *Halsbury's Laws* (n 19) vol 13 [701].

44 William Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edn, Sweet and Maxwell 1910) 73.

Constitution uses the term to denote, relevantly: the nation known as the Commonwealth of Australia ('Commonwealth (nation)'), the central government of the Federation ('Commonwealth (government)'), and the Commonwealth (constitutional person). The High Court has acknowledged that the term 'Commonwealth' is used in different ways in the text.[45] There is no guidance on how to distinguish different meanings in different contexts, and this thesis highlights (and seeks to combat) a tendency to correlate or connect two or more of those distinct conceptions. The process of defining and distinguishing the different meanings of the term is central to understanding the Commonwealth's constitutional personality.

The Commonwealth (nation) is 'the community united as a nation',[46] which has international legal personality.[47] This is a composite conception, comprising the territorial land mass, a 'government' (recognised internationally), the people, and the component States and Territories. All are bound together or united, in an 'indissoluble Federal Commonwealth',[48] by core rules established by the

45 eg *JT International SA v Commonwealth* (2012) 250 CLR 1 (*Plain Packaging Case*) 72 [185] (Hayne and Bell JJ) (and see 34 [42] (French CJ) and 63 [150] (Gummow J) agreeing); *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (2004) 217 CLR 264, 271 [23] (Gummow J) (*Goldie*); *Kruger v Commonwealth* (1997) 190 CLR 1, 56 (Dawson J); *Commonwealth v Mewett* (1997) 191 CLR 471, 498 (Dawson J). See also Geoffrey Sawer, 'Government as Personalised Legal Entity' in Leicester C Webb (ed), *Legal Personality and Political Pluralism* (Melbourne University Press 1958) 123-124; R Darryl Lumb, '"The Commonwealth of Australia" – Constitutional Implications' (1979) 10 *Federal Law Review* 287, 287.

46 *R v Sharkey* (1949) 79 CLR 121, 153 (Dixon J).

47 *New South Wales v Commonwealth* (1975) 135 CLR 337, 373 (Barwick CJ). There is academic and judicial debate as to when Australia obtained international legal personality. This thesis assumes that it is valid to distinguish the international from domestic legal personality, as to which see Westel W Willoughby, 'The Juristic Conception of the State' (1918) 12 *American Political Science Review* 192, 208 explaining why what is there called the 'constitutional state' must be different from the 'state' in international law.

48 Constitution Act (n 1), preamble.

Constitution, such as representative government,[49] federalism and the separation of powers.[50] The term 'nation' has a fluidity and ambiguity of meaning.[51] In *Davis v Commonwealth*,[52] Brennan J said that the 'reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition.' There may be different understandings of the Commonwealth (nation), and this thesis does not seek to reconcile all of the attendant issues. What matters here is to show that a (perhaps *the*) prominent view conceives of the Commonwealth (nation) as subsuming or embracing the people, the government, and the States. The States (not being nations) are also conceived for certain purposes as a composite of the people of the State, the territory and the State government. To this extent, the term 'political community' is also useful to describe this composite, since it can envelope both national and sub-national entities. As will be shown below, this composite characteristic is significant for theories of constitutional personality.

The Commonwealth (government) is the central government of the Federation. The word 'government,' not a term of art,[53] ordinarily signifies: first, the 'totality of continuing institutional machinery, incorporating all the varying offices and roles' of government;[54] and, second, more narrowly, the 'executive as distinct from the legislative branch of government, represented by the Ministry

49 *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413 (Isaacs J).

50 See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ); *McCloy v New South Wales* (2015) 325 ALR 15 (HCA) [106] (Gageler J).

51 See Andrew Vincent, *Theories of the State* (Basil Blackwell 1987) 26-29.

52 *Davis v Commonwealth* (1988) 166 CLR 79, 110-111 (Brennan J).

53 *Ryder v Foley* (1906) 4 CLR 422, 433 (Griffith CJ).

54 Vincent (n 51) 30.

and the administrative bureaucracy'.[55] Government in the first sense captures all of the branches: legislative, executive and judicial. It means the 'organised form of government which the fundamental rules of law have established'.[56] To avoid confusion, this thesis will use the expression 'executive government' to denote government in the second sense. The term 'governmental power' corresponds to the first sense of the word and signifies the 'whole power of a community'.[57] For present purposes, the vital characteristic of the Commonwealth (government), which distinguishes it from the Commonwealth (nation), is that government is distinct from the people who are governed, and the Commonwealth (government) does not embrace the States (who have separate governments).

The Commonwealth (constitutional person) is the legal person implied by the *Constitution* as having capacity for legal relations. Until recently, the 'Commonwealth' in this sense was understood as a compendious expression for 'the Crown', or the 'Crown in right of the Commonwealth'. Chapter I shows that there is deep and unresolved ambiguity about the 'Crown', which presented significant complications in a federal system. The foundation Justices of the High Court held that the 'Crown' was to be regarded not as one, but as several legal (constitutional) persons, '*representing*' the Commonwealth and States as 'distinct and separate sovereign bodies'. [58] The implicit understanding of the constitutional person as being distinct from, and *representing*, the body of people,

[55] *Sue v Hill* (n 19) 499 [87] (Gleeson CJ, Gummow and Hayne JJ); *Plain Packaging Case* (n 45) 72 [186] (Hayne and Bell JJ).

[56] *Burns v Ransley* (1949) 79 CLR 101, 115 (Dixon J).

[57] See *Enever v The King* (1906) 3 CLR 969, 989 (O'Connor J).

[58] *Municipal Council Case* (n 2) 231 (Griffith CJ).

is a highly significant feature. In 1920, a differently constituted Court held in the *Engineers' Case*[59] that distinctions between the 'Commonwealth King' and the 'State King' (as those juristic persons came to be called) overlooked the 'elementary' proposition that the 'Crown' was unified and indivisible throughout the Empire.[60] That triggered a change in terminology, but it did not involve any rejection of the distinction between the constitutional person and the 'body' that it represented. The Court emphasised that the term 'Commonwealth' comprehended '*both* the strictly legal conception of the King in right of a designated territory, *and* the people of that territory considered as a political organism.'[61] Thus, 'Crown in right of the Commonwealth' was substituted for 'Commonwealth King', and 'political organism' was substituted for 'sovereign body'. The core notion, that the 'Crown' was distinct from but *represented* the 'political organism', persisted.

59 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*Engineers' Case*) 152 (Knox CJ, Isaacs, Rich and Starke JJ).

60 cf *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 185-186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), pointing to factors that would subsequently displace the validity of this conclusion. The development of the Commonwealth as an association of independent nations involved an implicit acceptance of the divisibility of the 'Crown' (insofar as it referred to the Sovereign). See also *Halsbury's Laws* (n 19) vol 13 [717], saying: 'In fundamental respects, there are as many Crowns as there are independent realms'; see also *Sue v Hill* (n 19) 490 [59] (Gleeson CJ, Gummow and Hayne JJ) referring to the impact in this connection of the *Australia Act 1986* (Cth).

61 *Engineers' Case* (n 59) 146-147 (Knox CJ, Isaacs, Rich and Starke JJ) (emphasis added).

More recently, the High Court has rejected the term 'Crown' as being maladjusted to the text and structure of the *Constitution*.[62] The 'Crown' is a 'device', so it is said, to *dispense* with the need to recognise the 'state' as a legal person.[63] What is meant by 'state' has not been articulated.[64] Still, it is reasonably clear that the rejection of the 'device' of the 'Crown' was intended to unwind or reverse the *dispensing* with the 'state' as legal person. The theoretical effect of this change, if such a change was intended, is probably modest: there has been no change in the Commonwealth's capacities or liabilities, no expansion or contraction in the rules of attribution, and no adjustment in the approach to doctrinal matters affecting or affected by constitutional personality. Nevertheless, there has been an important change in terminology and nomenclature, which shifts subtly between judges and may imply different understandings of constitutional personality.

(c) 'Body Politic'/'Polity' etc

Since the eclipse of the 'Crown', certain meretricious idioms have emerged from obscure origins to describe the Commonwealth (constitutional person). The two most prominent terms are 'body politic' and 'polity', but there are a number of

62 *Mewett* (n 45) 546-548 (Gummow and Kirby JJ); *Commonwealth v Western Australia [Mining Act Case]* (1999) 196 CLR 392, 429-432 [105]-[110] (Gummow J); *Sue v Hill* (n 19) 497-502 [83]- [92] (Gleeson CJ, Gummow and Hayne JJ) and 525-526 [165]-[166] (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 346-347 [17]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 374-375 [99] (Kirby J); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 (*BAT v WA*) 82-86 [138]-[151] (Kirby J); cf *New South Wales v Ibbett* (2006) 229 CLR 638, 641 [5] fn 15 (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 (*Baxter Healthcare*) 41-51 [83]-[114] (Kirby J).

63 *Sue v Hill* (n 19) 498 [84] (Gleeson CJ, Gummow and Hayne JJ); *Williams (No 1)* (n 2) 237 [154] (Gummow and Bell JJ).

64 *Queensland Rail* (n 7) [53] (Gageler J), noting that the particular position of the 'state' as legal person remains 'untheorised even today'.

cognate expressions, including 'political entity',[65] 'political unit',[66] 'political organism',[67] and 'politically organised body'.[68] Interestingly, all share the adjective 'political,'[69] or some derivation thereof, and in many cases feature the metaphor of a living organism.[70] In this vein, Latham CJ one said (in a context explored in detail in chapter IV) that the 'Commonwealth of Australia was not born into a vacuum', but '*lives and moves and has its being* within a system of law'.[71] The organic metaphor is extended by terming the various institutions of government as 'organs' (as of a body), or 'branches' (as of a plant or tree).[72] Such terms are verbally impressive, but they lack determinate meaning and are avoided here. Chapter I shows that the terms are being used interchangeably in several distinct senses,[73] without any apparent consciousness of imprecision,[74] and in a manner that contributes significantly to theoretical confusion in the area.

65 eg *BAT v WA* (n 62) 83 [143] (Kirby J). This term was also used, with different inflections, in *Spratt v Hermes* (1965) 114 CLR 226, 246-247 (Barwick CJ); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346 (Murphy J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 643-644 (Latham CJ); *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 (*Bank Nationalisation Case*) 363 per Dixon J.

66 eg *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 49 [100] (Kirby J).

67 *Attorney-General (Vic) v The Commonwealth* (1945) 71 CLR 237 (*Pharmaceutical Benefits Case*) 256 (Latham CJ).

68 *White v South Australia* (2007) 96 SASR 581 (SASCFC) 589 [26] (Doyle CJ).

69 Maitland said of the King's 'body politic' that 'we can say little; but it is "politic," whatever "politic" may mean': Maitland (n 40) 36.

70 This tendency to personalise or bodify the nation or the government, to speak of as an abstract but organic entity, is thought by political scientists and intellectual historians to reach back to the sixteenth century: eg Vincent (n 51) 75; Quentin Skinner, 'From the state of princes to the person of the state' in *Visions of Politics* (CUP 2002) vol II, 368.

71 *In re Foreman & Sons; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 (*Uther*) 521 (Latham CJ) (emphasis added); see also *Henderson's Case* (n 27) 473 (Gummow J).

72 *Le Mesurier v Connor* (1929) 42 CLR 481, 495-496 (Knox CJ and Rich and Dixon JJ): 'But the Courts of the State are the judicial organs of another Government.'

73 Chapter I, §(3)(d) at 113ff.

(d) The 'State'

The language of 'body politic' (and perhaps also 'polity') seems to be used, somewhat self-consciously, to approximate the notion of the 'state' as legal person. This is yet another term that is avoided in this thesis: it is a Proteus, not only of constitutional jurisprudence but of political theory more generally.[75] Quentin Skinner, who investigated the genealogy of the term, concluded that 'there has never been any agreed concept to which the word *state* has answered', and thought that it was misconceived even to pursue such a concept.[76] That insight also holds true of constitutional law. In the legal materials relevant to constitutional personality, the term 'state' has an aspirational quality. Despite its lack of definitional clarity, it seems for some unarticulated reason to be regarded as desirable; its ambiguity is seen as reflecting the paucity of our own legal tradition, rather than the inherent instability of the concept.

Thus, it is an axiom of British constitutionalism that there is no conception of the 'state' *as* a legal person,[77] and this is deprecated. However, the significance of that axiom is greatly overstated: British constitutionalism does have a legal conception of the state, and it also has a sophisticated conception of constitutional personality. Professor Janet McLean has recently published a monograph arguing persuasively that British legal thought contains a

[74] An exception is *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* [2011] NSWCA 363, [49]-[57] (Basten JA) discussing different meanings of the term 'body politic'.

[75] Vincent (n 51) 1, saying that the question 'what is the state' is 'one of the most simple yet elusive questions that can be asked in politics.'

[76] Skinner, 'A Genealogy of the Modern State' (n 9) 326.

[77] Sir William Holdsworth, *A History of English Law* (5th impression, Sweet and Maxwell 2003) vol IX, 6-7; Haggen (n 19) 182; *A v Head Teacher and Governors of Lord Grey School* [2004] 4 All ER 628 (CA) 631 [3] (Sedley LJ) 'the law of England and Wales does not know the state as a legal entity'; Martin Loughlin, *The British Constitution: A Very Short Introduction* (OUP 2013) 82.

sophisticated state-tradition, which she describes as 'contested, adaptable and complex';[78] whilst the English notion of the 'Crown' as corporation is the prototypical constitutional person, and has proved enduring and adaptable. What is admittedly missing is a conception of the *whole* of the 'state' as a legal person. Turpin and Tompkins, for example, declare that 'there is no legal entity called "the state" in which powers are vested or to which allegiance or other duties are owed.'[79] The 'Crown' is said to be the nearest equivalent concept, but the 'Crown' has never corresponded to the 'state' in this sense.[80] As Mason CJ, Deane and Dawson JJ said, the 'Crown' is only 'a limited aspect of "the State" in the broad sense'.[81] Implicit in that statement are two propositions, which chapter I shows to be correct: the 'Crown' is not equivalent to the 'state'; and the 'state,' in this broader sense, has not been treated in English or Australian law as a legal person.

English commentators speak somewhat mournfully of the lack of a concept of the 'state' as legal person. Professor Loughlin, for example, has suggested that the English judiciary's 'vacillation' in reconceptualising the 'Crown' could 'frustrate' the development of 'a more realistic conception of the nature of State power and the conditions under which it may legitimately be exercised.'[82] What is meant by 'realistic' here is obscure; the premise is not so much that English law is actually operating upon this suppressed basis, but rather that it should *develop* along

78 Janet McLean, *Searching for the State in British Legal Thought* (Macmillan 2012) 310.

79 Colin Turpin and Adam Tompkins, *British Government and the Constitution: Texts and Materials* (7th edn, CUP 2011) 10-11.

80 cf Loughlin (n 77) 37.

81 *John L Proprietary Ltd v Attorney-General (New South Wales)* (1987) 163 CLR 508, 518 (Mason CJ, Deane and Dawson JJ).

82 Loughlin (n 77) 34.

those lines. If that is the case, then the proponents of any broad theory of the 'state' bear the onus of persuasion: first, as to what that concept means; and, second, as to why it is preferable in practice to the more limited theory presently symbolised by the 'Crown'. Loughlin, for example, criticised *M v Home Office*[83] as 'a faltering step in the modernisation process in public law,'[84] but he did not justify the premise, beyond stating (in circular fashion) that the 'monarchy no longer provides an adequate synonym for the State.'[85] The premise is that a larger concept of the 'state' would be better, *quoad* 'modernisation'. It remains unclear what the concept of the 'state' is to mean, why it is necessary, and why it would be better or even appropriate for it to be recognised as a legal (constitutional) person. For example, if the normative driver is 'accountability', as it seems to be for Loughlin,[86] then it is arguably more effective to sanction the responsible officer (as was done in *M v Home Office*) rather than some larger, prismatic concept of personified 'state'.

(2) Three Theories of Constitutional Personality

This thesis aims to state what the law is; it does not propound a theoretical (or theological) ideal. The terms 'body politic', 'polity', and 'state' suppress important differences in the way that constitutional personality is understood in modern Australia. There appear to be three main theories, though the (apparently

83 Explored in chapter I, §(1)(b).

84 Loughlin (n 77) 73, describing *M v Home Office* [1994] 1 AC 377 (HL) (*M v Home Office (HL)*).

85 Loughlin (n 77) 36.

86 cf McLean (n **Error! Bookmark not defined.**) 6-7, saying that Loughlin 'wants to hold [the state] responsible.'

unconscious) inconsistency in terminology means that these cannot be isolated with confidence.

First, and most problematic, is the theory that the government is a legal (constitutional) person. It will be convenient to describe this as the theory of 'government (constitutional person)'. One early expression of the theory, suggested by Professor Jethro Brown, described the 'state' as a 'collective real person', and said:

> there will be always certain highly important differences between the state and other collective real persons. In the first place, the state's will is sovereign, and therefore subject to no regulation from above; its powers over members are numerous, indefinite, and irresistible; and its purposes, general rather than special, touch human life at every point.[87]

This passage postulates the 'state' as something with sovereign will, which has and exercises 'powers over members' and is therefore separate from them. The passage usefully draws out characteristic features of the theory of government (constitutional person): the notion that governmental powers are vested *in* the constitutional person, and exercised by and through its governmental 'branches' or 'organs', over or in respect of people as 'members'. Justice Hayne, for example, spoke in *Williams (No 1)* about the expenditures in issue in that case as having been 'made by the executive government *of a polity* – an artificial legal person'.[88] His Honour said that the Executive Government of the Commonwealth was 'the

[87] William Jethro Brown, 'The Personality of the Corporation and the State' (1905) 21 *Law Quarterly Review* 365, 377.

[88] *Williams (No 1)* (n 2) 241 [173] (Hayne J) (emphasis added).

executive government *of* an artificial legal entity – a polity',[89] and also said that the Commonwealth makes contracts and can outlay public money '*as* a polity'.[90] Such language appears to conceive the constitutional person analogously to a Local Government Authority,[91] ie as a legal person invested with governmental powers exercisable over persons within its jurisdiction.

The deficiencies of the theory of government (constitutional person) form the main focus of this thesis. The theory is textually insupportable. As chapter II shows, governmental powers are not vested by the *Constitution* in the 'Commonwealth,' whilst certain provisions (ss 75(iii) and 114) are premised upon a distinction between the Commonwealth (constitutional person) and the Commonwealth (government). Nor can the theory accommodate the functional reality, that government is comprised of a multitude of persons, institutions and entities, many of which are acknowledged for legal purposes as having legal personality distinct from the Commonwealth (constitutional person). Chapter III shows that the theory is incompatible with constitutionally influenced rules of attribution, such as the principle of 'independent discretion'.[92] Chapter IV argues that a distinction between Commonwealth (constitutional person) and Commonwealth (government) underlies the evolution and operation of the

89 ibid 254 [205] (Hayne J) (emphasis added).

90 ibid 254 [207] and 259 [217] (Hayne J) (emphasis added).

91 Local Government Authorities are legal persons invested directly with statutory powers, including, eg, power to order a person to demolish a building: *Local Government Act 1993* (NSW), s 220(1) (Council is a 'body politic' with the capacities of an individual), and s 124 (Council may make 'orders' of various kinds).

92 According to the principle of 'independent discretion', the Commonwealth (constitutional person) would not be liable for torts committed by an officer of the Commonwealth (government) unlawfully exercising a discretion independently vested in the officer: see chapter III, §(2)(a)(ii) at 246.

doctrine associated with the decision of the High Court in *Commonwealth v Cigamatic Pty Ltd*.[93]

A second theory, more credible but definitionally unstable, is that the Commonwealth (nation) is a legal (constitutional) person. It will be convenient to describe this as the theory of 'nation (constitutional person)'. One expression of the theory, suggested by Professor Walker in relation to the 'British State', comprehends it as 'a corporation aggregate consisting of all those persons connected with … Great Britain and Northern Ireland by ties of nationality and domicile', with a 'managerial body called the government'.[94] The key elements of the theory are that the constitutional person *consists of* or *comprises* the people, and is controlled or affected by the government, operating in effect as a board of directors. This theory, or perhaps a variant of it, seems to have commended itself to Gummow J in particular.[95] In a recent case, Magdwick J referred to provisions of the *Constitution* making it clear, he thought, that the 'Commonwealth' was 'a body of people which may be sued as such, and as if it were, an individual.'[96]

The coherence of the theory of nation (constitutional person) depends on how the 'nation' or 'political community' is defined. That is not something that has been assayed by its proponents, and might differ as between them.

93 *Commonwealth v Cigamatic Pty Ltd* (1962) 108 CLR 372 (*Cigamatic*). The '*Cigamatic* doctrine' is a principle according to which State laws can be rendered invalid by reason of their operation upon the Commonwealth. Except where directly relevant to the Commonwealth's legal personality, this chapter does not consider the inverse principle protecting States from Commonwealth laws, associated with the decision in *Melbourne Corporation Case* (n 12).

94 Walker (n 12) 288.

95 The judgments are explored in chapter I, §(3)(d)(iv) at 124ff.

96 *Coochey v Commonwealth* [2005] 149 FCR 312 (FCA) 326-327 [66] (Madgwick J).

Nevertheless, as noted above, a prominent definition treats the Commonwealth (nation) as 'comprising' the people, the federal and State governments, and the whole territory. If this be correct, then the theory of nation (constitutional person) fails because it cannot accommodate the logical necessity for legal antagonism between the Commonwealth (constitutional person) and the individuals, and States (constitutional persons), who together constitute the Commonwealth (nation). Furthermore, the very point of artificial legal personality is to distinguish the entity from the natural persons by which it is constituted.[97] In what sense, then, is the nation (constitutional person) 'comprised' of its members? *Ex hypothesi*, the Commonwealth (constitutional person) must be a distinct legal person from the people and the States. Once that distinction is admitted, ie between the legal (constitutional) person and the people (as its 'members'), then the theory of nation (constitutional person) seems not to advance matters very far. It seems to reduce to the proposition that the Commonwealth (constitutional person) represents the people of Australia, perhaps analogously to the way that a company can be said to represent, and yet conduct litigation against, its shareholders. Representation, in this sense, is something that could be claimed for all theories. Whilst admitting the possibility of a more stable theory emerging from an alternative definition of 'nation', this thesis therefore rejects the theory of nation (constitutional person).

[97] eg *Salomon v Salomon & Co* [1897] AC 22 (HL) 42 (Lord Herschell); *Chaff and Hay Acquisition Committee Case* (n 26) 385 (Latham CJ); *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 256 [126] (Gummow and Hayne JJ).

This thesis advocates a third theory: that the Commonwealth (constitutional person) has a legal existence separate and distinct from other manifestations of the 'Commonwealth'. In its positive dimension, the theory holds only that the Commonwealth (constitutional person) is a unit of the legal system, in respect of which legal personality has been constitutionally conferred. The constitutional person is posited as a subject of the legal system, separate from but represented by (and affected by the acts of) the Executive Government of the Commonwealth. Whilst, in that limited respect, the constitutional person can be said to be 'part of' the Commonwealth (government), which in turn might be said to be part of the Commonwealth (nation), the constitutional person is not an incorporation of the Executive Government,[98] nor of the government more broadly. In the words of Professor Sawer, one of the few commentators seriously to consider this topic, there is 'in fact no juristic entity corresponding to the Commonwealth as a whole'.[99] Nor is there any need for, or purpose served by, viewing the people of Australia as the 'members' of the Commonwealth (constitutional person), save that (as with other theories) the constitutional person might be said to hold its lands, funds, liabilities and capacities of various kinds *on behalf of* the people of Australia. In that limited sense, the Commonwealth (constitutional person) *represents* (but does not incorporate) the people.

[98] cf *Sloman v The Governor and Government of New Zealand* (1876) 1 CPD 563 (CA) 565-566 (James LJ); *Williams (No 1)* (n 2) 184 [21] (French CJ) and 237 [154] (Gummow and Bell JJ); Geoffrey Sawer (n 45) 166; Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press 1967) 123-124.

[99] Geoffrey Sawer, 'State Statutes and the Commonwealth' (1963) 1 *Tasmania University Law Review* 580, 585.

The primary characteristic of the 'narrow' theory, which distinguishes it from the two 'broader' theories, is that it delineates the Commonwealth (constitutional person) from other concepts connoted by the term 'Commonwealth', predominantly the government. This is the subject of the correlative negative claims made in this thesis: the Commonwealth (constitutional person) is not the government, and the Commonwealth (government) is not a legal person. In this respect, the Commonwealth (constitutional person) is comparable to the Roman imperial concept of the 'fiscus',[100] or to the 'Crown' as corporation: neither conception, despite their ambiguities, is or was conflated with the people, the government as a whole, or the nation. On the narrow theory, there is no difficulty in explaining how the various parts of 'one indissoluble Federal Commonwealth' might sue that Commonwealth, or each other. Such a theory also avoids the need to explain how an undifferentiated 'Commonwealth' could both control the law of obligations, for example, and also make use of that law. There is no need for a broader conception of 'state' as legal person, and the difficulties thrown up by such conceptions are thereby avoided.

(3) Structure of the Thesis

This thesis explores the Commonwealth's constitutional personality: first, as a matter of history (chapter I); second, by scrutiny of the constitutional text (chapter II); third, by examination of constitutionally influenced rules of attribution, through which the capacities of the Commonwealth (constitutional person) are exercised and its liabilities affected; and, finally, through principles

[100] See Boehmer (n 11) 182.

determining the Commonwealth's susceptibility to laws of the State Parliaments (chapter IV).

Chapter I explores the historical background to the now discarded notion that the Commonwealth obtained legal personality by an identification with the Sovereign, expressed through the symbol of the 'Crown'. As noted above, the 'Crown' is a term that has different meanings, but, as an expression of constitutional personality, the 'Crown' was understood to be a form of corporation. Chapter I traces the history of that conception, from *Plowden's Reports* through the writings of Professor Frederic W Maitland at the turn of the twentieth century, [101] into modern British and Australian law. The chapter establishes the truth of Professor Sawer's observation that, at least as at 1900:

> There was no single or all-embracing theory of 'state personality' at all. The only juristic person associated with the general government of a colony was the Crown considered as the executive government; it was a weak sort of corporation, which had required much stiffening from legislation dealing with official tenure and organisation, and the handling of public moneys, but the

[101] Professor Maitland pursued the legal history of the 'Crown' as an 'organised group' over five separate articles published after 1900: the 'Corporation Sole' was first published in (1900) 16 *Law Quarterly Review* 335; 'The Crown as Corporation' was first published in (1901) 17 *Law Quarterly Review* 131; 'The Unincorporate Body' was not published before its appearance in HAL Fisher (ed), *Collected Papers of Frederic William Maitland*, vol III (CUP 1911) but is regarded as having been written between 1901 and 1903; 'Moral Personality and Legal Personality' (above, n 40) was delivered as the Sidgwick Lecture at Newnham College, Cambridge in 1904 and first published in (1905) 14 *Journal of the Society for Comparative Legislation* 192; and 'Trust and Corporation', which was originally written in German, was first published in English in Fisher's *Collected Papers*. Citations to these articles are to the collection published by Runciman and Ryan (n 40), which gives an account of the publishing history of the essays from xxxiv. See also David J Seipp, 'Formalism and Realism in Fifteenth-century English Law: Bodies Corporate and Bodies Natural,' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (2012, CUP) 37.

> Crown was at least capable of owning and disposing of property, and appearing in litigation as plaintiff and defendant…[102]

The 'Crown' was difficult to adapt to a federal context, because of the necessity for it simultaneously to represent multiple distinct governments within the Federation. In a series of cases in the late 1990s,[103] the 'Crown' was finally rejected in its application to Australian constitutional circumstances, on the ground that it paid insufficient regard to the text and structure of the *Constitution*.

The decisions rejecting the 'Crown' as the genealogical source of the Commonwealth's constitutional personality suggest, sensibly, that an inquiry into the text and structure of the *Constitution* is the source most likely to yield insight into the nature of constitutional personality. Chapter II conducts such an examination, but it shows, in the end, that the text itself is inconclusive. Whilst the *Constitution* undoubtedly assumes that something called 'the Commonwealth' has capacity for legal relations, it also uses the word 'Commonwealth' in a variety of other ways and provides no interpretative principle for distinguishing the meanings. The text is ambiguous—perhaps deliberately so.[104] It therefore presents a range of interpretative choices: the provisions implying constitutional personality might be viewed as being connected with provisions referring to

[102] Sawer, *Australian Federalism in the Courts* (n 98) 163.

[103] *Mewett* (n 45) 546-548 (Gummow and Kirby JJ); *Mining Act Case* (n 62) 429-432 [105]-[110] (Gummow J); *Sue v Hill* (n 19) 497-502 [83]-[92] (Gleeson CJ, Gummow and Hayne JJ), 525-526 [165]-[166] (Gaudron J); *Bass* (n 62) 346-347 [17]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 374-375 [99] (Kirby J); *BAT v WA* (n 62) 82-86 [138]-[151] (Kirby J); cf *Ibbett* (n 62) 41 [5] fn 15 (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *Baxter Healthcare* (n 62) 41-51 [83]-[114] (Kirby J).

[104] Professor Sawer has suggested that the 'Founders' were 'so uncertain about, or rather uninterested in, such questions' that they adopted a deliberately ambiguous usage: Sawer, *Australian Federalism in the Courts* (n 98) 123.

government, or provisions referring to nation, or it might be treated (consistently with the history explored in chapter I) as a self-contained usage. This, in essence, is the choice between the theories outlined above. Chapter II establishes that the text does not require 'a legal conception of the Commonwealth as a whole',[105] and suggests that certain drafting features point towards the narrow theory.

Chapter III collects and explores certain constitutionally influenced rules, by which the actions of the individuals comprising the government are attributed (or not) to the Commonwealth (constitutional person). The chapter concludes that the theory of government (constitutional person) cannot be reconciled with those attribution rules. Whilst the Parliament of the Commonwealth, and the Executive Government of the Commonwealth, are indisputably part of the Commonwealth (government), they are not treated as exercising governmental power for, as, or on behalf of, the Commonwealth (constitutional person). Governmental power is exercised either personally by individual office-bearers, or institutionally by bodies (eg a court, or the Parliament) to which legal personality is not ascribed. The Commonwealth (constitutional person) is not treated legally as the author of valid exercises of governmental power by those officers or bodies. Nor do the applicable attribution rules result in the Commonwealth (constitutional person) being made liable for the torts of those officers or bodies, save in certain circumstances where they can be established as acting as employees or agents of the Commonwealth (constitutional person). The conclusion deduced from the principles discussed in this chapter is that the

[105] Sawer, *Australian Federalism in the Courts* (n 98) 124.

Commonwealth (constitutional person) cannot be regarded as an incorporation of the whole 'government'. Thus, chapter III substantiates the negative claims made in this thesis: the Commonwealth (constitutional person) is not the government, whilst the government is not a legal person.

Chapter III also explores the relationship, termed 'constitutional agency', that exists between the Commonwealth (constitutional person) and the Executive Government of the Commonwealth. It is almost inevitably through the individuals comprising the Executive Government that the capacities of the constitutional person are exercised, and it is largely those individuals who affect its liability. In this sense, to adopt Professor Sawer's phrase, the Executive provides 'most of the "*substratum*" for government as person.'[106] Nevertheless, the rules of attribution show that constitutional personality is absent from many critical contexts where one would expect to find it, if the constitutional person were simply an incorporation of the Executive Government. In certain respects, moreover, those contexts also support the narrow theory because they illustrate the necessity of distinguishing activities of the Executive Government that are *governmental* (and do not implicate constitutional personality) from those that are *corporate*.[107] This resembles the distinction between the private and public law relations of the state, which had such a significant influence in Europe.[108]

[106] Sawer (n 45) 168.

[107] cf Harrison Moore, 'Law and Government' (1906-1907) 4 *Commonwealth Law Review* 49, 53.

[108] cf Edwin Borchard, 'Governmental Responsibility in Tort VII' (1928) 28 *Columbia Law Review* 577, 594ff.

Although there are obvious instabilities inherent in such distinctions,[109] they nevertheless show how deeply ingrained is the tendency to confine constitutional personality from broader notions, like government and nation. This thesis shows the truth of Pollock and Maitland's observation, adopted by Moore: whereas *corporate* activities of government require legal personality, the exercise of governmental power does not.[110] Governmental power is exercised by individuals, or by institutions such as Parliament.

Chapter IV develops this distinction (between *corporate* activities and *governmental* power) in the context of the doctrine associated with the decision of the High Court of Australia in *Commonwealth v Cigamatic Pty Ltd*.[111] That doctrine concerns the circumstances in which the 'Commonwealth' can validly be made the object of State legislation. This doctrine thus presents, in a uniquely federal setting, what Kelsen called 'the problem of the auto-obligation of the State'.[112] The problem is to understand how government, or the nation, could both control or symbolise the legal system *and* be a mere subject or unit of that legal system—to become, in Pollock's words, 'as it were a citizen for the nonce'.[113] This is a problem that arises only for the broader theories of constitutional personality, because of the special relationship that *government*

[109] Not least of which is that any action of the Executive Government is capable of being described as 'governmental': *Williams (No 1)* (n 2) 213 [77] (French CJ). Further, the dividing line between *corporate* and *governmental* acts might vary not only between decision-makers but also over time.

[110] Frederick Pollock and Frederic W Maitland, *The History of English Law before the Time of Edward I* (CUP 1895) vol 1, 673 (Pollock and Maitland); Harrison Moore (n 107) 53.

[111] *Cigamatic* (n 93).

[112] Kelsen (n 27) 197.

[113] Pollock, *A First Book of Jurisprudence for Students of the Common Law* (n 42) 98.

and *nation* are perceived as having with the legal system.[114] 'Nation' bespeaks an 'indissoluble' construct of sovereign people and government, recognised internationally; 'government' bespeaks a constitutionally prescribed form of control over the legal system. How can either of those concepts be postulated as a mere 'unit' of that legal system? Even Kelsen, who dealt with this by saying that 'state' and 'legal order' were a unity, said that the 'State as subject of property is the Fisc (*Fiscus*).'[115]

The narrow theory avoids this difficulty, because it distinguishes constitutional person from government and nation. The Australian legal system is an integrated or unitary legal system, in the sense that there is a single, composite body of law applicable to cases determined in federal and non-federal jurisdiction alike.[116] The Commonwealth (constitutional person) is a unit in that integrated legal system; it is not the government (which can modify that legal system), and nor is it the nation (which symbolises or embodies that system). Properly considered, the Commonwealth (constitutional person) is not the true object of the *Cigamatic* doctrine. The object of the doctrine is the Executive Government of the Commonwealth, which is protected from State interference analogously to the way that the Parliament of the Commonwealth is protected by section 109 of the *Constitution*.

[114] Sawer (n 45) 162.

[115] Kelsen (n 27) 193.

[116] *Fencott v Muller* (1983) 152 CLR 570, 607 (Mason, Murphy, Brennan and Deane JJ).

Although it will occasionally be necessary to take a position on conflicting lines of authority, the thesis aims to state the law as established in the cases. In doing so, it advocates a change in, or at least a consciousness of the imprecision of, the language that is presently used to describe what are shown to be distinct conceptions of the Commonwealth: as nation, government, and constitutional person. It suggests that three alternative theories underlie the way in which the Commonwealth is being described, one of which (the narrow theory) it advocates, and the others it rejects. Three recent developments illustrate the far-reaching doctrinal importance of appropriate theorisation of constitutional personality. The first is the 2012 decision of the High Court of Australia in *Williams v Commonwealth* (*Williams (No 1)*),[117] where the majority judgments give rise to confusion about the extent to which the legal personality of the Commonwealth informs the executive power conferred by section 61 of the *Constitution*. The second is the 2012 decision of the High Court in the *Plain Packaging Case*,[118] where the majority judgments give rise to confusion about what it means to say that the 'Commonwealth' must have received a 'benefit' in order to enliven the guarantee of just terms in section 51(xxxi) of the *Constitution*. The third is the enactment of section 10(2) of the *Workplace Health and Safety Act 2011* (Cth),[119]

[117] *Williams (No 1)* (n 2).

[118] *Plain Packaging Case* (n 45) 33 [42] (French CJ) and 63 [150] (Gummow J), agreeing with 72 [185] (Hayne and Bell JJ), and see 99-100 [279] (Crennan J) and 132 [369] (Kiefel J), cf 82-83 [217]-[231] (Heydon J) dissenting.

[119] See Explanatory Memorandum to the Work Health and Safety Bill 2011 (Cth) [49], referring to Workplace Relations Ministers Council, 'First Report of the National Review into Model Occupational Health and Safety Laws' (October 2008), [15.4]-[15.7], which acknowledges that 'government' is different from 'ordinary persons' (cf Australian Law Reform Commission, *The Judicial Power of the Commonwealth* (Report No 92, October 2001) [22.46]) but concludes that it is 'now widely accepted that the Crown should not be exempt from the offence provisions of the OHS legislation.'

which greatly increases the probability of criminal charges being laid against the Commonwealth (constitutional person); something that Dixon J once described as being 'opposed to all our conceptions, constitutional, legal and historical'.[120]

Many questions tangential to the topic remain unanswered. This thesis does not attempt exhaustively to list and comprehensively to categorise the capacities of the Commonwealth (constitutional person). The thesis must ignore the role of the Sovereign, can only canvass the impact of constitutional personality on the legislative powers of the Parliament, and does not explore the relationship between the constitutional personality of the Commonwealth and the international personality of the Commonwealth of Australia. It does not explain the operation upon the constitutional person of that part of the executive power that is associated with the royal prerogative; nor does it explain the influence upon the prerogative of different understandings of constitutional personality.[121] Identifying the Commonwealth as a legal (constitutional) person, according to strict definitions, may not result in a net improvement in understandings of the

[120] *Cain v Doyle* (1946) 72 CLR 409, 424 (Dixon J), see also 418 (Latham CJ), 420 (Starke J), 431 (Williams J); Wolfgang Friedmann, 'Public Welfare Offences, Statutory Duties, and the Legal Status of the Crown' (1950) 13 *Modern Law Review* 24, 35, saying that *Cain v Doyle* underlined 'the necessity of a more articulate theory of State in modern British law.' See generally Malcolm Barrett, 'Prosecuting the Crown' (2002) 4 *University of Notre Dame Australia Law Review* 39.

[121] eg *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 211 [34] fn 111 (French CJ), criticising the submissions of the appellants for conducting the litigation on the assumption that the prerogative rights in relation to royal metals accrued to the 'Crown in right of New South Wales'. cf Herbert V Evatt, *The Royal Prerogative* (Leslie Zines ed, Lawbook 1987) 137, expressing the conclusion that the royal prerogative was exerciseable in Australia because of the 'partial validity of the legal theory of the unity of the Crown'. It is now accepted that the prerogative is carried into the executive power by virtue of the fact that s 61 of the *Constitution* vests executive power in the Queen: see *Williams (No 1)* (n 2) 185 [24] (French CJ), quoting George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press 1983) 50, where the author relies upon the then-current notion of the 'Crown in right of the Commonwealth' as representing the 'legal concept of "the Queen"'.

'state'. Nevertheless, the negative claims made in this thesis guide the way to resolution of problems of doctrine, including those identified above.

CHAPTER I: THE 'CROWN'

This chapter explores the concept of the 'Crown' in English and Australian legal history. There are two reasons for beginning in this way. First, the *Constitution* was drafted at a time when constitutional personality was understood through the prism of the 'Crown'. That understanding has important textual and structural reflections in the text. As Professor Sawer concluded, the 'only satisfactory foundation' to speculation about what the 'Founders' intended by their description of the 'Commonwealth' is the 'relation of legal personality to governmental organization which was familiar to Anglo-Australian lawyers in 1900.'[122] It will aid the understanding of the text, therefore, to show that the legal person termed the 'Crown' was never equated with the 'government', and represented only part of the Executive Government. Second, in the process of rejecting the language of the 'Crown', the High Court has articulated an interpretative method for approaching the text of the *Constitution,* a method that is applied in chapter II. In order properly to appreciate this interpretative technique, it is necessary first to contextualise it against the interpretation of constitutional personality (ie the 'Crown') that it replaced.

The 'Crown' is a term that represents distinct concepts, not all of which are explored here. It is a multi-purpose label, which, because of its versatility, has tended to obstruct clear analysis of the relationship that the 'Crown' as legal (constitutional) person bears to the Sovereign, the 'government', the nation or

[122] Sawer, *Australian Federalism in the Courts* (n 98) 124.

political community, and the people.[123] The versatility of the 'Crown' as a label sometimes engendered an assumption that the Sovereign, the government, and the legal person known as the 'Crown' all operate as a single unit. This chapter demonstrates the falsity of that premise by reference to history, and by exploring decisions demonstrating that the Sovereign, the government, and the 'Crown' as legal (constitutional) person are all different concepts.

The chapter has three sections. Section 1 deals with the 'Crown' in the United Kingdom (UK), with particular focus on the use of the 'Crown' to describe a legal (constitutional) person. Section 2 deals with the 'Crown' as it was used in Australia, prior to being discarded. Section 3 explores the reasons for rejecting the 'Crown', and extrapolates a methodology to be applied in chapter II. Section 3 concludes by examining the new idioms that have been substituted for the 'Crown' as descriptors of constitutional personality. The chapter will also involve an exploration of the most prominent views on this topic, namely those of Maitland, Moore, Dixon, Sawer and McLean.

(1) The 'Crown' in the United Kingdom

The Crown is of course merely a physical object, or more accurately a number of physical objects, under guard in the Tower of London. As an object, it is just a

[123] cf Law Reform Commission of Canada, *The Legal Status of the Federal Administration* (Working Paper 40, 1985) 8, saying that the language of the 'Crown' made it impossible to distinguish 'Crown and Government, Government and Administration, and Crown and Administration'. These terms were not defined by the Law Reform Commission. See also Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (OUP 1999) 57-58, saying that the 'manner in which the concept of the Crown has been utilized [by lawyers] borders on the incoherent'; and Anne Twomey, *The Chameleon Crown* (Federation Press 2006) 272, saying that the 'Crown' can 'change its colour to suit its environment and deceive others as to its nature.'

piece of jewelled headgear. Despite the occasional assumption that the 'Crown' represents a single 'concept'[124] or 'constitutional notion',[125] it is used as a symbol for several different ideas and relationships in UK law.[126] The chapter does not attempt to account for the history of the usages of the 'Crown', save to isolate the 'Crown' as constitutional person. The discussion bears upon modern Australian conditions in two ways. First, the history of the Crown in the UK, discussed in section (a) below, preconditioned the way that constitutional personality was discussed and developed in Australia. Second, aspects of the theorisation of the 'Crown' in the UK, historically and today, provide an illustration of the difficulties that confront broad theories of constitutional personality in Australia.

This thesis does not discuss the debate in the UK as to the 'source' of the capacities of the 'Crown', or the power that the executive government requires to exercise those capacities. In 2013, the UK Supreme Court acknowledged that 'the Crown possesses some general administrative powers to carry on the ordinary business of government', but preferred not to identify the 'controversial' rationale for those powers.[127] Controversy exists as to whether those powers (the existence of which is never doubted) are to be 'rationalised' by reference to: the personality of the Monarch, the notion of the 'Crown' as corporation (sole or

[124] eg Loughlin (n 123) 37; Nick Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245, 246, saying that 'the concept of the Crown is not just deeply ambiguous but also deeply troubling' (emphasis added).

[125] eg Rodney Brazier, 'Constitutional Reform and the Crown' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (OUP 1999) 337, describing the 'constitutional notion' as 'slippery' and 'hard to pin down'.

[126] See n 19.

[127] *R (New London College Ltd) v Secretary of State for the Home Department* [2013] 1 WLR 2358 (UKSC), 2371-2372 [29] (Lord Sumption JSC).

aggregate), or on the basis that the 'Crown' can do anything not prohibited by law.[128] The High Court of Australia has recently reiterated that reasoning about the Commonwealth's executive power should not proceed by analogy with the power of the British Executive.[129] What matters for present purposes is that the 'Crown' has been established in UK law as the name of a constitutional person, distinct from the personality of the monarch for the time being, distinct from the persons comprising the executive branch, and distinct from the whole of the people of the UK (as nation).

(a) Emergence of the 'Crown' as a Legal Person

The notion of the 'Crown' as corporation developed in three stages: the first was the invention of the concept of the 'corporation sole' in the sixteenth century, the second was Sir Edward Coke's application of that concept to the King, and the third was the transmutation, in the 1860s, of the King as corporation sole into a 'Crown'. These developments occurred during the currency of older notions, such as absolute sovereignty, which are inapt in the Australian constitutional framework. Nevertheless, the history shows that the development of the 'Crown' as corporation, a constitutional person in the narrow tradition, occurred alongside, and coherently with, other aspects of the legal system having contemporary relevance.

[128] The debates have been helpfully summarised, recently, by Adam Perry, 'The Crown's Administrative Powers' (Working Paper, 2014) <http://ssrn.com/abstract=2493552>.

[129] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 (*Williams No 2*) 468-469 [78]-[83] (French CJ, Hayne, Kiefel, Bell and Keane JJ); and see *Williams (No 1)* (n 2) 237 [153] (Gummow and Bell JJ).

The notion of a corporation sole was traced by Professor Maitland to the political, social and legal pressures that had come to surround the parish church in the sixteenth century.[130] Maitland spoke of the 'disintegrating process' that was afflicting ecclesiastical groups at this time: instead of forming a common pool, church property was being divided between the bishop, the cathedral chapter or monastery, the dean, and the prebendary.[131] The application of the term 'corporation sole' to bishops, deans, and prebendaries marked the end of this disintegrating process. Maitland derided this development as an incoherent solution to the particular problem of a particular era.[132] The solution was incoherent because the 'corporation sole', a 'juristic abortion' or 'half-man',[133] failed to perform the first service required of a legal person: the parson as corporation sole bore insufficient interest to prevent the abeyance of the freehold in the parochial glebe. By far the worst of its doings, thought Maitland, was to engender 'clumsy thoughts' and 'clumsy words' about the King and the Commonwealth.[134]

The development of the King into a corporation sole is seen by some modern scholars as an outworking of the medieval doctrine that the King was made up of

[130] Maitland, 'The Corporation Sole' (n 101) 18, saying that the concept was unknown to the temporal law of the later Middle Ages.

[131] ibid 15.

[132] ibid 28. Whilst the corporation sole might have been the permanent 'subject' of the fee simple of the parochial glebe, for that purpose it was incompetent. By itself, it could neither contract nor own a chattel, nor could it prevent the freehold of the church falling into abeyance upon the death of the parson. For a helpful elaboration of Maitland's critique, see 'Editor's Introduction' in David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (CUP 2003) xiv.

[133] Maitland, 'The Corporation Sole' (n 101) 30.

[134] ibid and Maitland, 'Crown as Corporation' (n 101), saying: 'that foolish parson has led us astray.'

two 'bodies'. The latter doctrine was first utilised by lawyers in a series of late-Tudor and early-Stuart cases, reported by Edmund Plowden.[135] Of these cases, Maitland said that he did 'not know where to look in the whole series of our law books for so marvellous a display of metaphysical – or we might say metaphysiological – nonsense.'[136] Such cases took effect against background developments in Anglophone legal and political theory at the end of the sixteenth and beginning of the seventeenth centuries, in which the form of union underlying civil government was commonly described as the 'body politic'.[137] The pre-eminent history of the King's 'two bodies' was written by Ernst Kantorowicz, who was primarily interested in the theological origins of the language used by judges to describe the concept.[138] Kantorowicz showed that, in late mediaeval England, the disembodied 'Crown' did not correspond to the conception of the 'state' prevailing on the continent during and after the sixteenth century.[139] There, the state was a fictitious person in its own right, above its members and, importantly, divorced from them. Hobbes, who was increasingly influential after the seventeenth century and was himself influenced by continental treatises on corporations as *personae fictae*,[140] emphatically insisted that the state (named the "Leviathan") was a fictitious person distinct

135 *Case of Dutchy of Lancaster* (1561) 1 Plow 212 (KB) 213; 75 ER 325, 326; *Willion v Berkley* (1561) 1 Plow 223 (KB) 243, 244-5, 250; 75 ER 339, 370, 374, 383; *Sir Thomas Wroth's Case* (1573) 1 Plow 452 (KB) 457; 75 ER 678, 685.

136 Maitland, 'Crown as Corporation' (n 101) 35.

137 Skinner, 'A Genealogy of the Modern State' (n 9) 327.

138 Kantorowicz (n 19) 7-16.

139 ibid 382-383.

140 Skinner (n 70) 391-392.

from both rulers and ruled.[141] The 'Crown' muddled such distinctions, because of the difficulty of drawing the line between the rights of King as King, and the rights of King as man.

The King, as distinct from the 'Crown', was first described as a 'corporation sole' in Sir Edward Coke's report of the *Case of Sutton's Hospital*.[142] Writing in the *Law Quarterly Review* in 1901,[143] shortly after the Commonwealth of Australia had been called into existence, Maitland joked that the King as corporation sole had been 'parsonified'. This was a borrowing from Gilbert and Sullivan, which highlighted the fact that concept of the King as corporation sole had been borrowed from Church law. Shortly after the *Case of Sutton's Hospital*, the Court of King's Bench held in the *Magdalen College Case*[144] that an Act applying generally to 'any person or … body politic' would bind the Queen, both as person and as body politic. Sir Edward Coke's notion was adopted by Blackstone, and by that route seems to have become entrenched.[145] Prominent eighteenth century cases spoke of the 'King' contracting for public expenses in a personal capacity[146] and, in *Grant on Corporations*, published in the middle of the nineteenth century,

141 Skinner, 'A Genealogy of the Modern State' (n 9) 346.

142 *The Case of Sutton's Hospital* (1611) 10 Co Rep 23a (KB) 29b; 77 ER 960, 968.

143 Maitland, 'Crown as Corporation' (n 101).

144 *The Case of the Master and Fellows of Magdalen College in Cambridge* (1615) 11 Co Rep 66a (KB) (*Magdalen College Case*) 70a; 77 ER 1235, 1240.

145 1 Bl Comm 381 [470], referring to 'Co Litt 43' as authority for the proposition that the King is a corporation sole.

146 *The Bankers' Case* (1728) 5 Mod 29 (KB) 54; 87 ER 500, 515 (Holt CJ); also reported as *The Bankers Case in Cam Scacc* (1728) Skinner 601; 90 ER 270; *Macbeath v Haldimand* (1786) 1 TR 172 (KB) 176; 99 ER 1036, 1038 (Lord Mansfield), saying that the King 'in his individual capacity contracted for all expenses'.

the author warns that 'the King is altogether upon a different footing from other corporations sole'.[147]

Over the period that the concept of the King as corporation sole was being worked out, there occurred an evolution in prevailing attitudes towards accountability and responsibility, particularly with respect to public wrongs.[148] For example, in the 1843 decision in *Attorney-General v Viscount Canterbury*,[149] a petition was brought against Queen Victoria for damage to the property of the Speaker of the House, occasioned in the burning of Parliament in 1834. Since the fire had occurred during the reign of King George IV, the Speaker, the Viscount Canterbury, was obstructed by the principle *actio personalis moritur cum persona*. His counsel sought to shift liability for the wrongs of public servants onto 'the metaphysical abstraction called the King'.[150] Lord Lyndhurst could see no abstraction. He could see only 'the very personal Victoria R.'[151] Queen Victoria had surrendered her territorial revenues to the public. Out of what fund was she to pay for the wrongs of 'all persons holding public offices and appointments'?[152] Furthermore, the Commissioner of Woods and Forests, not the King, had employed the servants responsible for the fire. It was the Commissioner, rather than the 'Crown', who ought to be responsible for their appointment or removal.

147 James Grant, *A Practical Treatise on the Law of Corporations in General* (Butterworths 1850) 629; referring to *Rennell v the Bishop of Lincoln* (1827) 7 B&C 113 (KB) 168; 108 ER 667, 686 (Littledale J).

148 Stuart Anderson, 'Central Executive: The Legal Structure of State Institutions' in William Cornish et al (eds), *The Oxford History of the Laws of England* (OUP 2010) vol XI, 370.

149 *Attorney-General v Viscount Canterbury* (1842-1843) 1 Ph 306 (Ch); 41 ER 648.

150 ibid 314; 651.

151 Anderson (n 148) 366-384, 370.

152 *Attorney-General v Viscount Canterbury* (n 149) 323; 655 (Lyndhurst LC).

Suits against public officers, such as the Commissioner for Woods and Forests,[153] could not reach 'the Government revenue'. Yet suits brought against the office-holder in a personal capacity were viewed with odium, because of fear that they might deter 'any proper or prudent person from accepting a public situation at the hazard of such peril to himself.'[154] Thus it was obvious to historians, that the 'nation, the state, is not personified'.[155]

Janet McLean has argued that the mid-nineteenth century was a missed opportunity, a 'moment' at which the 'Crown' might have become an entity by which to 'personate' the increasingly centralised British state.[156] Certainly, the law reports in this period show that the expansion of state activities had entered the legal consciousness.[157] As noted above, statutes had begun more frequently to refer to the 'Crown', albeit not so as to represent the whole of the expanding public sphere. According to McLean, the 1860s marked an abrupt departure from the nascent ideas of public law that had been developing up to that point.[158] The leading case of *Mersey Docks and Harbour Board v Gibbs*[159] exemplifies the phenomenon: unpaid officials, acting as trustees for the public benefit, were denied the public immunity of the 'Crown' and its servants. Contemporary

153 See, eg, *Palmer v Hutchison* (1881) 6 App Cas 619 (PC) 626.

154 *Gidley v Lord Palmerston* (1822) 3 Brod & B 274 (CP) 287; 129 ER 1290, 1295 (Dallas CJ).

155 Pollock and Maitland (n 110) vol 2, 518; and see Sir William Holdsworth, 'Maitland Reissued' in AL Goodhart and HG Hanbury (eds), *Essays in Law and History* (Clarendon Press 1946) 214.

156 McLean, *Searching for the State in British Legal Thought* (n **Error! Bookmark not defined.**) 140.

157 eg *Thomas v The Queen* (1874) LR 10 QB 31, 33 (Blackburn J).

158 McLean (n **Error! Bookmark not defined.**) 141, relying upon the account given in Anderson (n 148).

159 *Mersey Docks and Harbour Board v Gibbs* (1866) 11 HLC 686; 11 ER 1500.

notions of responsibility and status were inconsistent with the metaphysical attribution of powers and responsibilities to abstractions, such as the 'Crown' or the state.[160] Responsibility was seen as personal, and yet to hold senior Crown servants liable might have deterred suitably qualified persons from accepting public office. These tensions were not resolved, as McLean points out, by resort to a grander notion of a personified 'state'.

The next stage of the development, from the King as corporation sole to 'Crown' as corporation sole, appears to have been largely accidental. In 1861, Lord Cranworth, without reference to authority, described the 'Crown' as a corporation sole with perpetual continuance.[161] The 1860s was also the point in time, according to Professor McLean, that statutes began more readily to refer to the 'Crown' as opposed to 'His Majesty' or 'Her Majesty'.[162] No one seems even to have noticed the transition until Maitland pointed it out, in 1901: '[a]nother of our subterfuges', he said, is 'that of slowly substituting "the Crown" for the King or Queen.'[163] That substitution went unobserved in Australian cases.[164] The conceptual relation of the 'Crown' to the King's two bodies was therefore never spelled out. It is not clear, for example, whether it was the 'body natural' or the 'body politic' that was constituted as the corporation sole; thus, it is hard to say

160 Anderson (n 148) 345-346.

161 *Attorney-General v Kohler* (1861) 9 HLC 654, 670; 11 ER 885, 892 (Lord Cranworth).

162 McLean (n **Error! Bookmark not defined.**) 140ff.

163 Maitland, 'Crown as Corporation' (n 101) 40; for the publishing history, see n 101.

164 cf Pitt Cobbett, 'The "Crown" as Representing the "State"' (1904) 1 *Commonwealth Law Review* 23, 26, saying that the 'Crown' was being used as an impersonal description of the office of the Sovereign, with *Sue v Hill* (n 19) 498 [84] (Gleeson CJ, Gummow and Hayne JJ), saying that the 'first usage of the expression "the Crown" was to identify the body politic'.

whether it is the sovereign, the people or the government (or none of the above) that was conceived as the constitutional person.

Maitland's essays on this topic have proved extremely influential, though his purpose was satirical and historical rather than declaratory. He never fully elaborated his conception of the State's legal personhood, and Runciman has observed that his writing 'provoked as much in what it left unsaid as in what it sought to say'.[165] Nevertheless it is passably clear that Maitland believed that the law had come to treat the *Sovereign* as the 'head of a complex and highly organised "corporation aggregate of many"'.[166] He saw no harm in 'calling this corporation a Crown', but he preferred to call it the 'Commonwealth'[167] because of the multiple distinct usages of the 'Crown'.[168] This seems to be a version of the theory of government (constitutional person), though it must be said that Maitland's discussion of this 'corporation aggregate' did not expound what he took to be the state of the law. Pieced together from a number of his writings, his personal view seemed to be that English law should *develop* a conception of the 'state' as the 'wielder of public power' and the 'subject' of private rights',[169] which would be liable for its wrongs.[170]

[165] Runciman (n 10) 123, suggesting that Matiland was reluctant to discuss matters he felt to be beyond his expertise.

[166] Maitland, 'The Crown as Corporation' (n 101) 41.

[167] ibid 41.

[168] ibid.

[169] ibid 34.

[170] Maitland, 'Corporation Sole' (n 101) 18, saying that 'persons who can never be in the wrong are useless in a court of law.'

Maitland is thought to have been influenced by the ideas of the German historian Dr Otto Gierke, whose *Political Theories of the Middle Age* he had translated into English in 1900.[171] In this final stage of his career, Maitland used Gierke to promote in the UK an understanding of public law as involving questions of moral and political theory.[172] He thus pursued a more organic understanding of group life, as something recognised rather than created by the law. In this, Maitland inspired a group of political theorists, identified as 'pluralists',[173] whose writings were largely divorced from the doctrinal and functional realities of any particular legal system and for that reason do not warrant exploration here.[174] These writings formed a genre that began to die out towards the end of the 1920s[175] and, by 1953, Professor Hart would condemn its metaphysical orientation as maladjusted to processes of legal reasoning.[176]

As British constitutional law entered the twentieth century, the association of 'Crown' and state was further obstructed by what is identified by its detractors as an aspect of the Diceyan tradition.[177] Dicey distrusted the 'Crown' as an

171 Otto Gierke, *Political Theories of the Middle Age* (Frederic W Maitland tr, CUP 1900).

172 cf Runciman and Ryan (n 132) xii.

173 See generally Runciman (n 10).

174 eg Harold Laski, 'The Personality of Associations' (1916) 29 *Harvard Law Review* 404; Harold Laski, 'The Responsibility of the State in England' (1919) 32 *Harvard Law Review* 447; Ernest Barker, *Church, State and Study: Essays* (Methuen 1930).

175 See McLean (n **Error! Bookmark not defined.**) 79-80; Mark M Hager, 'Bodies Politic: The Progressive History of Organizational "Real Entity" Theory' (1989) 50 *University of Pittsburgh Law Review* 575.

176 Herbert LA Hart, 'Definition and Theory in Jurisprudence,' reproduced in Herbert LA Hart, *Essays in Jurisprudene and Philosophy* (Clarendon Press, 1983) (first published 1953); see the discussion in McLean (n **Error! Bookmark not defined.**) 80-82.

177 See generally Janet McLean, 'The Crown in Contract and Administrative Law' (2004) 24 *Oxford Journal of Legal Studies* 129, 140-141.

abstraction, and discouraged any exaggeration of its powers.[178] The 'Crown' could only act through Ministers, according to prescribed forms by which the Minister became 'not only morally but legally responsible for the legality of the act in which he takes part.'[179] This was not an account of legal (constitutional) personality. It was a normative and systematic account of the emergence of administrative law from the system of prerogative writs,[180] which system was adopted as (and in Australia remains) the method by which government action is brought under the supremacy of the law of the land.[181] Dicey situated the rule of law in the exertion of judicial control over individual officials. Prerogative writs running from the monarch against these officers were not available against the 'Crown,' or the 'state' more generally. As Lord Woolf said in *M v Home Office*:[182] 'while prerogative orders are made regularly against ministers in their official capacity, they are never made against the Crown.' The development of the system of writs, still important in Australia today, is rightly seen as stifling the development of a concept 'state' (whatever that concept may have come to mean).

[178] Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 10-11.

[179] ibid 327.

[180] Stroud Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 33- 36.

[181] Dicey contrasted this with the French *droit administratif*, which was based upon two leading ideas 'alien to the conceptions of modern Englishmen'. First, the idea that the government 'as representative of the nation' possesses legal characteristics placing it on a different footing from the individual; and, second, the principle that the government and its officials ought whilst acting officially to be independent of and free from the jurisdiction of ordinary courts: Dicey (n 178) 336-338.

[182] *M v Home Office (HL)* (n 84) 407 (Lord Woolf).

It was not for that reason deficient; it rather shifted emphasis onto the judiciary. For Dicey, it has been said, the 'state' was represented in and by the judges.[183]

Scholars of the first two decades of the twentieth century, inspired by Maitland, saw themselves as observers of a slow process by which the 'Crown' was becoming one of the names of the organised community.[184] By 1927, Romer J took it as established law that 'the Crown is a corporation'.[185] It was unnecessary to decide whether the 'Crown' was a corporation sole ('as it is generally thought to be') or a corporation aggregate (as Maitland supposed). Reluctantly, it seems, the sixth edition of *Pollock's First Book of Jurisprudence*, published in 1929, said that the 'Crown' was a corporation and described this as 'an innovation made in an age of pedantry.'[186] Then, in 1955, the House of Lords held that the government of Madras, a 'branch of the Crown', was a 'person' within the meaning of a schedule to the Income Tax Assessment Act 1918 (UK).[187] Lord Keith thought that this outcome was supported by the definition of 'person' in the Interpretation Act 1889 (Imp), which by section 2(1) includes 'a body

[183] cf Julia Stapleton, 'Dicey and his Legacy' (1995) 16 *History of Political Thought* 234, 239 fn 24.

[184] Maitland, 'Crown as Corporation' (n 101) 40. See also Pollock and Maitland (n 110) vol 2, 524- 525; Cobbett (n 164) 26; and 'The Crown as Representing the State' (1904) 1 *Commonwealth Law Review* 145, 148; Haggen (n 19) 186-187; see Loughlin (n 123) 36-37, observing that the substitution of the 'Crown' for the King or Queen was a slow but 'relatively modern phenomenon.'

[185] *In Re Mason* [1928] Ch 385 (Ch) 401 (Romer J).

[186] Pollock (n 42) 121-122.

[187] cf *Madras Electric Supply Corporation Ltd v Boarland (Inspector of Taxes)* [1955] AC 667 (HL) 680 (Lord Oaksey), saying that it was conceded that the government was a 'branch of the Crown', and ibid 686 (Lord MacDermott), saying that it was 'not disputed that the Crown [was] in law a person'.

corporate.'[188] Implicit in this decision was a corporate conception of the 'Crown'.[189] Whether it was a corporation 'sole' or 'aggregate' is a question that has persisted in the modern cases, explored below.

What emerges from the contemporaneous cases and literature is that the constitutional person known as the 'Crown' emerged gradually as an impersonal substitute for the concept, invented by Coke, of the ('parsonated') King as corporation sole. That concept did not approximate the 'state', which was associated with continental jurisprudence but never translated—nor properly elaborated—in the English literature. The 'Crown' developed into a corporation, substitutable for and associated with the 'sovereign', but which was not thought to incorporate the whole government, or the people. In this development it was governed by, and progressed with, administrative law, which fixed upon the personated responsibility of office-holders. In these respects, the 'Crown' is the progenitor of constitutional personality in Australia.

(b) The 'Crown' in Modern Law

The power of Maitland's contribution may be seen, nowadays, in ambiguity about the nature of the 'Crown' as corporation. *Halsbury's Laws of England* indicates that the 'Crown' has 'legal status' either as a corporation sole *or* as a corporation aggregate.[190] In that ambiguity, *Halsbury's* follows the speech of Lord Woolf in *M*

[188] ibid 695 (Lord Keith). The Interpretation Act 1889 (Imp) provides in s 2(1) that in the construction of enactments 'relating to an offence punishable on indictment or on summary conviction', the expression 'person' shall include a body corporate.

[189] Loughlin (n 123) 36-37.

[190] *Halsbury's Laws* (4th edn reissue, 1996) vol 8(2), [15].

v Home Office,[191] who in turn referred to a dispute that emerged out of *Town Investments v Department of Environment*.[192] Whilst it has never been seriously suggested that the Commonwealth (constitutional person) is a corporation, these cases still merit detailed discussion because they present in acute form a persistent problem for any broad theory of constitutional personality: how to explain the presence of the constitutional person in some contexts, but not others where it would be remedially or analytically useful. This section suggests that the problem can be resolved by adopting the narrow theory: that the 'Crown' as constitutional person is distinct from the nation, the government and the executive.

The legislation considered in *Town Investments*[193] required the courts to answer three questions: who was the 'tenant' of two buildings in London occupied as government offices; did that tenant 'occupy' the premises; and was its occupation for the purposes of 'a business'. The Court of Appeal held that the 'tenant' was the Secretary of State for the Environment, which was the party named on the underleases.[194] This had the detrimental effect of exposing the Department to inflated rent negotiations, since it was clear on the facts that the

191 *M v Home Office (HL)* (n 84).

192 *Town Investments v Department of Environment* [1976] 1 WLR 1126 (Ch); *Town Investments v Department of Environment* [1976] 1 WLR 1133 (CA) (*Town Investments (CA)*); and *Town Investments (HL)* (n 19).

193 Namely the Counter-Inflation (Temporary Provisions) Act 1972 (UK), s 2(4), and the Counter-Inflation Act 1973 (UK), s 11(1). Each provision conferred a power upon the appropriate Minister to regulate rent-increases by order. The relevant orders were the Counter-Terrorism (Business Rents) Order 1972 (SI 1972/1850) (UK); and Counter-Terrorism (Business Rents) Order 1973 (SI 1973/741) (UK).

194 *Town Investments (CA)* (n 192) 1137A-B (Lawton LJ), 1143D (Sir John Pennycuick), 1147H (Buckley LJ).

Secretary was not in 'occupation'.[195] By majority, the House of Lords overturned this conclusion.[196] The tenant was held to be the 'Crown', not the Secretary. Although the Secretary was the named party, he was acting not on his own behalf but as an aspect or emanation[197] of something described in the speeches either as the 'Crown' or the 'government'.[198] It was the 'Crown', or the 'government', that was the tenant.[199] Because the persons physically present on the premises were in that broad sense 'government servants',[200] it could be said that the 'Crown' was in occupation.[201] By this mechanism, the majority reached the desired outcome of preventing an inflationary renegotiation of government leases.

Each of the speeches in *Town Investments* assumed or decided that something called the 'Crown', which was equated by Lord Diplock with the 'government', had the capacity to take an assignment of a leasehold interest, acting through a Secretary of State. In that sense the 'Crown' plainly had capacity for legal relations. In English law, just as in Australian law, 'capacity' entails legal personhood,[202] whilst the 'holding of a legal estate in land is undoubtedly one of

195 ibid 1141F-G (Lawton LJ), 1145E-F (Sir John Pennycuick), 1149H (Buckley LJ).

196 *Town Investments (HL)* (n 19).

197 ibid 381D-E (Lord Diplock), 400G-H (Lord Simon), 402C (Lord Kilbrandon), 403A (Lord Edmund Davies) agreeing with Lord Diplock.

198 ibid 381D-E (Lord Diplock) and 402A-B (Lord Kilbrandon) agreeing with Lord Diplock.

199 ibid 402D (Lord Kilbrandon).

200 ibid 382H (Lord Diplock).

201 ibid 402D (Lord Kilbrandon).

202 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL).

the capacities of a body corporate'.[203] To this extent, the words 'government' and 'Crown' must be taken in *Town Investments* as names for a legal person.

In a speech with which Lord Edmund-Davies agreed, Lord Diplock said that the 'Crown' was 'in law a corporation sole.'[204] When the Secretary accepted grants of leasehold interests, described by his Lordship as 'executive acts of government', the 'legal nature' of such acts was that they were 'acts done by "the Crown" in the fictional sense'.[205] The tenant was therefore the 'government acting through its appropriate member or, expressed in the term of art in public law, the tenant was the Crown.'[206] There is a firm sense here that the 'Crown' as corporation sole is the representative of the executive government. Lord Diplock identified the 'Crown' with the 'government', which he defined to include 'collectively and individually all of the ministers of the Crown and parliamentary secretaries' as well as civil servants.[207] How this conception related to the 'corporation sole' was not explained.

Lord Simon distinguished three meanings of the 'Crown': it was a piece of jewelled headgear, it denoted prerogative and statutory powers, and it corresponded, although 'not exactly, with terms of political science like "the Executive" or "the Administration" or "the Government"'.[208] Referring to this last

[203] ibid 504G-H (Lord Oliver).

[204] *Town Investments (HL)* (n 19) 384D-E (Lord Diplock) (emphasis added).

[205] ibid 381B-D (Lord Diplock).

[206] ibid 381E-F (Lord Diplock).

[207] ibid 381B-C (Lord Diplock).

[208] ibid 397F, 397G and 398G (Lord Simon).

conception, namely the cognate terms for Executive Government, his Lordship said that the 'Crown' was a 'corporation aggregate headed by the Queen.'[209] The Minister was a 'member of the corporation aggregate of the Crown', or in other words 'an aspect or member of the Crown.'[210] To similar effect, Lord Kilbrandon denied there could be a 'rational distinction' between the Secretary as tenant and the 'Crown' as tenant. Where the Secretary took a lease, he was 'taking it as the Crown: it is the only way in which the Crown can act in this aspect of its function.'[211] Lord Kilbrandon impliedly accepted a multiplicity of meanings when his Lordship said that the Secretary was 'property-holder for the Crown *in the executive sense of that word*'.[212] Again, there is the sense that the 'Crown' as legal person represents the Executive Government. Whether this is done as a corporation sole or aggregate did not seem to matter as between the majority speeches, and, it seems, would not have influenced the result.

Lord Morris dissented, agreeing with the Court of Appeal that the tenant was not the 'Crown' but the Secretary of State.[213] His Lordship did not deny that the 'Crown' was a legal person, but held that the terms of the underleases could not support the notion that the 'Crown' was the tenant.[214] The Secretary of State was said by his Lordship to be the 'person chosen by or, so to speak, deputed by *the organisation* which may conveniently and colloquially be called the government

209 ibid 400C-D (Lord Simon).

210 ibid 400F (Lord Simon).

211 ibid 402C (Lord Kilbrandon).

212 ibid 402C (Lord Kilbrandon) (emphasis added).

213 ibid 395E (Lord Morris); *Town Investments (CA)* (n 192) 1137A-B (Lawton LJ), 1143D (Sir John Pennycuik), 1147H (Buckley LJ).

214 *Town Investments (HL)* (n 19) 394D-F (Lord Morris).

to be the tenant or lessee of premises the use of which was needed.'[215] Here the Secretary of State, a legal person standing outside of the 'Crown', represents 'the government' regarded as an 'organisation'. That, with respect, was a sound way of viewing matters. Unfortunately, however, Lord Morris's definitions of the 'Crown' were unclear. His Lordship said that the term could designate, the Queen (personally, as Head of the Commonwealth, or as constitutional Monarch), and 'in reference to the functions of government and the public administration.'[216] It is not always clear which of these 'Crowns' his Lordship was referring to in different parts of the speech, or which (if any) of those 'Crowns' was the constitutional person.

Thus, for the majority in *Town Investments*, the 'Crown' was present in a full-throated corporate form: its legal personality subsumed that of the Secretary of State for the Environment, who was the named party to the underlease. For the minority, in contrast, the 'Crown' as constitutional person was not present: the Secretary of State represented the government, in respect of the lease. That position is often compared to *M v Home Office*, which arose from a decision by the Home Secretary to ignore a mandatory court order commanding the return from Kinshasa of the asylum seeker 'M', who had been deported prematurely. The order had been made *ex parte* by Garland J the night before, and to ignore it was the culmination of a remarkable 'chapter of accidents, mistakes and misunderstandings'.[217] As a result, contempt proceedings were begun on behalf

[215] ibid 395E (Lord Morris) (emphasis added).

[216] ibid 393C-D (Lord Morris).

[217] *M v Home Office* [1992] 1 QB 270 (CA), 284B (Lord Donaldson MR) (*M v Home Office (CA)*).

of M against the 'Crown', the Home Secretary, and the Home Office. Approaching both cases from the perspective of a search for the 'state', these two decisions can be seen as standing in stark contrast.

The Court of Appeal in *M v Home Office* took the speeches of the House of Lords in *Town Investments* to mean that the 'Crown' was not a legal person, and could not be the subject of contempt proceedings.[218] That was a surprising result, particularly since Mr Stephen Sedley QC had directed the Court to authorities, such as *In Re Mason*,[219] establishing that the 'Crown' is the name of a corporation. Purporting to follow the speech of Lord Diplock, Lord Donaldson MR said (in a sense, rightly) that the 'Crown' was a synonym for 'the Government'. In turn, it was pointed out (rightly) that 'the Government' lacks legal personality.[220] The error was in assuming that 'Crown' and 'government' were in every sense synonymous: the Court of Appeal held that the 'Crown', as well as governmental departments, were 'non-persons' in the law.[221] The result was that the proceedings against the 'Crown' and the Department failed, because there was no legal person to be found in contempt. The majority made a finding of contempt against the Home Secretary personally: like any other citizen, he was subject to the full jurisdiction of the courts.[222]

[218] ibid.

[219] *In Re Mason* (n 185) 401 (Romer J) and Maitland, 'The Crown as Corporation' (n 101); see *M v Home Office (CA)* (n 217) 282E-F (Report of argument of Sedley QC).

[220] *M v Home Office (CA)* (n 217) 300F-H (Lord Donaldson MR), 308D (McCowan LJ), and 313 (Nolan LJ).

[221] ibid 308D (McCowan LJ), 313C (Nolan LJ).

[222] ibid 302G (Lord Donaldson MR) and 314F (Nolan LJ), 310D-E (McCowan LJ) dissenting.

The House of Lords upheld this decision, but substituted the designation 'Secretary of State for Home Affairs' for the name of Mr Kenneth Baker as the proper object of the finding of contempt.[223] Lord Woolf, delivering the leading speech, seemed to accept that the 'government' and 'government departments' lacked legal personality. One mistake of the Court of Appeal was to misapprehend the legal personality of the 'Crown'. His Lordship said:

> [A]t least for some purposes, the Crown has a legal personality. It can be appropriately described as a corporation sole or a corporation aggregate: *per* Lord Diplock and Lord Simon of Glaisdale respectively in [*Town Investments*]. The Crown can hold property and enter into contracts. On the other hand, even after the [Crown Proceedings Act] 1947, it cannot conduct litigation except in the name of an authorised government department or, in the case of judicial review, in the name of a minister.[224]

Although this is in some respects a difficult passage, its importance is that the 'Crown' was ignored as the object of a contempt finding out of a preference for the officer who had authorised the contempt. Like *Town Investments*, this case confirms that that there is a constitutional person called the 'Crown' playing a role in the processes of government. Like *Town Investments*, it confirms that the term 'Crown' has distinct though related meanings, and that one of its meanings is to signify a corporation (sole or aggregate) that *represents* the Executive Government. The critical difference between the decisions concerns the extent of that representation. In *Town Investments*, the 'Crown' was amplified or elevated so as to subsume the legal personality of the Secretary of State. In *M v Home*

[223] *M v Home Office* (HL) (n 84) 427F (Lord Woolf) and 395A (Lord Keith), 395-396 (Lord Templeman), 396B (Lord Griffiths) and 396C (Lord Browne-Wilkinson) agreeing with Lord Woolf.

[224] ibid 424F (Lord Woolf).

Office, on the other hand, the 'Crown' (ignored as the object of an order for contempt) was seemingly marginalised in preference for the personality of the Home Secretary.

The contrast between *Town Investments* and *M v Home Office* inspired perhaps the most significant contemporary contribution to this topic. In a series of articles,[225] Professor McLean has argued that those cases show that there are different conceptions of the legal personality of 'the State' within 'public' and 'private' law. With reference to *M v Home Office,*[226] McLean argued that *administrative law* operates in a way that '[avoids] any attribution of legal personality to the State.' The crux of the argument is that executive powers are wielded on a departmental basis by individual decision-makers, who are compelled to wield them in accordance with law by prerogative writs issued against the office holder personally.[227] This involves a much diminished role for a right-and-duty-bearing unit collectively representing the 'state'. On the other hand, McLean argued, contract law 'constructs a unified Government legal personality'.[228] The latter was present in *Town Investments*, where for leasehold purposes the 'Crown' was treated as an aggregated entity subsuming its officeholders.

[225] McLean (n 177); Janet McLean, 'Government to State: Globalisation, Regulation, and Governments as Legal Persons' (2003) 10 *Indiana Journal of Global Legal Studies* 173, 178.

[226] McLean (n 177)136.

[227] cf Mark Freedland, 'The Crown and the Changing Nature of Government', in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (OUP 1999) 114 and 115; quoted with approval in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] 1 AC 1003 (HL) (*BAPIO*).

[228] McLean (n 177) 136.

A flaw in McLean's argument is that it attributes too much significance to the somewhat idiosyncratic reasoning in *Town Investments* and *M v Home Office*. The argument appears to be undermined by the subsequent appearance of the aggregated 'Crown' in the 'public law context' presented by *BAPIO*,[229] where an organisation of Indian doctors sought judicial review of a non-binding 'guidance', issued by the Secretary of State for Health to employers within the National Health Service (NHS).[230] The effect of the 'guidance' was to discourage NHS Trusts from recruiting international medical graduates for training posts in circumstances where they had obtained leave to enter and remain in the UK under the 'Highly Skilled Migrant Program' implemented by the Home Secretary. Lord Mance and Lord Rodger held that the 'guidance' was invalid because it defeated the 'legitimate expectations' of the international medical graduates whom it prejudiced. That proposition was predicated, as Lord Scott said in dissent, upon 'the constitutional principle that the Crown is indivisible, that ministers are merely "emanations" of the Crown'.[231] Lord Rodger said that in the UK, 'the executive power of the Crown is, in practice, exercised by a single body of ministers, making up Her Majesty's Government.'[232] The 'executive power of the Crown' was exercised by 'a single body' or a 'single entity, Her Majesty's Government.'[233] Lord Mance, too, treated the 'Crown' as the wielder of the

[229] *BAPIO* (n 227).

[230] The objective of the 'guidance' was to secure post-graduate training positions at NHS hospitals for British (or European Economic Area) nationals. The Department's concern was that international medical graduates recruited to these positions would afterwards emigrate, potentially creating a shortage of fully qualified doctors in the United Kingdom.

[231] *BAPIO* (n 227) 1015 [27] (Lord Scott), 1023 [52]-[53] (Lord Mance).

[232] ibid 1018 [33] (Lord Rodger).

[233] ibid 1018A [33] and 1018D [34] (Lord Rodger).

powers of the two Secretaries.[234] The issuing of the 'guidance' by 'one emanation of the Crown' was prejudicial to a legitimate expectation generated by the Home Secretary, which was 'another emanation of the Crown'.[235] Whatever else might be thought of these judgments, they seem to embrace an aggregated conception of the 'Crown' that, according to McLean, ought not to have been seen in a 'public law' context.

BAPIO is a 'public law' decision in the sense that it invalidated the exercise by a departmental Secretary of what was taken[236] to be a statutory discretion. Thus, the 'Crown' of the *Town Investments* speeches, which McLean would confine to private law, is seen in *BAPIO* to trespass into the field of 'public administrative law'. That contradicts the position taken by McLean, that administrative law and contract law differently construct what she termed 'the juristic status of the State'.[237] In *BAPIO*, only Lord Scott adhered to the disaggregated conception of the 'Crown', which McLean would confine to administrative law.[238]

BAPIO shows that two contentious assumptions underlie McLean's approach. The first is that different areas of law are capable of compartmentalisation; thus, that 'contract' law and international law might *contain* a conception of the

234 ibid 1023H [54] (Lord Mance).

235 ibid 1026D [60] (Lord Mance).

236 The Health Secretary's 'guidance' was conceded to be an otherwise valid exercise of a general discretion under the National Health Service Act 1977 (UK), which was only on the two grounds discussed: *BAPIO* (n 227) 1007E (Lord Bingham), 1013A (Lord Scott), 1022B [49] (Lord Mance) noting this concession.

237 McLean (n 177) 139. Regrettably, Professor McLean offered no definition of these terms.

238 *BAPIO* (n 227) 1016D [28] (Lord Scott), saying that he could 'see no good or sensible reason' why a representation by the Health Secretary could be invalidated by the policy of the Home Secretary.

'Crown' that is different from the conception in administrative law.[239] This assumption is evocative of the French *droit administratif*, which, as Dicey said, is 'utterly unlike any branch of modern English law'.[240] Nor does it find any support in Australian law. The second assumption is that different uses of the term 'Crown' in these decisions (ie with breadth in *Town Investments*, but narrowly in *M v Home Office*) reflect two different constructions of the legal personhood of the 'State'. The better view is that these decisions deploy the same term for different purposes: there is not one 'contract Crown' and another 'administrative Crown', but rather, underlying instability in the conception of the 'Crown' and what it represents. In administrative law, the 'Crown' is usually used in the sense of an aggregate of the officers and institutions comprising the Executive Government. In contract law, the 'Crown' is usually used in the sense of a constitutional person. McLean is, of course, correct to observe that the 'Crown' as constitutional person is present to different degrees in contract and administrative law, but she is wrong to conclude that the constitutional person is differently constructed. The 'Crown' is not a monolithic conception having an unstable content as between different curricula. To say that there are different 'Crowns' in public law and private law is to sidestep the problem: neither area of law contains a consistent conception of the 'Crown', a term which means many things to many people.

[239] eg McLean, 'Government to State: Globalisation, Regulation, and Governments as Legal Persons' (n 225) 175.

[240] cf Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (ECS Wade ed, 9th edn, Macmillan 1939) Ch XII.

(2) The 'Crown' in Australia

This section explores the history of the 'Crown' in Australia. Section (a) examines old colonial cases, which first established that the government per se was not a legal person, and that constitutional personality could be attained or utilised only through the 'Crown'. This conception became difficult to sustain after Federation, because of the functional and textual necessity for component governments to have mutual legal relations. Section (b) deals with the solution first devised by the High Court of Australia to address that problem; namely, to multiply the 'Crown' into several distinct legal persons, each representing different sovereign governments. That conception was abolished when, in the *Engineers' Case*,[241] the High Court reasserted the theory that the 'Crown' was unified and indivisible. Section (c) explains that judgment and its impact. It shows that the formal assertion of unity was never actually allowed to obstruct or obscure the distinction between the unified 'Crown' and the distinct governments as 'political bodies', which the 'Crown' represented.

At each stage, it will be shown that neither the 'government', nor the nation (after its emergence) was treated as the constitutional person. Instead, the government or the nation/political community was *represented* by the 'Crown,' which was a species of corporation having limited capacities and limited liability.

[241] *Engineers' Case* (n 59).

(a) The 'Crown' in the Colonies[242]

This section isolates a cross-section of cases and legislation elucidating the nature of the undivided 'Crown', by which colonial governments were represented in the integrated imperial legal system. The primary interest of these cases is their development of a conception of 'government', as something distinct from the 'Crown' as legal (constitutional) person, which identified the distinctive sets of interests that were *represented* by the 'Crown' where rights and obligations were necessary. 'Government' was understood in these cases as having a concrete existence, and for certain analytical purposes was even personalised, but was never treated as a legal person and indeed was established *not* to be a legal person.

(i) Colony as Litigant

Colonial governments were notorious for the scale of the litigation that they generated. Professor Paul Finn explained that the 'raw conditions' in the Colonies, the imperatives of development and the patterns of settlement compelled them to innovate and improve.[243] Yet they were not constitutional persons.

[242] This section considers only the 'royal' and settled variety of colony, since the chartered and proprietary varieties of colony (and conquered or ceded royal colonies) are inapposite to the structure of government in Australia. A description of the distinguishing features may be found in 1 Bl Comm 107-109; Herman Merivale, *Lectures on Colonization and Colonies*, (Longman, Orme, Brown, Green and Longmans 1841) vol 1, 69; Herbert Osgoode, *The American Colonies in the Seventeenth Century* (Macmillan 1904), vol 1, xxix; and Percival Griffiths, *A Licence to Trade: The History of English Chartered Companies*, (Ernest Benn 1974) xiii-xiv. The British East India Company was a separate case entirely; see generally Philip J Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (OUP 2011).

[243] Paul D Finn, 'Claims Against the Government Legislation' in Paul D Finn (ed), *Essays on Law and Government* (Lawbook Co 1996) vol 2, 25 at 30-31.

An illustrative case is *Sloman v The Governor and Government of New Zealand*,[244] which concerned an action for damages for breach of an emigration contract between Her Majesty the Queen 'on behalf of the colony' of New Zealand, the agent-general for the colony in London, and Messrs Sloman and Loesner. The matter came before the Court of Appeal upon a motion to discharge orders for substituted service upon the solicitor in England for the colony. The Court of Appeal decided the motion on the ground that there was no defendant upon whom original service could be issued. Lord Justice James said that the party named on the writ, the 'governor and government of the colony of New Zealand', 'does not exist'. There is a governor, there are 'certain persons carrying on the government', and there is the legislature; 'but to call them a corporation seems an abuse of language. We must take notice that there is no such corporation as a governor and government of New Zealand.'[245]

The principle articulated in *Sloman's Case* has never been challenged or disputed in a Court, and may be taken to represent the understanding at the time the *Constitution* was drafted of the way that the law conceived of colonial 'governments'. 'New Zealand' did not exist in the legal contemplation of the judges, otherwise than as some islands in the South Pacific, ruled in a particular way by agents of the Queen.[246] Professor Pitt Cobbett of the University of Sydney deduced from this that 'the colony of New Zealand does not possess either in

[244] *Sloman v The Governor and Government of New Zealand* (n 98).

[245] ibid 565-566 (James LJ).

[246] cf Tomas Baty, 'Sovereign Colonies' (1921) 34 *Harvard Law Review* 837, 851, where New Zealand is mistakenly described as being comprised of a single island!

itself or through its executive government any attribute of legal personality.'[247] At the University of Melbourne, Professor Harrison Moore reached the same conclusion, embracing the case as authority for the proposition that a 'colony and the government of a colony has no legal persona save *through* the King.'[248] Implicit in this statement is the notion that colonial government is something more than just a process; it is a group, not recognised as a legal person as such, but represented by and able to utilise the constitutional personality of the Imperial 'Crown' from time to time. Here, the 'government' is implicitly understood as a 'group', in the sense of a collection of human beings coordinated in the pursuit of joint action, and which was represented by the 'Crown'.

The extent to which the 'Crown' represented colonial governments was significantly curtailed by the principle that the 'Crown' could not be sued for wrongs committed by the colonial government. The sovereign's immunities were attributed to the 'Crown',[249] a matter deemed unjust, given the extent of the activities of colonial governments. Local legislatures acted to remedy these perceived injustices. One mechanism was to extend the petition of right. That was done in the Colonies of Western Australia,[250] Tasmania,[251] New Zealand,[252] and

247 Cobbett (1904) (n 184) 148.

248 William Harrison Moore, 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 351, 356 (emphasis added); see also Moore (n 44) 87.

249 GS Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (Stevens and Sons 1908) 2.

250 *Crown Suits Act 1898* (WA), s 33.

251 *The Crown Redress Act 1891* (Tas), s 4.

252 *Crown Suits Act 1881* (NZ).

the Straits Settlements on the Malay Peninsula.[253] Typically, the legislation provided for claims 'upon or against Her Majesty' for damage caused in connection with 'public works' done 'by or under' the authority of 'the Governor on behalf of Her Majesty or of Her Majesty's Executive Government in the colony'.[254] The petition would be granted in circumstances where a remedy would lie between subject and subject.[255] Thus, the 'Executive Government' of New Zealand was held liable to pay compensation for damage to a steamship, arising because of the negligent failure to remove a vertical snag lying at the bottom of the harbour at Westport.[256] The legislature thus extended the availability of pre-existing remedies against the 'Crown', without effecting an incorporation of the colonial government.

The second solution was radically different, and exemplified the legal innovation necessitated by the circumstances of colonial life.[257] The *Claims Against the Government Act 1866* (Qld) was the first legislation in the British Commonwealth comprehensively to impose legal responsibility upon government.[258] Its equivalent would not be enacted in the United States until 1946, and in the UK until 1947.[259] It was introduced to the legislative assembly of the Colony of Queensland by a layperson, and was unencumbered by any

253 Crown Suits Ordinance 1876 (Straits Settlements); cf *Attorney-General of the Straits Settlements v Wemyss* (1888) 13 App Cas 192 (PC).

254 See, eg, *Crown Suits Act 1881* (NZ), s 37.

255 See the general observations in Robertson (n 249) 352.

256 *The Queen v Williams* (1884) 9 App Cas 418 (PC) 427.

257 cf WMC Gummow, *Change and Continuity: Statute, Equity and Federalism* (Clarendon Press 1999) xviii-xix.

258 Sawer, *Australian Federalism in the Courts* (n 98) 163.

259 ibid 164.

knowledge of the intricacies of prerogative law.[260] In its ultimate form, the legislation erected a 'nominal defendant' to represent the 'Government of the colony' in legal actions. In place of legislation erecting a nominal defendant, the colonial legislature might simply have created a legal person called the 'Colonial Government', by rendering it liable to suit by name. In the 1920s, two prominent lawyers saw this as a missed opportunity.[261] The device of a nominal defendant preserved the status quo, whereby the government existed as a collectivity, to which it made sense to attribute a non-legal or imperfect responsibility for the actions of the persons exercising executive power. Nevertheless, it was not a legal person, against which orders could be made or remedies could run.[262]

(ii) Colony as Proprietor

Albeit that it was an unsatisfactory litigant, the 'Crown' was demonstrably the governmental property owner. Colonies could not own property by name. This was not merely because of the incapacity of the common law to recognise the co-existence in different hands of mutually incompatible rights.[263] It was not as if the colony was a landless but existing legal person. Colonies could not own property because they did not exist, as right-and-duty-bearing units.[264]

260 cf Paul Finn, *Law and Government in Colonial Australia* (OUP 1987), chapter 6; Finn (n 243) vol 2, 25.

261 *Downie v Jamieson* (1922) 22 SR (NSW) 121 (NSWSC) 130-131 (Cullen CJ); and Evatt (n 121) 53.

262 See Cobbett (1904) (n 184) 153.

263 cf *Wik Peoples v Queensland* (1996) 187 CLR 1, 87 (Brennan CJ), referring to *Aisbett v City of Camberwell* (1933) 50 CLR 154, 178-179 (McTiernan J) and the citation in that case of *Yarmouth Corporation v Simmons* (1878) 10 Ch D 518, 527.

264 Cobbett (n 164) 28.

The decisions establishing that the 'Crown' owned public property reflected developments in the basis upon which land was granted in the colony. At first, the Governor granted land *ex mero motu*[265] in order to settle and cultivate the country.[266] The grants were seen as having been made by delegated authority of the King, as 'absolute owner'.[267] Under the influence of Mr Gibbon Wakefield's theories,[268] the disposition of public land came to be regulated by a progression of statutes.[269] These statutes adopted definitions that assumed the continuing validity of the theory of absolute Crown ownership. The 1855 Constitution Act,[270] which granted responsible government, referred in section 2 to 'waste lands belonging to the Crown', and vested only their control (but not their ownership) in the local legislature.[271] In the words of Isaacs J, statutory control of wastelands 'was transferred to the Colony not as a matter of title … but as a matter of

[265] See *Joachim v O'Shanassy* (1877) 1 Knox 118 (NSWSC) 119-120 (Martin CJ); *Attorney-General v The Municipal Council of Sydney* (1919) 20 SR (NSW) 46 (NSWSC) 55-56 (Owen AJ). Governor Phillip's Commission from King George III, bearing the date 2 April 1788, contained a passage granting him 'full power and authority' to dispose of and grant land upon terms and conditions in accordance with Royal Instructions given under the Sign Manual: cf *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, 416-417 (Barton ACJ).

[266] See Enid Campbell, 'Crown Land Grants: Form and Validity' (1966) 40 *Australian Law Journal* 35, 35.

[267] *Rhode Island v Massachusetts* 37 US 657 (1838) 738. In Australia, compare *Williams v Attorney-General for New South Wales* (n 265), 439 (Isaacs J) with Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens and Sons 1966) 631.

[268] ie that government land should be sold at a comparatively high price, with the proceeds applied to facilitating the emigration of a labour force; see Merivale (n 242) vol 2, 42.

[269] Sale of Waste Lands Act 1842 (Imp), amended by Sale of Waste Lands Amendment Act 1846 (Imp). cf *Wik Peoples v State of Queensland* (1996) 63 FCR 450 (FCA) 461 (Drummond J).

[270] New South Wales Constitution Act 1855 (Imp).

[271] See generally TP Fry, 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158, 159.

governmental function;'[272] the 1855 constitution 'left title exactly where it was'.[273]

The conclusion derivable from these authorities is that the colonial government, a collectivity brought into the very processes of legal reasoning by colonial legislation, was not a legal person. The 'Crown' was a legal person, operating throughout the (undivided) realm. True it is that the 'Crown' *represented* the colonial governments. In the absence of legislative intervention, however, it could not be sued for wrongs committed by the individuals comprising the colonial governments and its ownership of public property, consistently with prevailing theories of sovereignty, was seen as *absolute*. Thus, the non-equivalence of constitutional person and government was established very early in Australian law. What remains to be seen is the extent to which the *Constitution* altered this position.

(b) The 'Multi-Cellular Crown' of the Early High Court of Australia

The federation of the Australian colonies vastly complicated the already overwrought structure by which the colonial governments had to rely upon the unified and indivisible 'Crown' in litigation, contracts and property. The 'Commonwealth' was understood within the public service to be represented by the 'Crown', and so could sue in a State court[274] and obtain the benefit of the 'Crown' priority in a wind-up.[275] It was soon perceived, however, that a confusion of 'Crowns' might arise. On 6 February 1902, the Commonwealth Attorney-

[272] *Williams v Attorney-General for New South Wales* (n 265) 456 (Isaacs J).

[273] *New South Wales v Commonwealth* (1926) 38 CLR 74, 89 (Isaacs J).

General, Mr Alfred Deakin, advised that a transfer of land in Victoria made out 'to the King' was not in order:

> 'It should be to the Commonwealth of Australia. If the transfer of the land is taken in the name of the King, there will be nothing on the title to show whether the property is vested in the Commonwealth or the State.[276]

Meanwhile, inspired by the scholarship of Maitland, prominent Australian academics writing about the new constitutional arrangements, and observing that the 'Crown' had multiple meanings, advocated the recognition of distinct legal personhood of the Commonwealth and States.[277]

The High Court of Australia dealt with these issues in a series of decisions described by Mr HT Postle as establishing, at least for judicial process, the 'multi-cellular corporate character of the Crown.'[278] This new device was first pronounced in the *Municipal Council Case*.[279] In the weeks prior to delivery of judgment in that case, an article was published in the first volume of the *Commonwealth Law Review* by Professor Pitt Cobbett, Challis Professor and Dean of the University of Sydney Law School.[280] Bearing the clear influence of

[274] Alfred Deakin, 'Advice to the Minister for Trade and Customs' (23 February 1903) in Patrick Brazil and Bevan Mitchell (eds), *Opinions of the Attorneys-General of the Commonwealth of Australia* (Australian Government Publishing Service 1981) 166 [Opinion No 129].

[275] William Morris Hughes, 'Advice to the Treasurer' (15 April 1913) in Patrick Brazil and Bevan Mitchell (eds), *Opinions of the Attorneys-General of the Commonwealth of Australia* (Australian Government Publishing Service 1981) 648 [Opinion No 504].

[276] Alfred Deakin, 'Advice to the Department of Home Affairs' (6 February 1902) in Patrick Brazil and Bevan Mitchell (eds), *Opinions of the Attorneys-General of the Commonwealth of Australia* (Australian Government Publishing Service 1981) 52 [Opinion No 41].

[277] Moore, 'Crown as Corporation' (n 248) 358-359; Cobbett (1904) (n 184) 152.

[278] cf HT Postle, 'Commonwealth and Crown' (1929) 3 *Australian Law Journal* 109, 110.

[279] *Municipal Council Case* (n 2).

[280] Cobbett (n 164).

Maitland,[281] it pointed out the many anomalies resulting from the attempt to utilise the King, the head of the executive branch, as the '*legal representative* of the whole State.'[282] In his second article, Cobbett traced the mischievous consequences of this 'defective conception'[283] into Australian institutions and habits of thought. One consequence of the prevailing theory was that the States were incapable of direct legal relations with each other. This contradicted political and social facts. Each community wielded 'large public powers' and also 'exercised rights within the domain of private law', whilst maintaining continuity of function and perpetual succession. This, to Cobbett, constituted a 'State', and moreover exhibited 'the marks of a well defined legal personality.'[284] For all practical purposes each State in the Federation was 'a juristic person'. Using words that would be echoed by Griffith CJ in the *Municipal Council Case*, he said that the High Court should recognise that the King 'as representing one State' was a different legal person from 'the King as representing the Commonwealth'.[285] The 'King', Cobbett seems to have thought, should be understood as 'a legal description of the organised community'.[286]

Judgment was delivered in the *Municipal Council Case* at the end of April, 1904.[287] Griffith CJ is reported to have said during argument that the 'whole

281 ibid 26.

282 ibid 25 (emphasis in original).

283 ibid 30.

284 Cobbett (1904) (n 184) 150.

285 ibid 155.

286 ibid 156.

287 *Municipal Council Case* (n 2).

scope of the Constitution shows that a distinction is made between the different Governments as different entities.'[288] His Honour therefore held that the 'Crown', which was '*representing*' the Commonwealth and States as 'distinct and separate sovereign bodies', was 'several juristic persons'.[289] In *Commonwealth v Baume*,[290] decided the following year, Griffith CJ said that the 'Commonwealth', as that word appeared in the *Judiciary Act 1903* (Cth), meant 'the body politic called by that name, which is not a corporation or body corporate … but stands for the Crown as representing the whole community'. The judgment is significant in a number of ways. It recognises the legal (constitutional) personality of the 'Commonwealth,' termed a 'body politic', and represents a significant development from the indivisible 'Crown' that had been seen in the colonial cases discussed in the section above. Moreover, it conceives of that personality as *representing* the 'whole community'.

Another significant contribution to this topic was provided, at around this time, by Harrison Moore. Moore was a Cambridge-educated lawyer who, having graduated from King's College in 1891, was very likely taught there by Maitland,

[288] ibid 222.

[289] *Municipal Council Case* (n 2) 231 (Griffith CJ) (emphasis added).

[290] *Commonwealth v Baume* (n 2) 413 (Griffith CJ).

who had recently been elected to the Downing professorship.[291] Moore's writings on the 'Crown' were presented as an Australian elaboration of the line of enquiry suggested by Maitland's article, 'Crown as Corporation'.[292] Moore exerted a deep influence on Australian constitutional law, including, apparently, as a reference to be consulted by the framers of the *Constitution*.[293] He is also regarded as having influenced the young Owen Dixon, whom he taught at the University of Melbourne[294] and whose views are explored later in this chapter. Of particular relevance to this topic are four articles written by Moore between 1904 and 1907.[295] These articulates contain perhaps the earliest critique in Australia of the theory of government (constitutional person).

A feature of those articles is Moore's discussion of and reference to the contemporary German conceptions of the *Fiskus*.[296] From Maitland's translation

[291] W Harrison Moore had graduated head of his class in the law tripos from King's College Cambridge in 1891, three years after Professor Maitland had been elected to the Downing Chair in the summer of 1888. HAL Fisher of New College, Oxford records that the last word of Maitland's lectures on the constitutional history of England were written in April of 1888: HAL Fisher (ed), *The Constitutional History of England: A Course of Lectures Delivered by FW Maitland* (CUP 1955) v (preface). These lectures were written for the benefit of Cambridge undergraduates reading for the law tripos, such as Moore, who would have arrived at Cambridge at around the time they were finished. cf Loretta Re, 'Moore, Sir William Harrison (1867–1935)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University <http://adb.anu.edu.au/biography/moore-sir-william-harrison-7645/text13367> accessed 1 April 2013.

[292] Maitland, 'Crown as Corporation' (n 101).

[293] Re (n 291).

[294] Phillip Ayres, *Owen Dixon* (Miegunyah Press 2003) 400; Severin Woinarski, *Jesting Pilate* (Lawbook 1965) 189-190; JD Merralls, 'The Rt Hon Sir Owen Dixon' (1972) 46 *Australian Law Journal* 429, 429-430.

[295] Moore, 'Crown as Corporation' (n 248) (1904); Moore, 'Law and Government' (1905-1906) 3 *Commonwealth Law Review* 205; Moore (n 107) (1906-1907); and Moore, 'Liability for Acts of Public Servants' (1907) 23 *Law Quarterly Review* 12.

[296] cf Moore, 'Liability for Acts of Public Servants' (n 295) 13.

of Gierke,[297] and from Pollock and Maitland's *History of English Law*,[298] he had concluded that in neither English nor continental legal history or philosophy had it been necessary to develop a doctrine of personality to explain the 'allocation and exercise of political power'. The first edition of *Pollock and Maitland* contained the following passage:

> Purely governmental and justiciary institutions are not likely to engender the ideal person… It is property (if we give to that word its largest meaning) that demands the juristic person. Property wants a proprietor and in some cases no natural person or group of natural persons is fit for the place.[299]

Referring to this passage, Moore argued that the government required legal personhood only to adapt conceptions of private law.[300] This gives sense to his statement that federal institutions involve 'the interlacing of governmental powers and of juristic persons'.[301] Moore argued that, to appreciate the limited sense in which the 'Crown' represented the Commonwealth as a 'sovereign body', lawyers must distinguish between different varieties of government action.[302] So far as the state governs, 'we need not invoke the juristic person'. It was only 'property', and not government, that demanded the juristic person.

297 Gierke (n 171).

298 Pollock and Maitland (n 110).

299 Pollock and Maitland (n 110) vol 1, 673.

300 Moore, 'Law and Government' (n 295) 209.

301 Moore, 'The Crown as Corporation' (n 248) 351.

302 Moore, 'Law and Government' (n 295) 208-209: '[t]he state governs, but it plays other parts as well'. In accordance with usage then current, the original recites 'State' as a proper noun. The context clearly indicates that it was 'state' in the non-constitutional sense that was the intended meaning.

Moore's arguments were reinforced by the decision of the High Court of Australia in *Enever v The King*,[303] examined in chapter III below. Moore thought that this case illustrated 'the imperfect personification of the State in English law', and a rejection of the 'notion of the group-personality of the whole political community'. *A propos* the theory of government (constitutional person), Moore understood the latter notion as involving the 'recognition of the several depositaries of political power as the delegates of such a *persona*.'[304] Moore took *Enever* as authority for the proposition that 'public law per se—the allocation and exercise of political power—has little need of any doctrine of personality'.[305] If the 'State' was to be liable for the acts of a police officer, Moore said, then it 'must be equally liable for the acts of a Judge done in excess of jurisdiction'.[306] That is an outcome that has never been thought desirable in Australia, even after the eclipse of the 'Crown'.[307] Professor Sawer, writing in 1958, said that he was not aware of any 'modern state' that had 'attempted to adopt an "incorporation" of every aspect of government as a legal entity for all purposes of government responsibility.[308]

303 *Enever v The King* (n 57).

304 Moore (n 107) 51.

305 ibid 52-53.

306 ibid 54.

307 In *State of New South Wales v Kable (No 2)* (2013) 252 CLR 118, eg, the State avoided liability, notwithstanding that the order for imprisonment, issued by a Judge of the Supreme Court of New South Wales, was made pursuant to an invalid statute. The basis of the decision was that an order of a superior court of record is valid until set aside, even if made in excess of jurisdiction; on being set aside, the order is spent but not void *ab initio*.

308 Sawer (n 45) 166.

The early High Court's notion of the 'multi-cellular Crown' was developed in the context of cases, further explored in chapter IV, concerning the Commonwealth's immunity from State law. For present purposes, what is important is that the device of multiplying the legal personhood of the 'Crown' was effected without interrupting the distinction, established in colonial times, between the political community (signified by the term 'Sovereign body') and the constitutional person (signified by the term 'Crown').

(c) The Unified and Indivisible 'Crown'

The next significant development in the theorisation of constitutional personality in Australia occurred in 1920, when a newly constituted High Court rejected concept of the 'multi-cellular Crown' in the *Engineers' Case*. The Court took that opportunity to reiterate the politicised doctrine, afterwards to become known as the doctrine of 'Crown unity and indivisibility', that there was only one 'Crown', throughout the Empire. In its legal or juristic dimension, the crux of this finding was aptly summarised by Mr Douglas Menzies KC, in a prosecution conducted in the 1940s for offences against the *Secret Commissions Act 1905* (Cth): the 'Commonwealth is a juristic person only as the Crown in right of the Commonwealth'.[309] The term 'Commonwealth', to that extent, was 'merely a compendious expression which means the Crown in right of the Commonwealth.'

This section substantiates two propositions about this development. First, the change sparked by the *Engineers' Case* was, for the most part, a linguistic

[309] *R v Brewer* (1942) 66 CLR 535, 540 (report of argument of Menzies KC).

revolution only. The legal person formerly known as the 'Commonwealth Crown' came to be designated as the 'Crown in right of the Commonwealth', without suffering any alteration in its capacities or any interruption of its legal relationships. Second, the decision preserved the distinction between the constitutional person (conceived for theoretical purposes as a unified, singular 'Crown') and the component governments of the Federation, which came to be signified by the phrase 'political organism,' or its cognates 'constitutional unit', 'political unit' and more recently 'polity.'

(i) *The* Engineers' Case

An unsatisfactory aspect of the *Engineers' Case* is that no party actually challenged the theory of the 'multi-cellular Crown:' no argument was heard on the Commonwealth's legal personality, and the report indicates that most of the distinguished barristers appearing in that case at least implicitly accepted this concept.[310] Why it was necessary to attack the theory, in the course of a decision about the ambit of the Commonwealth's legislative power over industrial disputes,[311] was nowhere explained. The *Engineers' Case* is famous in Australian constitutional jurisprudence as a reflection of the growth in war of national

[310] *Engineers' Case* (n 59) 152 (Knox CJ, Isaacs, Rich and Starke JJ), saying that the truth and force of the unity and indivisibility of the Crown had 'been overlooked, not merely during the argument of this case, but also on previous occasions.'

[311] cf *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 313 (Dixon J) (*Farley's Case*).

identity, and economic and commercial integration.[312] The significance of the case for constitutional personality has not always been clearly appreciated.

The question for decision was whether the Minister for Trading Concerns of Western Australia, together with 844 other respondents to an industrial dispute, was amenable to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration. A majority of the High Court held that the Commonwealth's legislative power over industrial disputes under section 51(xxxv) was capable of binding State industries and activities.[313] The case is nowadays famous not only for its rejection of the prior theory of intergovernmental immunities (explored in chapter IV) but also for its rejection of the rule of construction, by which broadly expressed heads of Commonwealth legislative power had been interpreted so as not bind State activities.[314] What is less often noticed is that the decision represented a profound shift in the Court's thinking on constitutional personality. The Court said that it was a 'primary legal axiom' that the 'Crown' was 'ubiquitous and indivisible' throughout the Empire.[315] It followed from this axiom

[312] cf *Victoria v Commonwealth* (1971) 122 CLR 353 (*Payroll Tax Case*) 396 (Windeyer J); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 244-245 (Deane J); but cf Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) *Federal Law Review* 162, 182, saying that this explanation of the *Engineers' Case* ignores several important facts. See also Jeffrey Goldsworthy, 'Justice Windeyer on the *Engineers' Case*' (2009) 37 *Federal Law Review* 363.

[313] *Engineers' Case* (n 59) 159 (Knox CJ, Isaacs, Rich and Starke JJ).

[314] The rule of construction was known as the doctrine of 'implied prohibitions', and was established in *Peterswald v Bartley* (1904) 1 CLR 497 and entrenched in *R v Barger* (1908) 6 CLR 41; see also *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, and *Federated Saw Mill &c Employees of Australasia v James Moore & Son Pty Ltd* (1909) 8 CLR 465. The rule was rejected in the *Engineers' Case* (n 59) 152 (Knox CJ, Isaacs, Rich and Starke JJ), where it was also described as the doctrine of 'political necessity'. On the history of reserved powers in Australian constitutional jurisprudence, see Nicholas Aroney, 'Constitutional Choices in the *Work Choices Case,* or What *Exactly* is Wrong with the Reserved Powers Doctrine?' (2008) 32 *University of Melbourne Law Review* 1.

[315] *Engineers' Case* (n 59) 152 (Knox CJ, Isaacs, Rich and Starke JJ).

that there could be no distinction between 'Imperial King', 'Commonwealth King', and 'State King'.[316] This amounted to an emphatic repudiation of the earlier theory.[317] Justice Rich would later say that the *Engineers' Case* laid to rest 'the ghost of the heresy of Crown schizophrenia'.[318]

The theory propounded by the plurality in the *Engineers' Case* did not deny to the Commonwealth a separate geopolitical identity. Commonwealth and States were described in the plurality judgment as 'political organisms',[319] language evocative of their description in the *Wire Netting Case* as 'distinct and separate organisms'.[320] That proposition was refined in the subsequent judgment of Isaacs J in the *Wool Tops Case*,[321] using the language of 'constitutional units'. Within each 'constitutional unit', the *Constitution* had effected a distribution and delimitation of the King's authority.[322] The powers of the Commonwealth, such as they were described in the *Constitution*, were the powers of 'His Majesty the King acting in any of his great capacities—as legislator, administrator or judge—and in each capacity by his appropriate constitutional agent.'[323] Whilst it is not entirely clear what was comprehended as falling within these expressions, it is contextually clear that the expressions 'political organisms' or 'constitutional

316 ibid.

317 cf *In re EO Farley Ltd* (1940) 40 SR (NSW) 240 (NSWSC) 247 (Jordan CJ).

318 ibid 357 (Rich J).

319 *Engineers' Case* (n 59) 153 (Knox CJ, Isaacs, Rich and Starke JJ).

320 *Wire Netting Case* (n 2) 809-810 (Isaacs J).

321 *Commonwealth v Colonial Combing, Spinning and Weaving Co* (1922) 31 CLR 421 (*Wool Tops Case*) 440 (Isaacs J).

322 ibid.

323 *Kreglinger* (n 49) 418 (Isaacs J).

units' meant the government, and were not imagined to be legal persons as such. Instead, these terms reified that which the legal person was to *represent*. Thus, the plurality said, the constitutional term 'Commonwealth' embraces 'both the strictly legal conception of the King in right of a designated territory, and the people of that territory considered as a political organism.'[324] This is an extremely significant passage, for its contrast of the '*legal* conception' of the King (or 'Crown'), with the conception of the people considered together as 'political organism'. The role of the 'Crown', a giant corporation, multi-national in the sense that it extended to other British possessions, was jointly to represent the separate 'political organisms'.

To enable the unified 'Crown' to represent coexisting governments within Australia and the Empire more broadly, the plurality deployed a concept of 'agency'. The 'Crown' was one and indivisible as a source of government power. The government powers distributed between Commonwealth and States were the 'Australian powers of the Crown'.[325] The functions and powers of the 'Crown' were exercised by different agents, for different localities.[326] By vesting the Commonwealth's executive power in the Sovereign, section 61 of the *Constitution* had applied 'to the new constitutional structure' the basic principle of the law of the Empire: the 'King is indistinguishably the King of the whole Empire', but 'the springs of royal action differ with locality.'[327] It was the 'agents' who actually

[324] *Engineers' Case* (n 59) 146-147 (Knox CJ, Isaacs, Rich and Starke JJ).

[325] *Kreglinger* (n 49) 418-419 (Isaacs J).

[326] cf *Wire Netting Case* (n 2) 813 (Isaacs J).

[327] *Wool Tops Case* (n 321) 438 (Isaacs J).

exercised the King's powers.[328] A major problem with this language was the slippage that it encouraged between 'Crown' as Sovereign and 'Crown' as person, and the inevitable confusion as to what if any relation existed between them. As Marshall said, the phrase 'the Crown in right of' 'is made to work; but what does it mean?'[329] On one hand, the 'Crown' was the theoretical source of governmental power, wielded in an agency capacity by the 'polities … each *representing* the Crown'.[330] On the other hand, the 'polities' were represented by the 'Crown' in matters of property, contract and litigation.

The agencies exercising royal powers were differently constituted and authorised, according to their respective spheres of jurisdiction.[331] In respect of each locality, there would be a question as to how far the authority of the King's 'agents' extended. Thus the *Wool Tops Case*, a case about Commonwealth contracts, was resolved on the basis that the Commonwealth executive did not have the 'legal power' to bind the 'Crown' to the contracts in question.[332] Had they been formed under a different agency or authority, the contracts might have been valid.[333] Justice Higgins said that the Governor-General and the Executive Government were both 'creatures of the *Constitution*', and could have no powers

328 *Engineers' Case* (n 59) 152 (Knox CJ, Isaacs, Rich and Starke JJ).

329 cf Geoffrey Marshall, *Constitutional Theory* (first published 1971, Clarendon Press 1980) 21.

330 cf *Bradken Consolidated Ltd v Broken Hill Proprietary Company Ltd* (1979) 145 CLR 107, 127- 128 (Stephen J) (emphasis added).

331 cf *Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation* (1926) 26 CLR 508, 533 (Isaacs and Rich JJ).

332 *Wool Tops Case* (n 321) 431 (Knox CJ and Gavan Duffy J), 433 and 436 (Isaacs J).

333 ibid 432 (Knox CJ and Gavan Duffy J), 441 (Isaacs J).

except such as had been conferred by or under it.[334] The Governor-General was not 'a general agent of His Majesty, with power to exercise all His Majesty's prerogatives'.[335] Instead he was a 'special agent with power to carry out the Constitution and the laws'. Since he had been assigned no special functions, and since the Court for the purposes of the Special Case was to ignore the laws of the Commonwealth, the only power left to him was the power in section 61 'to execute and maintain this *Constitution*'.[336] The agreements did not fall within that power.[337]

The minority judgments in the *Engineers' Case* embody a more pragmatic view of constitutional personality. Justice Higgins described governments as organised bodies of persons, acting through human beings.[338] Justice Gavan Duffy spoke frankly of the 'Government of Western Australia', carrying on industrial enterprises 'through its agents'.[339] He seemed content to describe the 'Crown operating in Western Australia' as an artificial but 'sovereign' person.[340] Where one 'Crown' conducted operations in another jurisdiction, it lost the character of 'maker and administrator of the law', and submitted itself to those jurisdictions

334 ibid 453 (Higgins J).

335 ibid 453-454 (Higgins J).

336 ibid.

337 The *Wool Tops Case* is a difficult authority: *Williams (No 1)* (n 2) 308 [374] (Heydon J). The dependence of these judgments upon the idea that there was a residue of executive power, exercisable by the King otherwise than through the Governor-General, make them an infirm authority for a proposition about the limits of Commonwealth contracting in modern times; but see *Williams (No 1)* (n 2) 257 [212] (Hayne J).

338 *Engineers' Case* (n 59) 167 (Higgins J).

339 ibid 171 (Gavan Duffy J).

340 ibid 173 (Gavan Duffy J), summarising the submission of the Society of Engineers.

'as if it were a private person.'[341] The division of the role or function of the 'Crown' between two 'characters' ('maker and administrator of the law', and 'private person') is a significant feature of the law of intergovernmental immunity. There is a superficial attraction to such reasoning, and it has proved enduring. Ultimately, however, it provokes a set of even more difficult questions: how to determine where one 'character' ends and the other begins, and how to reconcile the two 'characters' with a singular (bipolar) personality. These difficulties are elaborated in chapter IV, which conducts a more thorough review of intergovernmental immunity.

(ii) The Reception of the Engineers' Case

The *Engineers' Case* was to engender the belief that the 'Commonwealth', as a matter of strict legal theory, did not exist.[342] Certainly the 'Commonwealth' continued to evoke a set of social, political or moral ideas. It was variously a 'political organism' and a 'constitutional unit'. For the purposes of capacities, however, the term 'Commonwealth' described only 'the Crown in right of the Commonwealth'. The 'Commonwealth' was not otherwise the name of a legal person; to hold otherwise would contradict the unity of the 'Crown' throughout the Empire. Cases on section 114 of the *Constitution*, for example the *Superannuation Fund Investment Trust Case*, were argued and decided as if property must belong either to 'the Crown in right of the Commonwealth', or to

[341] ibid 176 (Gavan Duffy J).

[342] eg W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th edn, Lawbook Co 1976) 390.

an owner that could be 'equated to the Crown in right of the Commonwealth.'[343] To repeat what is reported to have been the argument before the High Court of Mr Douglas Menzies KC in 1942: the 'Commonwealth is a juristic person only as the Crown in right of the Commonwealth'.[344] It was not until the late 1990s that the High Court, in a series of cases explored in the next section, began to discourage the use of such language.

Nevertheless, the rhetoric of Crown unity and indivisibility was at no point permitted to obstruct the functional capability of Commonwealth and State governments separately to avail themselves of capacities. In cases where only one government was involved, it was easier to maintain the premise of indivisibility. The *Commonwealth Law Reports* contains a number of post-*Engineers'* cases involving war-time contracts of the Commonwealth. The *Wool Tops Case*[345] concerned contracts, signed by the Prime Minister, for the use of the Australian wool clip in the Allied war effort. The *Colonial Ammunition Case*[346] concerned negotiations, under letter of the Secretary of Defence for the Commonwealth, to take over a munitions factory in Footscray, Melbourne. The *Kidman* litigation concerned Commonwealth contracts, again signed by the Prime

[343] cf *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 (*Superannuation Fund Investment Trust Case*) 339 (Stephen J), 335 (Barwick CJ), 353-356 (Mason J), 359 (Aickin J).

[344] *R v Brewer* (n 309) 540.

[345] *Wool Tops Case* (n 321). The background is described in *John Cooke & Co Pty Ltd v Commonwealth; Field v Central Wool Committee* (1922) 31 CLR 394, 399-404. The *Wool Tops Case* is explored fully in chapter III.

[346] *Commonwealth v Colonial Ammunition Co Ltd* (1923) 34 CLR 198 (*Colonial Ammunition Case*).

Minister, for the construction of wooden cargo barquentines.[347] These cases disclose different views about the extent of contracting activity that may be undertaken using the Commonwealth executive power, but none of the judgments suggest any doubt that the legal person, which Isaacs and Rich JJ described as the 'Commonwealth Government, that is, the Crown',[348] had legal status sufficient to make contracts binding at general law.

Difficulties with the theory were brought into relief in cases where the Commonwealth and States were both involved in contractual or other legal disputes. Thomas Baty had said in the *Harvard Law Review* that the 'suit of one colony by another colony would be like the suit of the cook by the butler because too much was spent on coals'.[349] This was the kind of attitude manifest in and perpetuated by the *Engineers' Case*, but it was textually impossible to maintain, for reasons that had been explained by Barton J in the *Municipal Council Case*. His Honour aptly observed that, while one might be able to understand the Commonwealth compensating a State, 'compensation made by the Crown to the Crown, or an agreement made by the Crown with itself, is in either case an operation which baffles comprehension'.[350] No attempt was made in the *Engineers' Case* or afterwards to address these logical difficulties. As Latham CJ would later say in *Gulson's Case*, assertions of 'Crown unity' were almost invariably followed by a sentence beginning with the word 'but', or introduced by

[347] *Commonwealth v Kidman* (1923) 23 SR (NSW) 590 (NSWSC); *Kidman v Commonwealth* (1925) 37 CLR 233; *Kidman v Commonwealth* (1925) 32 ALR 1 (PC).

[348] *Colonial Ammunition Case* (n 346) 214 (Isaacs and Rich JJ).

[349] Baty (n 246) 846.

[350] *Municipal Council Case* (n 2) 235 (Barton J).

a sentence beginning with 'though.'[351] The theoretical assertion that the 'Crown' was a single corporation belied the functional reality, that the Commonwealth and States coexisted as legal persons, capable of mutual legal relations.[352] As Latham CJ said, in a memorable phrase, statements that the 'Crown' was one and indivisible reduced to 'verbally impressive mysticism.'[353]

The doctrine of 'Crown unity' did not prevent the Commonwealth from suing or being sued by the States. In 1911, the High Court had resolved a long-standing boundary dispute between South Australia and Victoria as to the true line of the 141st meridian in an action in ejectment.[354] Justice Higgins, dissenting on this point, had said that the King, rather than the State of South Australia, was the owner:

> It is true that, within its own limits, a State represents the Crown as against private persons; but it cannot represent the Crown in contests between itself and other States which equally represent the Crown. The "States" mean the late "Colonies": (Constitution Act, sec 6).[355]

The majority treated South Australia as the proper plaintiff in an action of ejectment,[356] in what O'Connor J described as 'redress for an alleged infringement of the plaintiff State's rights of property'.[357] Strikingly, the authority

351 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350 (Latham CJ).

352 cf DP O'Connell, 'The Crown in the British Commonwealth' (1957) 6 *International & Comparative Law Quarterly* 103, 111. The status of intergovernmental agreements or arrangements within the Federation remains unclear. The issue is taken up in chapter III.

353 *Gulson's Case* (n 351) 350 (Latham CJ).

354 *South Australia v Victoria* (1911) 12 CLR 667.

355 ibid 744 (Higgins J).

356 ibid 676 (Griffith CJ), 707 and 709 (O'Connor J), 716 (Isaacs J).

357 ibid 707 (O'Connor J).

of this decision was affirmed by the High Court immediately after the *Engineers' Case*, in an action in tort by the Commonwealth claiming damages against the State of New South Wales in respect of a collision between vessels.[358] A joint judgment of Isaacs, Rich and Starke JJ said that, where 'the Commonwealth and the States' were specifically mentioned in the Constitution, 'it is plain those organisations are bound—that is, the Crown in right of them is bound.'[359] It is difficult to reconcile these passages, and the result, with the assertion that the 'Crown' is unified and indivisible. To this extent, the *Engineers' Case* did not have a functional impact: the Commonwealth (constitutional person) still possessed capacities; it contracted, appeared in Court, and held property even in opposition to States theoretically represented by the same indivisible 'Crown'.

An interesting illustration of the way that the doctrine of 'Crown unity and indivisibility' came to be understood is provided by certain statements in *Commonwealth v Anderson*,[360] which was an action in ejectment brought by the Commonwealth in a State Court under section 39(2) of the *Judiciary Act*. The litigation was decided on the basis that State legislation had altered the basis of the action of ejectment.[361] Justice Menzies said:

> Whatever justification there was for the view that the King could not at common law sue in ejectment … I am satisfied that it can have no application to the Australian federation *where the Crown is present in various rights; where the Crown in one right may claim from the Crown in another right; where the Commonwealth may be registered by a State as the proprietor of land*

358 *Commonwealth v New South Wales* (1923) 32 CLR 200.

359 ibid 214 (Isaacs, Rich and Starke JJ).

360 *Commonwealth v Anderson* (n 4) 324 (Windeyer J).

361 ibid 312 (Dixon CJ).

> … and where there are statutes which authorise the Commonwealth and States to take proceedings for possession of land.[362]

The assumption that it was 'the Crown in right of the Commonwealth' who owned the property and 'the Crown in right of the Commonwealth' who brought the suit went unquestioned in this case.[363] Nevertheless, in a fascinating but opaque statement, Windeyer J said that: 'the Commonwealth of Australia is the plaintiff. The Crown in right of the Commonwealth brings the action.'[364] This seems to suggest that the 'Commonwealth of Australia' is an abstraction of the governed, whose interests are represented in litigation by the 'Crown in right of the Commonwealth' as the legal person.

Thus, the doctrine of Crown unity and indivisibility seemed merely to have substituted for the language of the 'multi-cellular Crown' the phrase 'Crown in right of'.[365] It purported to permit multiple concurrent usages of the legal personality of an 'indivisible Crown' by divisible political communities, which were no longer treated as 'sovereign bodies' but instead jointly partook of the common sovereignty of the 'Crown' throughout the Empire. Despite this language, as a matter of law, it remained indisputable that several distinct constitutional persons existed within the Australian legal system, designated by the phrase 'Crown in right of…'.

362 ibid 318 (Menzies J) (emphasis added).

363 ibid 311 (Dixon CJ), saying that the question was whether the remedy was 'available to the Crown in right of the Commonwealth', 313 (McTiernan J) and 313-314 (Fullagar J) agreeing, 318 (Menzies J), 324 (Windeyer J).

364 ibid 324 (Windeyer J).

365 cf Evatt (n 121) 63, explaining that the phrase 'Crown in right of' was the symbol of the new doctrine.

(3) The 'Crown' Rejected

In modern times, the High Court of Australia has rejected the device of 'Crown in right of the Commonwealth' to designate the Commonwealth's legal personhood. That has been done in reliance on certain cases interpreting the use of the word 'Commonwealth' in the *Constitution*, in particular sections 75 and 114,[366] as well as in connection with aspects of the royal prerogative.[367] Other chapters will place these cases in their proper doctrinal context. This section abstracts the decisions from their context, in an attempt to perceive what lessons may be learned about the constitutional person from the rejection of the 'Crown'.

(a) The 'Doctrine' of Sir Owen Dixon

Many judgments[368] dealing with or touching upon the legal personality of government have seen fit to rely upon a passage in the judgment of Dixon J in the *Bank Nationalisation Case*,[369] which is regarded as having propounded a 'constitutional conception'[370] of the Commonwealth. This section explores that passage, in the context of the *Bank Nationalisation Case* and his Honour's broader jurisprudence. It shows that Dixon J propounded no 'doctrine' having the effect of

366 Namely, *Crouch v Commissioner of Railways (Qld)* (1985) 159 CLR 22; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1997) 189 CLR 253 (*State Superannuation Case*).

367 Namely, the immunity from suit: *Mewett* (n 45).

368 cf *Crouch* (n 366) 28-29 (Gibbs CJ), 39 (Mason, Wilson, Brennan, Dean and Dawson JJ); *Deputy Commissioner of Taxation v State Bank of New South Wales* (n 366) 230 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *State Superannuation Case* (n 366) 282-283 (McHugh and Gummow JJ); *Mewett* (n 45) 497 (Dawson J), 546 (Gummow and Kirby JJ).

369 *Bank Nationalisation Case* (n 65) 363 (Dixon J). It may be convenient, since older judgments of the *Commonwealth Law Reports* do not contain paragraph numbers or alphabetically ordered margins, to note that passage commonly extracted begins with the words 'The Constitution sweeps aside', and ends with the words 'responsibility of enforcing the Constitution rests.'

370 cf *Deputy Commissioner of Taxation v State Bank of New South Wales* (n 366) 230 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

arrogating legal personhood to the government or the nation. His Honour's judgments are not consistent with the broad theories of constitutional personality, but persist with the use of the phrase 'Crown in right of' to distinguish government from constitutional person.

(i) *The* Bank Nationalisation Case

The *Bank Nationalisation Case* was a challenge to the validity of *Banking Act 1947* (Cth), a central pillar in the social democratic aspirations of the Labor government of Prime Minister Ben Chifley. It is said to be the longest and most expensive piece of High Court litigation in Australian constitutional history.[371] The judgments and arguments occupy 400 pages of the *Commonwealth Law Reports*.

Like the *Engineers' Case* before it, this case itself did not directly present any issue about the Commonwealth's legal personality. The *Banking Act* was designed to abolish the business of private banking, and effectuated that design by vesting a power to acquire a private bank in the Treasurer of the Commonwealth. Upon exercise of the power, ownership of a private bank would be vested in the Commonwealth Bank of Australia. Compensation was payable under Part VI of the *Banking Act 1947* (Cth). It was payable by the Commonwealth Bank rather than the Commonwealth, which was made liable only as a guarantor.[372] Importantly, compensation was to be calculated only by the newly erected Court

[371] 'Bank Nationalisation Case' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP 2001).

[372] *Banking Act 1947* (Cth), s 1.

of Claims. Its provisions were designed, as Dixon J noted,[373] to ensure that the jurisdiction of the Court of Claims to determine claims for compensation was exclusive of the jurisdiction of the High Court. This raised the constitutional question in the resolution of which Dixon J articulated what has been called his 'constitutional conception' of the Commonwealth. Section 75(iii) grants the High Court original jurisdiction in 'all matters' in which 'the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'. Did the legislation create a 'matter' invoking the High Court's jurisdiction under section 75(iii)? These questions turned in substantial part on the meaning of the phrase 'Commonwealth, or a person suing or being sued on behalf of the Commonwealth'.

The plaintiff banks challenged these provisions on the ground that they invalidly attempted to oust the original jurisdiction of the High Court under section 75(iii).[374] Dr Evatt KC, who had retired from the High Court to enter politics and was at this time serving as Attorney-General in the Parliament of the Commonwealth, met that argument with the submission that section 75(iii) was enlivened only where 'the Commonwealth itself' was a party, or where its interest on the record was being represented by a Minister, a nominal defendant, or some other official (such as the Commissioner of Taxation) authorised to sue on its behalf.[375] Sir Garfield Barwick KC in reply proposed an alternative

[373] *Bank Nationalisation Case* (n 65) 356 (Dixon J).

[374] ibid 42-43 (report of argument of Taylor KC), and see in support of this argument 49 (report of argument of Hannah KC for the States).

[375] ibid 75-76 (report of argument of Evatt KC).

interpretation of section 75(iii), as extending beyond 'the Commonwealth itself' to include any officer or company forming 'part of the organisation of the central government of the country.'[376] The parties' submissions presented the High Court with a choice between two interpretations of the expression 'the Commonwealth, or a person suing or being sued on behalf of the Commonwealth'.[377] Justice Dixon described the competing interpretations as follows:

> By the use of these expressions does the third paragraph of s 75 intend to give a jurisdiction confined to matters in which the Crown exercising (through the Governor-General) the Executive power of the Commonwealth is itself a party, whether suing or sued in the name of the King or by the Attorney-General or some other officer or nominal party authorised for the purpose as a matter of procedure? Or, on the other hand, does the paragraph intend to place within the jurisdiction of the High Court all matters in which a claim of right is made by or against any part of the central government of the country in its executive department including the corporate and other agencies by which it is administered?[378] (emphasis added)

On Dr Evatt's submission, the expression would be limited to cases in which the Commonwealth was 'the real defendant (in interest)';[379] using Dixon J's language, where the 'Crown … is itself a party'. That had been the view of Quick and Garran, and it was accepted in the *Bank Nationalisation Case* by Latham CJ and McTiernan J.[380] On Sir Garfield Barwick's submission, the expression in section 75(iii) extended beyond such cases, to include the whole of the

[376] ibid 136 (report of argument of Barwick KC).

[377] That the Court saw itself as confronted with a choice is particularly clear in the following passages: ibid 275 (Rich and Williams JJ), 358 (Dixon J).

[378] ibid 358 (Dixon J).

[379] ibid 224-225 (Latham CJ).

[380] ibid 226 (Latham CJ), 396 (McTiernan J).

government; in Dixon J's words, 'any part of the central government of the country in its executive department'. This was the argument accepted by the majority, including Dixon J,[381] and it is against this background that Dixon J's 'doctrine' in the *Bank Nationalisation Case* falls to be considered.

Justice Dixon said that the *Constitution* sweeps aside the traditional distinctions between 'the Sovereign as the representative of the State in a monarchy', and 'the State as legal person in other forms of government'.[382] His Honour did not say that the *Constitution* obviates the need, per se, for 'the State' to be represented as a legal person. It was the distinction that was swept aside, in particular by treating 'the Commonwealth' and the States as organisations or institutions of government possessing distinct individualities.[383] The idea of 'distinct individualities' does not imply legal personality. 'Formally', his Honour said, these 'individualities' are not 'juristic persons'. They are instead 'politically organised bodies',[384] or 'individualities', or 'organisation[s] or institution[s] of government'. Justice Dixon then said that it was '*perhaps* strictly correct' to say that 'the Commonwealth' means 'the Crown in right of the Commonwealth.'[385] His Honour was not thereby casting doubt upon the notion that the Commonwealth was represented in litigation by the 'Crown'. Instead, he was preferring Sir Garfield Barwick's submission that the 'Commonwealth', where used in section 75(iii), meant more than just 'the Crown in right of the

381 ibid 275-276 (Rich and Williams JJ), 321-322 (Starke J), 366-367 (Dixon J).

382 ibid 363 (Dixon J).

383 ibid.

384 ibid.

385 ibid.

Commonwealth'. Thus, he said, in section 75(iii), the word comprehended the 'central Government of the country in its executive department'.[386]

Justice Dixon should not be understood to have propounded any new or different theory (or 'doctrine') of constitutional personality in the *Bank Nationalisation Case*. His Honour explicitly said that a 'politically organised body' (or government, in the broad sense) was not a legal person, and explicitly said that the 'Commonwealth' means 'the Crown in right of the Commonwealth'. Nor can his Honour be understood to have made the Commonwealth (nation) into a legal person. There is no warrant for thinking that his Honour intended the slightest departure from the narrow theory, expressed at this time using the language of the 'Crown'.

(ii) Other Judgments Dealing with the 'Crown'

That understanding of Dixon J's judgment in the *Bank Nationalisation Case* is confirmed by a sample of some other judgments, where Dixon J had occasion to speak of the Commonwealth as a legal person. In each case, his Honour used the expression 'Crown in right of'. Taken together with the passage in the *Bank Nationalisation Case*, in which his Honour denied that the 'distinct individualities' were formally legal persons, the survey demonstrates that Dixon J was not attempting to collapse the conceptual distinctions, as they are identified in this thesis, between the Commonwealth (constitutional person), the Commonwealth (nation) and the Commonwealth (government).

[386] ibid 363 (Dixon J).

It is convenient to commence the survey with *Farley's Case* (1940),[387] since that his where Dixon J said (contrary to the modern view) that the 'Crown' 'is as much the central element in the *Constitution* of the Commonwealth as in a unitary constitution.' In *Werrin* (1938),[388] his Honour's discussion of the genesis of the Commonwealth's liability in tort[389] was expressed as if the Commonwealth and States were each represented by the 'Crown' in particular 'rights'. Two years later, his Honour described the word 'Commonwealth' in section 56 of the *Judiciary Act 1903* (Cth) as shorthand for 'the Crown in right of the Commonwealth of Australia.' [390] His Honour's judgment in the *Bank Nationalisation Case* itself, in various passages, describes as the 'Crown in right of the Commonwealth' the Commonwealth as legal (constitutional) person. After the *Bank Nationalisation Case*, his Honour may be found describing the inter-governmental agreement litigated in the *Railway Standardisation Case* (1962)[391] as an agreement 'between governments in Australia, that is to say, between the Sovereign in right of the Commonwealth and the Sovereign in right of the State of South Australia.'

387 *Farley's Case* (n 311) 304 (Dixon J).

388 *Werrin v The Commonwealth* (1938) 59 CLR 150, 165 (Dixon J).

389 Regarding the dispute about Dixon J's view of *Commonwealth v New South Wales* (n 358), see *Mewett* (n 45) 496- 497 (Dawson J).

390 *Shaw Savill and Albion Company Ltd v The Commonwealth* (1940) 66 CLR 233, 357-358 (Dixon J).

391 *Railway Standardisation Case* (n 2).

Mr Anstey Wynes suggested that Sir Owen Dixon preferred to regard the Commonwealth as a juristic person for certain purposes only.[392] Wynes did not explain what he meant by this, or what the notion of qualified legal personality might involve.[393] At any rate, Dixon J's judgments do not support this view. The concept of a 'politically organised body' was not intended as a surrogate for the 'Crown' (a term which Dixon J continued to use to describe the constitutional person). It was something existing alongside the 'Crown': a term representing the political identity of the components of the Federation, which the 'Crown' represented.

Thus, there is no firm ground for regarding Dixon J as having advocated a view of 'the State as legal person.' His Honour adhered to the 'Crown in right of the Commonwealth' device, with which he never explicitly cavilled. The relevant passages in the *Bank Nationalisation Case* interpreted the term 'Commonwealth' in section 75 of the *Constitution* as meaning Commonwealth (government). This would ensure that the 'political organisation called into existence under the name of the Commonwealth' was 'in every way' amenable to the jurisdiction of the High Court.[394] That was not intended to elevate the 'political organisation' into a legal person, and it cannot sensibly be understood in that way.

[392] Wynes (n 342) 392, referring in fn 65 to the *Melbourne Corporation Case* (n 12) 82 (Dixon J) and the *Bank Nationalisation Case* (n 65) 362-363 (Dixon J).

[393] Professor Maitland gave some thought to the idea of 'semi-personality and demi-semi-personality', but his writings suggest that it involves a blurring of the language and concepts of the law with those of political morality: Maitland, 'Moral Personality and Legal Personality' (n 40) 319.

[394] ibid.

(b) Cases on Sections 75 and 114 of the Constitution

Modern authorities expressly rejecting the 'Crown' have relied upon three decisions applying Dixon J's 'doctrine' to other heads of jurisdiction in section 75, and to the guarantee in section 114 of the *Constitution*. These decisions did not advocate replacement of the 'Crown in right of' device. They merely treated the word 'Commonwealth' in those constitutional provisions as meaning Commonwealth (government).

The first case[395] applying Dixon J's reasoning in the *Bank Nationalisation Case* was *Crouch v Commissioner of Railways* (Qld). Counsel for the defendants had argued that section 75(iv) of the *Constitution* excluded a corporation established by the State of Queensland for the conduct of State railways because section 75(iv), in contrast to section 75(iii), comprehended the State 'as a polity'.[396] By that word it was evidently intended to convey a conception of the State of Queensland, as constitutional person, excluding other branches or emanations having distinct legal personality. Chief Justice Gibbs rejected this submission. Provisions conferring jurisdiction should not be given a narrow construction, and the phrase 'a State' in section 75(iv) was wide enough to include agencies and instrumentalities of a State. In that respect, it was similar to other provisions, for which 'State' appeared to be used in the wider sense to refer to 'a polity, rather than to a geographical area'.[397] Chief Justice Gibbs used 'polity' as a synonym for government. The distinction in theory, between what Counsel is

395 *Crouch* (n 366).

396 ibid 24 (report of argument of Jackson QC).

397 ibid 32 (Gibbs CJ).

reported as having meant by 'polity' and the way in which Gibbs CJ was using the term, is brought out in the following passage of the plurality judgment:[398]

> The corporation sole by the name of 'The Commissioner for Railways' does not, of course, constitute the State of Queensland. In that sense, it is not the State. That assertion of the obvious does not, however, suffice to answer the question whether the plaintiff's action against the Commissioner falls within the Court's original jurisdiction under section 75(iv) of the Constitution.

Notwithstanding that the Commissioner and the State of Queensland were not equivalent, the 'substance of the controversy'[399] concerned 'an instrumentality or emanation of the State'.[400] The breadth of the constitutional concept of a 'matter' had this consequence for the interpretation of the word 'State': the Court's jurisdiction was not confined by the 'form in which the legal proceedings … happen to be framed.'[401] The Court was thus confronted with the need to distinguish Queensland (constitutional person) from Queensland (government).

This interpretation of the expression 'State' was applied to section 114 of the *Constitution* in *Deputy Commissioner of Taxation v State Bank of New South Wales*.[402] 'There can be no doubt', said the Court in a joint judgment, that section 114 refers 'to the polity which is a State within the Australian

398 ibid 36 (Mason, Wilson, Brennan, Deane and Dawson JJ).

399 ibid 43 (Mason, Wilson, Brennan, Deane and Dawson JJ).

400 ibid 39 (Mason, Wilson, Brennan, Deane and Dawson JJ).

401 ibid 37, 43 (Mason, Wilson, Brennan, Deane and Dawson JJ).

402 *Deputy Commissioner of Taxation v State Bank of New South Wales* (n 366). The question was whether an assessment of sales tax on printed material, manufactured by the Bank of New South Wales, amounted to a tax on the State of New South Wales.

federation.'[403] That usage of the word 'polity' is significant. Later in the judgment, their Honours adopted Gibbs CJ's distinction between constitutional provisions describing 'a State as a polity', on one hand, and those describing the State as 'a geographical area' on the other.[404] This usage of the word 'polity' takes its significance from the rejection of the submission of the Commonwealth Solicitor- General, that the words 'the Commonwealth' and 'a State' should be restricted to entities that could either be 'equated to the Crown', or had 'the shield of the Crown'.[405] Their Honours said:

> Once it is accepted that the Constitution refers to the Commonwealth and the States as organisations or institutions of government in accordance with the conceptions of ordinary life, it must follow that these references are wide enough to denote a corporation which is an instrumentality of the Commonwealth or a State as the case may be.[406]

The very point of this passage is to distinguish the State (government) from the State (constitutional person). Likewise, the 'conception of ordinary life' is of the Commonwealth (government). That is not to say the Commonwealth (government) is a legal person, it merely emphasises that constitutional personality is not a 'conception of ordinary life'.

[403] ibid 229 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added).

[404] cf *Crouch* (n 366) 32 (Gibbs CJ); *Deputy Commissioner of Taxation v State Bank of New South Wales* (n 366) 233 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[405] ibid 222 (report of argument of Bennett QC).

[406] ibid 231 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

The first shot at the 'Crown' was fired in the *State Superannuation Case,*[407] which concerned the liability of the State Authorities Superannuation Board ('the Board') to pay stamp duty on an agreement to purchase real property in Perth. The Board's objections to that assessment depended at the outset upon the premise that the *Stamp Act* did not intend to impose liability upon 'the Crown in right of New South Wales'.[408] That premise was rejected unanimously by the Court,[409] which made other issues strictly unnecessary to decide. But in a separate judgment, McHugh and Gummow JJ proceeded to consider the further submission that, because the Board 'represents the Crown in right of New South Wales', it was for that reason a 'State' within the meaning of section 75(iv) of the *Constitution*. Their Honours accepted the submission that the Board was to be classified as a 'State'. But they rejected the reasoning. The meaning of the term 'State', as it appeared in sections 75 and 114 of the *Constitution*, was not governed by equivalence with the 'Crown', nor by entitlement to the privileges, immunities or the 'shield of the Crown'.[410] The SASB was the 'State' because of the method of its creation, its powers and functions, the manner of its audit, its governance structure, and the history of public administration in New South Wales.[411] So far, there was no explicit connection with constitutional personality; this was to come.

[407] *State Superannuation Case* (n 366).

[408] *Stamp Act 1921* (WA).

[409] *State Superannuation Case* (n 366) 269-270 (Brennan CJ, Dawson, Toohey and Gaudron JJ), 278 (McHugh and Gummow JJ).

[410] ibid 282 (McHugh and Gummow JJ).

[411] ibid 284 (McHugh and Gummow JJ).

(c) The Attack on the 'Crown'

After the *State Superannuation Case*, there was a flurry of decisions in which individual judgments criticised the 'Crown in right of' device. This section organises the judgments according to the three main lines of attack: first, the *Constitution* does not use the term 'Crown'; second, the doctrines of immunity associated with the 'Crown' were inconsistent with the structural aspects of the *Constitution*; third, the particular view of Kirby J.

(i) Textual Omission

The first line of attack was based on an interpretative premise, derived from Dixon J's observations about the way that the *Constitution* 'treats' the Commonwealth.[412] The interpretative premise was that, because the *Constitution* does not use the 'Crown' in the provisions describing the Commonwealth, the 'Crown' should not be used by those interpreting the *Constitution*.

In the *State Superannuation Case*, McHugh and Gummow J adverted to the 'special considerations of federalism'[413] provoked by the imposition on the State of New South Wales of a tax by an Act of the Parliament of Western Australia. These matters had been approached by the Solicitor-General for New South Wales as questions of statutory construction. The Solicitor-General had eschewed any submission depending upon the equivalence of the legal personhood of the two States,[414] such as might have been assumed if the 'Crown' had been regarded

412 *Bank Nationalisation Case* (n 65) 363 (Dixon J).

413 *State Superannuation Case* (n 366) 288 (McHugh and Gummow JJ).

414 ibid 285 (McHugh and Gummow JJ).

as unified and indivisible. Nevertheless, their Honours went out of their way to attack that notion. The 'mysticism'[415] of the doctrine of Crown unity could not assist 'today in dealing with the mutual legal relationships between the Australian States.'[416] The doctrine was now politically unimportant and insignificant. Moreover, it was inconsistent with the text of the *Constitution*:

> As we have indicated with reference to earlier decisions of this Court, the Constitution does not identify the polities which are components of the federal system as the Crown in any one or other right. It speaks of the Commonwealth and of the States. …
>
> In such a setting, to speak of the Crown in right of the Commonwealth is to give inadequate recognition to the structure of the Constitution.[417]

In no case cited by their Honours was there a rejection of the language of the 'Crown'. This part of the litigation was not addressed in argument. The various meanings of the word 'polity', which had been highlighted so recently, were ignored. Nevertheless, at least so far, it is possible their Honours were merely substituting a new designation for the legal person formerly known as the 'Crown in right of the Commonwealth'.

These ideas were developed in the joint judgment of Gummow and Kirby JJ in *Commonwealth v Mewett*.[418] Mr Mewett was one of three former servicemen who

[415] This was an allusion to *Gulson's Case* (n 351) 350 (Latham CJ).

[416] *State Superannuation Case* (n 366) 289-290 (McHugh and Gummow JJ).

[417] ibid 291 (McHugh and Gummow JJ).

[418] *Mewett* (n 45).

brought time-barred[419] actions in negligence against the Commonwealth, in respect of damage occurring on Commonwealth naval vessels. The plaintiffs' applications for extension of time were met by strike-out applications, filed by the Commonwealth on the ground that their causes of action had been extinguished by section 44(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). Following the decision in *Georgiadis*,[420] the Act was understood to be constitutionally competent to extinguish causes of action based upon statute. But causes of action arising at common law attracted the protection of section 51(xxxi) of the *Constitution*, which prevents the acquisition, otherwise than on 'just terms', of certain forms of 'property'.

The Commonwealth's strike-out motion raised for decision the legal basis of the Commonwealth's liability in tort. The Solicitor-General for the Commonwealth argued that the plaintiffs' rights to proceed, against what he called 'the Commonwealth Crown', were based upon the *Judiciary Act 1903* (Cth).[421] The judgment in *Georgiadis*[422] should be overruled to the extent it assumed otherwise. The causes of action could not have been based upon general law, because at common law the 'Crown in right of the Commonwealth' had the benefit of the sovereign's immunity from liability in tort. The plaintiffs, who were respondents in the High Court, responded with the submission that the

[419] The applications for extension of time were made on the basis of the late discovery of the nature of the medical conditions suffered and the causal connections between the injuries and the events in respect of which the claims were brought: ibid 518 (Gaudron J).

[420] cf *Georgiadis v Australian and Overseas Telecommunications Commission* (1994) 179 CLR 297.

[421] *Mewett* (n 45) 476-477 (report of argument of Griffith QC).

[422] cf *Georgiadis* (n 420) 306 (Mason CJ, Deane and Gaudron JJ), 312 (Brennan J), but see 321 (Toohey J) and 325-326 (McHugh J).

Commonwealth's common law immunity from suit in contract and tort had been removed by section 75(iii) of the *Constitution*.[423] That submission did not involve a rejection of the 'Crown'. The right to proceed, against what was again called 'the Commonwealth Crown', was derived from general law, and the grant of jurisdiction in section 75(iii) was inconsistent with the continued existence of a general 'Crown immunity' in matters to which section 75 applied.

The respondents' submission was ultimately accepted by a majority of the Court.[424] Only two of the six judgments gave any attention to the place of the 'Crown' in the *Constitution*.[425] Chief Justice Brennan concurred in the 'propositions' and the 'result' that were the outcome of the reasoning in the joint judgment of Gummow and Kirby JJ.[426] Justice Gaudron's concurrence was limited to Gummow and Kirby JJ's treatment of the submission that *Georgiadis* should be overruled.[427] Justice Dawson delivered what was to be the last spirited defence of the role of the 'Crown' in the *Constitution*. His reasons attracted the qualified support of Toohey J[428] and McHugh J.[429]

The joint judgment of Gummow and Kirby JJ in *Mewett* posits only one explanation for the rejection of the 'Crown'. Echoing what was said by Gummow

[423] ibid 486 (report of argument of Giles QC).

[424] *Mewett* (n 45) 491 (Brennan CJ), 531 (Gaudron J), 546 (Gummow and Kirby JJ).

[425] ibid 491 (Brennan CJ), 531 (Gaudron J).

[426] ibid 491 (Brennan CJ).

[427] ibid 531 (Gaudron J).

[428] ibid 513 (Toohey J), disagreeing to the extent that a cause of action against the Commonwealth 'must be found in the general law of contract and tort'.

[429] ibid 532-533 (McHugh J), disagreeing only to the extent of the effect of s 63(1) of the *Limitation Act 1969* (NSW).

and McHugh JJ in the *State Superannuation Case*, their Honours concentrated on the vocabulary and syntactical structure of section 75 of the *Constitution*. That provision did not identify 'the Crown in any particular capacity.'[430] The use of 'the Commonwealth' as a noun, the judgment seems to suggest, is the paramount consideration. This noun is made to be the subject and object of constitutional sentences dealing with rights and duties. It is textually conceived as a 'politically organised body.' This 'new state of affairs', their Honours said after paraphrasing Dixon J in the *Bank Nationalisation Case*, 'required adjustment to habits of thought formed in a common law system with a unitary structure of government.'[431] Which 'habits of thought' were being adjusted was not made clear.

Justice Dawson contested this interpretation. Section 75 of the *Constitution* was confined in its operation to the conferral of jurisdiction. His Honour conceded that it did not use the language of the 'Crown'. But, on the other hand, the phrase 'Crown in right of' had never been used before 1904.[432] The Framers of the *Constitution* had no developed vocabulary with which to distinguish the Commonwealth and the States, 'as separate polities under the Crown'.[433] Moreover, it was the executive branch that would often enliven the jurisdiction in section 75 of the *Constitution*, and the Commonwealth's executive power was vested in the Queen:

[430] ibid 546 (Gummow and Kirby JJ).

[431] ibid.

[432] ibid 498 (Dawson J), referring to WE Cuppaidge, 'The Divisibility of the Crown' (1954) 27 *Australian Law Journal* 594, 595 and the *Municipal Council Case* (n 2) 231 (Griffith CJ).

[433] *Mewett* (n 45) 497-498 (Dawson J).

> To speak of the Commonwealth committing a tort or breaching a contract is to speak of a wrong committed by executive act. To sue the Commonwealth for such a wrong is to sue it in its executive capacity, that is to say, as the Crown in which the executive power of the Commonwealth is vested by s 61 of the Constitution.[434]

To attribute substantive significance to the use of the word 'Commonwealth', merely because it was used as a noun, was to ignore its loose usage in the text. The syntactical structure of section 75 could neither diminish nor deny 'the centrality of the Crown in the Constitution.'[435]

A further reason for querying this dimension of the attack on the 'Crown' is that the Framers had to hand the experience of the British North America Act 1867 (Imp),[436] in the interpretation of which the Privy Council had treated the continuing role of the 'Crown' as assumed. Like the *Constitution*, this Act had used language, applauded by Maitland,[437] tending towards personalisation of Provincial and Dominion governments. 'Canada' and each of the several provinces were, by name, made the subject and object of verbs and, seemingly, of rights and liabilities.[438] There was no 'Crown' in the provisions describing transfer or retention of public property. Nevertheless, in *St Catherine's Lumber*,[439] which concerned the distribution of contractual liabilities undertaken by Her

434 ibid 498 (Dawson J).

435 ibid 498 (Dawson J).

436 cf *D'Emden v Pedder* (1904) 1 CLR 91, 113 (Griffith CJ), saying that the framers of the *Constitution* were familiar with the constitution of the Canadian Dominion.

437 Maitland, 'The Crown as Corporation' (n 101) 142-143.

438 cf British North America Act 1867 (Imp) ss 110, 113, 117.

439 *St Catherine's Milling and Lumber Company v The Queen* (1888) 14 App Cas 46 (PC); *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 (PC) 441 (Lord Watson); and see *R v Foreign Secretary; Ex parte Indian Association* [1982] 1 QB 892 (CA) 915 (Lord Denning MR).

Majesty in relation to the Indian Tribes, Lord Watson said that, regardless of the syntactical structure of the legislation, it 'must always be kept in view' that the 'land itself' was 'vested in the Crown.'[440]

A further difficulty is that the key phrase, 'politically organised body,' was not defined. This was the language Dixon J had used to describe something that his Honour said was 'formally' not a 'juristic person'. The judgment of Gummow and Kirby JJ in *Mewett* appears to contradict that notion, by attributing to the 'politically organised body' the capacity to appear in Court. Here, the problem is coherence. Justice Dixon's 'doctrine' was designed to enfold within a jurisdiction, defined using the word 'Commonwealth,' agencies (like the Commonwealth Bank) who had legal personality separate from what his Honour was accustomed to calling the 'Crown' in right of the Commonwealth. Attributing legal personhood to the 'politically organised body' obscures that design and, indeed, removes any need for it at all.

(ii) Structural Implications

The second explanation for rejecting the 'Crown,' offered by Gummow and Kirby JJ in *Mewett*, concentrated on a structural implication. The concept of a 'matter' in chapter III, read with other sections of the *Constitution*, encompasses four species of justiciable controversy unknowable in the UK.[441] First, the Commonwealth and States may sue each other in tort and contract. Second, suits against the Commonwealth would be necessary to enforce the 'legal standards of

[440] *St Catherine's Lumber* (n 439) 56 (Lord Watson).

[441] *Mewett* (n 45) 547-549 (Gummow and Kirby JJ).

right and obligation' created by provisions such as sections 89(iii) and 93(iii) of the *Constitution*. Third, section 75(v) authorised injunctive relief against officers of the Commonwealth to restrain actions in excess of constitutional authority. Fourth, an individual or corporation may seek redress for governmental conduct done in the administration of an invalid law. These four classes of controversy gave rise to an implication that the immunity doctrine, as it had been developed in the UK,[442] was inconsistent with chapter III of the *Constitution*.

Justice Dawson's judgment responded directly to these points. The immunity that the 'Crown' enjoyed from suit in contract and tort rests upon propositions that obviously have no application in the 'observance of constitutional boundaries.'[443] That, according to Dawson J, was the significance of the passage in the judgment of Dixon J in the *Bank Nationalisation Case*: the Commonwealth and States, as politically organised bodies who are not formally legal persons, must be 'amenable to the jurisdiction of Courts upon which the responsibility of enforcing the *Constitution* rests'.'[444] The principle associated with *Marbury v Madison*[445] ensured that, in proceedings under section 75(v), or in proceedings where rights or obligations conferred or imposed by the *Constitution* itself were

[442] ibid 548-549 (Gummow and Kirby JJ).

[443] ibid 497 (Dawson J).

[444] ibid.

[445] *Marbury v Madison* 5 US 137 (1803). On the principle of judicial review in the Australian context, see *Kioa v West* (1985) 159 CLR 550, 582 (Mason J), 609 (Brennan J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 96-101 [33]-[40] (Gaudron and Gummow JJ) and discussion in Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303; Susan Kneebone, 'What is the Basis of Judicial Review?' (2000) 12 *Public Law Review* 95; Bradley Selway, 'The Principle behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217.

at stake, the Commonwealth would not enjoy immunity from suit. In all other cases, it was the *Judiciary Act* that had abolished the immunity from suit[446] and it was from the *Judiciary Act* that the plaintiffs' rights to proceed arose.[447]

Justices Gummow and Kirby did not say whether the mere possibility that these classes of controversy might arise showed anything about the nature of constitutional personality. An argument like that would have been confronted with the ahistorical or cross-temporal nature of their methodology, which drew insight indiscriminately from a selective reading of judgments each reflecting different stages in Australian legal culture. What was done by the Court in the pre-*Engineers'* decision in *South Australia v Victoria*,[448] cited by Gummow and Kirby JJ as a suit in trespass,[449] afterwards was regarded by at least one scholar as 'inconsistent with legal and constitutional theory.'[450] What was done in the post-*Engineers'* decision in *Commonwealth v New South Wales*,[451] cited by Gummow and Kirby JJ as a suit in tort arising from a 'collision between vessels',[452] was described in its own headnote as done with respect to a 'complaint' between different 'agent[s] of the King'. The 1962 decision in the *Railway Standardisation Case*,[453] cited by Gummow and Kirby JJ as exemplifying

446 *Mewett* (n 45) 501-502 (Dawson J), 513 (TooheyJ) and 532-533 (McHugh J) agreeing with Dawson J on this point.

447 ibid 513 (Toohey J) and 532-533 (McHugh J).

448 *South Australia v Victoria* (n 354).

449 *Mewett* (n 45) 547 fn 278 (Gummow and Kirby JJ).

450 Baty (n 246) 853. See also Enid Campbell, 'Suits between the Governments of a Federation' (1971) 6 *Sydney Law Review* 309.

451 *Commonwealth v New South Wales* (n 358).

452 *Mewett* (n 45) 547 fn 278 (Gummow and Kirby JJ).

453 *Railway Standardisation Case* (n 2).

an action between the Commonwealth and a State in contract,[454] was treated by Dixon CJ as a political agreement 'between the Sovereign in right of the Commonwealth and the Sovereign in right of the State of South Australia'.[455] These decisions treated the Commonwealth as an instantiation of the 'Crown' in accordance with theories current at the time they were decided.

The textual basis for rejecting the 'Crown' was further elaborated by Gummow J in the *Mining Act Case*.[456] His Honour observed that the term 'Crown' had come to be used in various senses.[457] Its 'oldest meaning', his Honour said, was to identify the 'body politic'.[458] The meaning of 'body politic' here is obscure: the 'Crown' was not used to describe the constitutional person until the 1860s, whereas the 'body politic' (as distinct from the 'body natural') was not described as the 'Crown'. His Honour went on to say that the term 'Crown' also identified both the monarch and the executive branch.[459] Additionally, it might identify the rights, privileges and immunities identified with the royal prerogative.[460] More generally, it identified the common law powers of the Executive Government. The *Constitution*, his Honour emphasised, did not use this language. It contemplated dealings between or involving 'the Commonwealth' and the 'Parliament of a State', for example in section 111 in Chapter V, and sections 123 and 124 in

454 *Mewett* (n 45) 547 fn 279 (Gummow and Kirby JJ).

455 *Railway Standardisation Case* (n 2) 139 (Dixon CJ), and at 149 (Kitto J).

456 *Mining Act Case* (n 62).

457 ibid 429-430 [105]-[106] (Gummow J).

458 ibid 429 [105] (Gummow J).

459 ibid 429, citing *M v Home Office (HL)* (n 84) 395B-C (Lord Templeman).

460 ibid 430, citing *In re Silver Brothers Ltd* [1932] AC 514 (PC).

Chapter VI. It distinguished those dealings from others between or involving 'the Commonwealth' and the 'Executive Government' of a State, for example in section 119. Other provisions, such as sections 85 and 51(xxxi), spoke of the vesting in or acquisition by 'the Commonwealth' of the property of 'a State' or 'any State'. These provisions did not operate by reference to distinctions drawn between the 'Crown' in various capacities.[461]

These structural observations were and are sound, but they invite closer attention to the distinct meanings of the word 'Commonwealth'. When the context required an impersonal or categorical description of the Commonwealth, Gummow J preferred the phrase 'body politic' or 'bodies politic'.[462] The 'body politic' was the governmental property owner, and the 'bodies politic' were parties to an instrument alienating property. This medieval metaphor, which Hart had tried to lay to rest,[463] was thus made to be a legal person. This phrase was also used, uncritically, to describe the Commonwealth (government). Thus, his Honour referred in terms to the 'legislature of one body politic', and the executive government 'of' a 'body politic'.[464]

Other judgments in the *Mining Act Case* did not explicitly reject the 'Crown', nor otherwise expressly endorse Gummow J's interpretative priorities. However, perhaps just as significantly, for the most part they avoided describing the Commonwealth as the 'Crown'. That is so notwithstanding that the arguments

461 *Mining Act Case* (n 62) 431 [109] (Gummow J).

462 ibid 429 [105], 427 [97] and 435 [119] (Gummow J).

463 cf McLean (n **Error! Bookmark not defined.**) 80.

464 *Mining Act Case* (n 62) 432 fn 118 and 435 [119] (Gummow J).

were presented using that language.[465] Old phrases, like the 'Crown in right of', were often parenthesised or bracketed with inverted commas.[466] New phrases—and with them, new ambiguities—were substituted. It was the 'polities in the federation' [467] that bound each other by legislation and owned government property,[468] and it was 'two polities in the Federation'[469] who had alienated property by 'Crown grant'. These judgments assume a fixed content in the word 'polity', and evoke the personalised state present in republican forms of government.[470]

Chief Justice Gleeson and Gaudron J expressed a preference, 'consonant with our constitutional arrangements', that the presumption that a statute 'does not bind the Crown' be expressed as a presumption that a statute regulating the conduct of individuals does not apply to 'the executive government of any of the polities in the federation'.[471] That linguistic preference would be repeated in *Bass v Permanent Trustee Co Ltd*,[472] *NT Power Generation v P&W Authority*[473] and

[465] *Mining Act Case* (n 62) 396 (report of argument of Burmester QC for the Commonwealth), 399 (report of argument of Graham QC for Victoria), 400 (report of argument of Selway QC for South Australia).

[466] Examples may be seen at ibid 405 [19] and 409 [31] (Gleeson CJ and Gaudron J), 431 [109] (Gummow J), 447 [165] (Kirby J), and 466 [210] (Hayne J).

[467] ibid 409 [31] (Gleeson CJ and Gaudron J) and 469 [225] (Hayne J).

[468] ibid 407 [24] (Gleeson CJ and Gaudron J).

[469] ibid 477 [254] (Hayne J).

[470] cf *United States of America v Wagner* (1867) LR 2 Ch App 582 (CA); see generally Willoughby (n 47).

[471] *Mining Act Case* (n 62) 410 [33] (Gleeson CJ and Gaudron J).

[472] *Bass* (n 62) 346-347 [17]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[473] *NT Power Generation v P&W Authority* (2004) 219 CLR 90, 149 [163] (McHugh ACJ, Gummow, Callinan and Heydon JJ).

McNamara v Consumer Tribunal.[474] The width of the activities carried on by the Executive Government, something that had been noticed by the Court in *Bropho*,[475] as well as 'the nature of our federal structure', made it inappropriate and potentially misleading for parties to continue to use expressions such as 'shield of the Crown', or 'binding the Crown'. In *Bass*, it was assumed that the Commonwealth and the States were 'bodies politic' within the meaning of section 22(1) of the *Acts Interpretation Act 1901* (Cth).[476] The expressions 'Crown in right of the Commonwealth' and 'Crown in right of the State' were said to be particularly inapposite. It would be more appropriate to speak of the legislation 'of one polity in the federation', and to ask whether it was intended to regulate the conduct of members of the 'executive government of the polity concerned' or to apply to 'land or property owned by or on behalf of the polity in question.'[477]

The difficulty with the interpretative marginalisation of the 'Crown', as Dawson J had reasoned in *Mewett*, is that the 'Crown' and the Queen are textually interwoven throughout the *Constitution*.[478] Justice Dixon, the author of the

[474] *McNamara v Consumer Tribunal* (2005) 221 CLR 646, 654-655 [22] (McHugh, Gummow and Heydon JJ).

[475] cf *Bropho v Western Australia* (1990) 171 CLR 1, 19 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[476] Section 22(1) of the *Acts Interpretation Act 1901* (Cth) provided that 'expressions used to denote persons generally' should include a 'body politic' unless the contrary intention appears. Assuming that the State as 'body politic' was otherwise caught by the general reference to 'person' in ss 6(3) and 75B(1) of the *Trade Practices Act 1974* (Cth), the Court found that the Act 'evinces an intention that, contrary to s 22(1)(a) of the *Acts Interpretation Act*, a State is not a 'person' for the purpose of those sections': *Bass* (n 62) 349 [24] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[477] *Bass* (n 62) 346-347 [17]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[478] *Mewett* (n 45) 498 (Dawson J). The word 'Crown' appears four times, in the preamble, s 44(iv), and s 125. The word 'Queen' appears 40 times in the text of the *Constitution*.

'doctrine' rehearsed in its rejection, had said in *Farley* that the 'Crown' was a 'central element in the *Constitution*'.[479] So much is shown in litigation about the result of the 1998 election in Queensland for the Senate. Ms Heather Hill, a candidate of Pauline Hanson's One Nation Party, was held to be ineligible for the Senate because she was a citizen of the UK,[480] apparently in contravention of section 44(i) of the *Constitution*, which renders ineligible any person who is a citizen of a 'foreign power'. Ms Hill argued that the phrase 'foreign power' should be interpreted consistently with the reference in the preamble to the Constitution Act to the agreement of the people 'to unite in one indissoluble Federal Commonwealth under the Crown'. [481] The majority rejected this argument and, in doing so, elaborated the attacks on the 'Crown in right of' device.

The joint judgment of Gleeson CJ, Gummow and Hayne JJ, following the judgment of Gummow J in the *Mining Act Case*,[482] said that the 'Crown' had a number of different meanings. It could identify 'the body politic', the 'international personality of a body politic', 'the Government',[483] the paramount powers of the UK in relation to its dependencies, and the person occupying the hereditary office of Sovereign of the UK.[484] The reference to the 'Crown' in the preamble was a reference to the last of those concepts: 'the Queen.' Although it

479 *Farley's Case* (n 311) 304 (Dixon J).

480 *Sue v Hill* (n 19).

481 ibid 471 (report of argument of Ellicot QC).

482 cf *Mining Act Case* (n 62) 429-430 [105]-[106] (Gummow J).

483 Meaning the executive as distinct from the legislative branch.

484 *Mining Act Case* (n 62) 497-502 [83]-[93] (Gleeson CJ, Gummow and Hayne JJ).

did not bear upon the interpretation of section 44(i) of the *Constitution*, their Honours took the opportunity to re-emphasise the interpretative lessons propounded in earlier decisions. In identifying the new 'body politic' that it established, the *Constitution* did not use the term the 'Crown'.[485] In the past, lawyers had pressed the 'Crown' into service to distinguish between the 'newly created and evolving political units'. That had been done by use of the expression 'the Crown in right of …'.[486] However, the 'Crown' was inapt to describe 'complex political structures' that exist in a federation. It was 'of no assistance in determining today' whether the UK was a 'foreign power' in section 44(i) of the *Constitution*.

Justice Gaudron agreed that the UK was a 'foreign power', notwithstanding that at Federation it would not have been. The *Constitution* itself acknowledged the possibility for change in the relationship between the UK and the Commonwealth of Australia.[487] With respect to the 'Crown', her Honour said that the *Constitution* implied that it was divisible. The States were 'separate bodies politic with separate legal personality'. These bodies politic were separate from each other and separate from the Commonwealth, which was termed a 'body politic … with its own legal personality.' That these bodies politic were separate

485 ibid 498 [84] (Gleeson CJ, Gummow and Hayne JJ).

486 ibid 501 [90] (Gleeson CJ, Gummow and Hayne JJ).

487 ibid 524-525 [162] (Gaudron J).

was 'recognised throughout the Constitution', particularly in sections 75(iii), 75(iv) and 78 in Chapter III.[488]

(iii) Justice Kirby's Attack on the Crown

Justice Kirby took a further step in his 2007 judgment in *Baxter Healthcare*.[489] To hold the Commonwealth immune from the application of statutes was to assume that the Commonwealth was legally equivalent to the 'Crown', an assumption 'inconsistent with the text, purpose and character of the *Australian Constitution* and of its constituent polities.'[490] The *Constitution* had created new constitutional entities, called 'polities' or 'governmental polities', who derived their existence and character from the text.[491] The nature of these 'polities', and how they related to the branches of government and the legal system generally, was not explained and must be deduced from his Honour's citations.

Justice Kirby referred to the judgment of Dixon J in the *Bank Nationalisation Case*, and said that the 'starting point for the enlightenment' should be the decision of the Supreme Court of Ireland in *Byrne v Ireland*.[492] That case concerned the question whether the prerogative immunity from suit had survived the enactment of the *Constitution of Saorstát Éireann* of 1922 and the *Constitution of Ireland* of 1937. A majority of the Irish Supreme Court held that the royal prerogative, as found in the common law of the UK or Ireland prior to

488 ibid 525-526 [165] (Gaudron J).

489 *Baxter Healthcare* (n 62).

490 ibid 43 [88] (Kirby J).

491 ibid 46 [95] (Kirby J).

492 *Byrne v Ireland* (n 20).

the enactment of the *Constitution of Saorstát Éireann* 1922, was based upon the notion that 'the Crown personified the State'.[493] That notion had been expressly repudiated by Article 2, which declared that the powers of government and all authority were derived from the people of Ireland. The 'sovereign people' had thereby created a 'state'-like entity called 'Saorstát Éireann'.[494] Article 51 of that *Constitution* vested the executive authority in the King, but it was Saorstát Éireann who might be bound by statutes[495] and who would be liable for damage 'caused by the executive organ in carrying out the executive powers of government of the principal.'[496] Thus, on one hand, Saorstát Éireann was a 'juristic person capable of holding property' and capable of being sued 'as such'.[497] On the other hand, Saorstát Éireann was the 'principal' on whose behalf the 'organs' or 'organisations' of government carried out governmental powers.[498]

The conclusion of this reasoning process is that the judicial power of Saorstát Éireann may be exercisable by an 'organ'[499] of Saorstát Éireann so as to bind Saorstát Éireann. It was the duty of Saorstát Éireann 'to render justice against

493 ibid 272 (Walsh J).

494 ibid 274 (Walsh J).

495 cf ibid 279 (Walsh J), saying that any immunity from the application of statutes would have been enjoyed by Saorstát Éireann and not by the King. The implication is that, absent the immunity, it would be Saorstát Éireann and not the King who would be bound.

496 ibid 274 (Walsh J).

497 ibid 263 (Walsh J).

498 cf ibid 280-281 (Walsh J), asserting that the doctrine of *respondeat superior* would apply to render the State liable for the actions of its servants or agents in carrying out the State's affairs.

499 ibid 263 (Walsh J).

itself in favour of citizens'.[500] The preamble to the Constitution of the Irish Free State Act 1922 asserts that all lawful authority comes from God to the People, from whom by Article 2 the powers of government derive. Saorstát Éireann was created by the people, possessed the governmental powers devolved from God to the people, and was amenable to suits brought by the people. Justice Walsh did not explain how Saorstát Éireann could render justice against itself, without provoking what he acknowledged to be (and described as) 'a juristic problem'.[501] Justice Kirby did not explain how these ideas, difficult to understand in relation to a unitary system, could apply to a federal system of government.

(d) 'Body Politic' and 'Polity'

As is demonstrated in the judgments discussed in the preceding sections, the eclipse of the 'Crown' has been attended by the emergence of new idioms, of describing the Commonwealth as a 'body politic', or as a 'polity'. These idioms originate (respectively) in late medieval and ancient times. The term 'body politic' (*corps politique*) was introduced in the Year Books in 1478,[502] whereas 'polity' (from the Latin *politia*) is a modern rendering of a classical Greek term (πολιτεία), which was the title of one of Plato's works. It is somewhat surprising to find that such terms have become the new master nouns of constitutional discourse in modern Australia. This section surveys the usage of those terms in Australian constitutional jurisprudence. Sections (i) and (ii) suggest that the terms (mostly interchangeably) denote two distinct concepts: nation and government.

[500] ibid 281 (Walsh J).

[501] ibid 267 (Walsh J).

[502] Seipp (n 101) 39.

Section (iii) shows that the term 'body politic' (and, less frequently, 'polity') also has what is a third meaning: an artificial legal person existing for a public purpose. Section (iv) deals with the overlap between the terms in their application to the Commonwealth of Australia.

The 'Commonwealth of Australia' matches each description: it is a nation, a government, and an artificial legal (constitutional) person existing for a public purpose. As section (iv) shows, the overlapping usage of the terms makes it difficult to discern, in relevant contexts involving the 'Commonwealth', how the author using the terms actually conceives of constitutional personality: whether it is understood as incorporating government and/or nation, or whether the constitutional person has a separate existence. Nevertheless, it is passably clear that at least two different theories have emerged, in contrast to the older, narrow theory for which the thesis contends: the theory of government (constitutional person) and the theory of nation (constitutional person),

(i) 'Body Politic'/'Polity' as Nation/Political Community

This section demonstrates that the terms 'body politic' and 'polity' are each used, interchangeably, to denote the nation/political community, ie a composite of 'government' and the people who are governed, united by rules embodied in the *Constitution*. In the case of the Commonwealth (nation), that conception usually also includes the States.

The term 'body politic' is sometimes used in this sense in the context of citizenship laws. Thus, a person born in Australia to an Australian citizen is said to be a 'member of the Australian body politic',[503] whereas the status of 'alien' is given to a person who is not a member of the 'body politic'.[504] Taken together, the cases suggest that the Commonwealth as 'body politic' or 'polity' is made up of at least the following elements: the territory,[505] the people[506] and the organs and institutions of government at both federal and state level.[507] It is created and underpinned by the *Constitution*[508] and, at least according to some judges, sustained by popular compact.[509] In *Thomas v Mowbray*,[510] Gummow and Crennan JJ said that 'governments' and 'the public' were 'elements of the body politic'. In a significant passage, their Honours held (rejecting a submission to the contrary) that the 'notion of a "body politic" cannot sensibly be treated apart from those who are bound together by that body politic.' That reasoning, it is suggested, stands against the theory of nation (constitutional person). It is hard to comprehend how the Commonwealth (nation), if it 'cannot sensibly be treated

503 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 409 [41] (Gaudron J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 212 CLR 162, 179 [54]-[55], 180 [58]-[59] (Gaudron J); see also 187 [86], 188 [89]-[90] (McHugh J); 211 [181] (Kirby J) and 227 [223] (Callinan J).

504 *Nolan v Minister for Immigration and Ethnic Affairs* (n 60) 189 (Gaudron J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (n 503) 175 [38]-[39] (Gleeson CJ).

505 Geographical area was described as an 'aspect' of the body politic in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 448 (Dawson J).

506 The franchise reflects 'membership' of the body politic: *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 [83] (Gummow, Kirby and Crennan JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [120] (Gummow and Bell JJ).

507 *New South Wales v Commonwealth [Work Choices Case]* (2006) 229 CLR 1, 119–120 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

508 *Brown v R* (1986) 160 CLR 171, 190 (Wilson J).

509 eg *Thomas v Mowbray* (2007) 233 CLR 307, 362 [142] (Gummow and Crennan JJ).

510 ibid 338 [45] and 362 [142] (Gummow and Crennan JJ).

apart' from the people, could yet be understood to have legal personality *separate* from the people.

These usages can be traced back to Thomas Hobbes, who argued that, when people submit themselves to an organised form of government, they create an ideal 'person', which Hobbes termed 'the Common-wealth', which becomes the seat of sovereignty.[511] The 'absolutist' vision of this ideal person may be seen in the top quadrant of the frontispiece of Hobbes's *Leviathan*, which depicts a sixteenth-century King whose head and arms are his own but whose body is comprised of a multitude of persons.[512] This mystical body, thought to be a borrowing from ecclesiology,[513] emerges in the Reports of Sir Edmund Plowden.[514] In *Willion v Berkley*,[515] for example, Southcote J is reported by Plowden to have said that the King and his subjects 'together compose the corporation': 'he is the Head, and they are the Members, and he has the sole Government of them'.

The term 'polity' is also used in this sense, particularly by Kirby J. In a 2008 case, his Honour said that the *Constitution* established 'a polity adhering to the

511 Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (first published 1651, Richard Tuck ed, rev student edn, CUP 1996) 120.

512 See Quentin Skinner (n 70) 368; and Quentin Skinner, 'Hobbes and the purely artificial person of the state' in *Visions of Politics* (CUP 2002) vol III, 177.

513 Kantorowicz (n 19) 15.

514 eg Maitland, 'Crown as Corporation' (n 101) 35: 'Whether this sort of talk was really new about the year 1550, or whether it had gone unreported until Plowden arose, it were not easy to say; but the Year Books have not prepared us for it'; Kantorowicz (n 19) 42, saying that the 'legal fiction of the King's two bodies was a distinctive feature of English political thought in the age of Elizabeth and the early Stuarts', though it had identifiable antecedents in medieval theology.

515 *Willion v Berkley* (n 135) 234; ER 339.

rule of law'.[516] Australia has also been described as a 'secular polity.'[517] The States are clearly comprehended within such usages; indeed, it is sometimes said that the Commonwealth is a 'single polity',[518] which has the character of a 'dualist federal polity'[519] in that it is 'made up of'[520] or 'divided into federal, state and territory governments.'[521] That may be a way of saying that the 'polity' is comprised in part of different 'governments'; as Kirby J said in *Mobil Oil Australia v Victoria,*[522] the 'Commonwealth of Australia is a polity in which governmental powers are shared.' The particular place of the Commonwealth (government) within that single polity enables it, on the current orthodoxy, to exercise a particular type of executive power, known as the 'nationhood power'.[523] In each of these contexts, and many others, the term 'polity' is used to describe a composite notion of the government and the governed, including the States, and bound together by a set of rules.

(ii) 'Polity'/'Body Politic' as Government

The terms 'body politic' and 'polity' are also used, interchangeably, to denote the 'government', namely an abstraction of all of the individuals and institutions comprising the three branches of government associated with any given

[516] *Commissioner of Taxation v Futuris Corporation Limited* (2008) 247 CLR 146, 171 [85] (Kirby J).

[517] *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 122 [76] (Kirby J).

[518] *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 232 ALR 209 (NSWCA) 219 [35] (Spigelman CJ).

[519] *O'Donoghue v Ireland* (2008) 234 CLR 599, 637 [87] (Kirby J).

[520] *BAT v WA* (n 62) 73 [113] (Kirby J).

[521] *XYZ v Commonwealth* (2006) 227 CLR 532, 575 [125] (Kirby J).

[522] *Mobil Oil* (n 66) 49 [102] (Kirby J).

[523] cf *Hwang v Commonwealth* (2005) 222 ALR 83 (HCA) 86 [9] (McHugh J).

component of the Federation. In this sense, the terms are usually used to distinguish the Commonwealth (government) from the State (government).

The first reported usage of this sense of the word 'polity' in a decision of the High Court of Australia was in 1920, in the *Engineers' Case*. There, Gavan Duffy J said that the 'existence of the State as a polity is as essential to the Constitution as the existence of the Commonwealth.'[524] These words from Gavan Duffy J's judgment were picked up by Dixon J, and quoted by his Honour in *West*,[525] and then shortly thereafter in *Uther*.[526] In *Burns v Ransley*,[527] Dixon J gave the following definitions for the statutory phrase "the Government or Constitution of the Commonwealth":

> I take the word "Government" to signify the established system of political rule, the governing power of the country consisting of the executive and the legislature considered as an organised entity and independently of the persons of whom it consists from time to time. …
>
> The word "Constitution" … probably has the same meaning, and, if so, it does not refer to a document or instrument of government but to the polity or organized form of government which the fundamental rules of law have established whether they are expressed in a written constitution or not.

In 1958, in *Lamshed v Lake*, Dixon CJ said that the expressions 'accepted by the Commonwealth' and 'placed under the authority of the Commonwealth' in section 122 of the *Constitution* described the Commonwealth as the 'polity

524 *Engineers' Case* (n 59) 174 (Gavan Duffy J).

525 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 698 (Dixon J).

526 *Uther* (n 71) 530 (Dixon J).

527 *Burns v Ransley* (n 56) 115 (Dixon J) (emphasis added).

established by the Constitution'.[528] In this sense of the term, 'polity' seems to be a personification of the whole of the government, separate from the people. By this route, it seems, the term 'polity' became popular as a description of the Commonwealth (government).

Such language is nowadays very common in Australia. We read that the 'legislature of one polity' has vested power in an institution created by the legislature 'of another polity',[529] or that a court exercising judicial power 'asserts the power of the polity',[530] or that the 'executive government of a polity' does not owe a duty of care in the exercise of 'its' powers.[531] In *BHP Billiton v Schultz*,[532] it was said that a 'polity' without power to create its own courts and confer upon them jurisdiction 'would be a very weak polity, indeed, a polity far weaker than the colonies at federation'. Such usages may invoke invoke a personificatied or bodified entity ('polity') comprising the legislative, executive and judicial branches of government;[533] as Dixon J said in *Burns v Ransley*, 'the governing power of the country …considered as an organised entity'. Each 'polity' in the Federation, though distinct, is then said to be an integral part of 'the government of one nation'.[534] The Commonwealth is the 'national,'[535] 'central',[536] or 'federal

528 *Lamshed v Lake* (1958) 99 CLR 132, 141-142 (Dixon CJ).

529 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 604 [197] (Gummow and Hayne JJ).

530 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 468 [178] (Hayne J).

531 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 580 [91] (McHugh J).

532 *BHP Billiton v Schultz* (n 530) 471-472 [192] (Callinan J).

533 See also *Austin v Commonwealth* (2003) 215 CLR 185, 302 [284] (Kirby J).

534 *Gould v Brown* (1998) 193 CLR 346, 485 [283] (Kirby J); *BHP Billiton v Schultz* (n 530) 468- 469 [179] (Hayne J).

535 *Permanent Trustee Australia v Commissioner of State Revenue* (2004) 220 CLR 388, 467 [231] (Kirby J).

polity' and so has unique powers and status. Yet the 'polity of a State' has responsibility for and hegemony over people, institutions, lands and activities with its boundaries.[537] The necessity for the continued coexistence of the two 'polities' influences the interpretation of various constitutional provisions and rules.[538] Most recently, in *Williams (No 2)*, the plurality emphasised that the Commonwealth as 'polity' is the 'central polity of a federation in which *independent* governments exist in the one area and exercise powers in different fields of action carefully defined by law.'[539] According to this usage, 'polity' means government, in a sense distinct from nation or political community.

Two examples suffice to show that the term 'body politic' is also used in this sense, although less frequently. In the *Second Territory Senators Case*,[540] in the context of an issue estoppel, Aickin J said:

> Generally speaking when an Attorney-General sues to enforce a public right or liberty he does so as representing Her Majesty's subjects, and not the *body politic of the government unit* in which he holds office. The presence of the State of Queensland as a plaintiff adds emphasis to the Attorney's separate role, even though he appears by the same counsel as the State.[541] (emphasis added)

536 *Spratt v Hermes* (n 65) 250 (Kitto J).

537 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 420-421 [101] (Callinan J); see also *Work Choices Case* (n 507) 326 [785] (Callinan J).

538 eg *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers' Case*) 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Pharmaceutical Benefits Case* (n 67) 271-272 (Dixon J).

539 *Williams (No 2)* (n 129) 469 [83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

540 *Queensland v Commonwealth* (1977) 139 CLR 585 (*Second Territory Senators Case*).

541 ibid 615 (Aickin J).

This conception, of the 'body politic of the government unit,' is something distinct from the people and, for that reason, necessarily distinct from the nation.[542] Similarly, in *Thomas v Mowbray*, Kirby J treated the terms 'body politic' and 'polities' as describing 'Australian units of government',[543] and held that those concepts did not, per se, extend to 'individual persons or their property or other interests'.[544]

(iii) 'Body Politic' (and 'Polity') as Body Created for Public Purposes

The terms 'body politic' (and less frequently 'polity') are also used to describe public bodies (that may or may not be artificial legal persons) created for public purposes. It has been a common feature of English parliamentary drafting that the term 'person' should be defined so as to include a 'body politic', and this device has been adopted in Australia.[545] In a 1925 case, Isaacs J said of the *Real Property Act 1915* (Vic):

> The Act is quite general. It includes by sec. 16, under the expression "person," *a body politic* and "classes of persons." "Body politic" is found in the *Magdalen College Case*[546]*. … The expression "body politic", as distinguished from "body corporate", indicates to my mind a body created for some public purpose*. For instance, the Hudson's Bay Company and the East India Company, invested with public functions, were bodies politic. The Sovereign is a body politic (see

[542] cf *Thomas v Mowbray* (n 509) 338 [45] and 362 [142] (Gummow and Crennan JJ).

[543] ibid 396 [252] (referring to protection of 'the bodies politic of the Commonwealth and the States'), 400 [262] (referring to the protection of 'Australian units of government, as such') and 411 [296] (referring to the defence of the 'Commonwealth and State polities') (Kirby J).

[544] ibid 393 [245] (Kirby J).

[545] A number of the Australian *Interpretation Acts* contain a general definition of the word 'person' as including a 'body corporate or politic': *Interpretation Act 1987* (NSW), s 21; *Acts Interpretation Act 1901* (Cth), s 2C; *Interpretation of Legislation Act 1984* (Vic), s 38; *Acts Interpretation Act 1954* (Qld), s 36 and schedule 1 ('person' and 'corporation'); *Interpretation Act 1978* (NT), s 24AA.

[546] *Magdalen College Case* (n 144) 70a; ER 1240.

> *Magdalen College Case*). In *Attorney-General for Ontario v Attorney-General for the Dominion*,[547] Lord Watson used the expression "body politic" to denote the Dominion of Canada.[548] (emphasis added)

There is a line of authority to the effect that a 'body politic' *must* be a legal person, at least for statutory purposes.[549] Outside the statutory purpose, however, it is clear that a 'body politic' is not *necessarily* a legal person. Basten JA, having conducted a survey of some of the usages, concluded that the term could describe a 'social group, which may or may not have legal personality but has constitutional significance, in the broadest sense of that term.'[550] That is a definition broad enough to cover all three of the distinct usages discussed here.

The first reported [551] application of the term 'body politic' to the Commonwealth was in 1905, in *Baume v Commonwealth*.[552] In that case, Griffith CJ said that the 'Commonwealth' as mentioned in the *Judiciary Act 1903* (Cth) 'means the body politic called by that name … [which] stands for the Crown as representing the whole community'.[553] That his Honour conceived the Commonwealth ('body politic') as a legal person is made clear later in the judgment, in a reference to suits 'against a body politic such as the

[547] *Attorney-General for Ontario v Attorney-General for the Dominion* [1896] AC 348 (PC) 361 (Lord Watson).

[548] *Melbourne Harbour Trust Commissioners v Colonial Sugar Refining Co Ltd* (1925) 36 CLR 230, 279 (Isaacs J).

[549] *R v Inhabitants of Barton* (1840) 11 Ad & E 343 (KB); 113 ER 446; *Clarke v Tweed District Ambulance Committee* [1965] AR (NSW) 8 (NSWIndCmn); *Bristol v Water Conservation and Irrigation Commission* [1975] 2 NSWLR 643 (NSWSC) 648D (Waddell J).

[550] *Hoxton Park* (n 74) [50] (Basten JA).

[551] The survey that follows is limited to the *Commonwealth Law Reports*.

[552] *Commonwealth v Baume* (n 2).

[553] ibid 413 (Griffith CJ).

Commonwealth'.[554] In the same case, O'Connor J expressed a more conventional view of the place of the 'Crown', saying that 'Commonwealth *representing the Executive power of the community*, or the Crown as it is sometimes called' was 'constituted a juristic person'.[555] Here, 'body politic' is a synonym for the 'Crown', which 'represents' (but does not incorporate) either 'the whole community' or the 'executive power'. Later, it was held by reference to the *Acts Interpretation Act 1901* (Cth) that, because the word 'person' includes 'body politic', it 'therefore includes the Commonwealth.'[556]

The term 'polity' has also been used to describe the Commonwealth (constitutional person) in contexts where a narrow theory might have been intended. Emmett J said that the Commonwealth was a 'polity that is capable of owning property and incurring obligations under municipal law.'[557] Justice Allsop said that the capacity of a State to contract 'was an attribute of each polity as a juristic person.'[558] Chief Justice Doyle said that a State 'may be treated as a "politically organised body", capable of entering into legal relationships and of exercising the powers and capacities of a separate legal entity'.[559] Other examples, which tend to suggest or imply some theory about the way the Commonwealth (constitutional person) is to be understood, are examined below.

554 ibid 415 (Griffith CJ).

555 ibid 418 (O'Connor J).

556 *R v Brewer* (n 309) 550 (Latham CJ and McTiernan J).

557 *Spencer v Commonwealth* [2008] FCA 1256, [148] (Emmett J).

558 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FCA 581, [691] (Allsop J).

559 *White v South Australia* (n 68) [26] (Doyle CJ).

(iv) Overlapping Usage

The terms 'body politic' and 'polity' have at least the three different meanings identified in the previous sections. This section shows that, in particular contexts involving constitutional personality, these terms have also been used in ways that are both unclear and overlapping. In particular, the third sense (body created for public purposes) has been conflated with one of the two other senses (nation or government), such as to give rise to the impression that either the Commonwealth (nation) or the Commonwealth (government), as the case may be, is conceived to be the constitutional person. It is upon the basis of these cases that this thesis has extrapolated two broad theories, of government (constitutional person) and nation (constitutional person).

The theory of nation (constitutional person) emerges from a series of modern judgments, each having in common Gummow J as a joint author. The series begins with *Sue v Hill*,[560] where a joint judgment of Gleeson CJ, Gummow and Hayne JJ indicated that the first use of the expression 'the Crown' was as a 'device to dispense with'[561] the recognition of the 'State as a juristic person'. The 'State as juristic person' was in turn called the 'body politic'.[562] In *Lam*,[563] McHugh and Gummow JJ said that, whereas there had been a lack of understanding in the UK of the "'state' as a body politic," the 'federal system of government' in Australia

560 *Sue v Hill* (n 19) 498 [84] (Gleeson CJ, Gummow and Hayne JJ).

561 *Williams (No 1)* (n 2) 237 [154] (Gummow and Bell JJ).

562 *Sue v Hill* (n 19) 498 [84] (Gleeson CJ, Gummow and Hayne JJ); see also *Mining Act Case* (n 62) [102] (Gummow J).

563 *Ex parte Lam* (2003) 214 CLR 1, 24-25 [74]-[76] (McHugh and Gummow JJ).

required 'such an understanding'. The terms 'State' and 'body politic' appear in these judgments as synonyms for the Commonwealth (nation).

The thread of these judgments may be picked up in *Eastman's Case*,[564] where Gummow and Hayne JJ referred with approval to Barwick CJ's observations in *Spratt v Hermes*[565] that the *Constitution* 'brought into existence but one Commonwealth, which was, in turn, destined to become the nation.' Their Honours had earlier identified this nation as a 'body politic', and said that it was *this* 'body politic', identified in the covering clauses to the *Constitution*, that was denoted by the term 'the Commonwealth' in sections 1, 61 and 71 of the *Constitution*. Then, in *Williams (No 1)*,[566] Gummow and Bell JJ said that '[t]he legal personality' was 'that of the Commonwealth of Australia', rather than the executive branch, and that the Commonwealth was the 'body politic established under the [*Constitution*], and identified in covering cl 6'.

Assuming it is legitimate to read these judgments together, they seem to support a theory that the Commonwealth of Australia, as nation or (in that sense) 'body politic', is the constitutional person. Thus, it is passably clear that: the terms 'nation', 'body politic' and 'State' are synonyms for the Commonwealth (nation); legal personality is attributed to the Commonwealth (nation); and the Commonwealth (nation) is the origin but not the wielder of governmental power. What is not clear is the relationship between the nation (constitutional person)

564 *Re Governor Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 323 (*Eastman's Case*) 344 [50]-[51] (Gummow and Hayne JJ).

565 *Spratt v Hermes* (n 65) 247 (Barwick CJ).

566 *Williams (No 1)* (n 2) 237 [154] (Gummow and Bell JJ).

and the government. The theory does not sit altogether well with the finding, in *Thomas v Mowbray*,[567] that 'governments' and 'the public' were 'elements of the body politic', which 'cannot sensibly be treated apart from those who are bound together by that body politic.' Plainly, the coherence of the theory of nation (constitutional person) depends upon definitions that have not been clearly spelled out, and which may be shifting from context to context.

Other judgments in *Williams (No 1)* suggest the theory of government (constitutional person). French CJ emphasised that the executive power of the Commonwealth was the power '*exercised* by the Commonwealth as a polity *through* the executive branch of its government'.[568] The emphasis suggests that the polity incorporates the branches of government, and acts through them. It would be an error, French CJ said, to 'treat the Commonwealth Executive as a *separate* juristic person'. It seems to be implicit in this that the Executive Government *shares* the 'juristic personality' of the Commonwealth (constitutional person), which is in turn the 'polity'. Thus, the Commonwealth as 'polity' is the government, and is a legal person. The separate judgment of Hayne J in *Williams (No 1)* is replete with such language. His Honour said that the expenditures in issue in the case were 'expenditures made by the executive government *of a polity* – an artificial legal person',[569] that the Executive Government of the Commonwealth was 'the executive government *of* an artificial

[567] *Thomas v Mowbray* (n 509) 338 [45] and 362 [142] (Gummow and Crennan JJ).

[568] *Williams (No 1)* (n 2) 184 [21] (French CJ) (emphasis added).

[569] *Williams (No 1)* (n 2) 241 [173] (Hayne J) (emphasis added).

legal entity – a polity;'[570] and that the Commonwealth makes contracts and can outlay public money '*as* a polity'.[571] Assuming that it is legitimate to read these judgments together, and accepting that they are not full expressions of any theory, these passages imply the theory of government (constitutional person).

It is open to doubt whether any of the judgments surveyed above actually intended to propound a different theory of constitutional personality. Certainly there is no apparent consciousness of any difference as between them, nor of any departure from the seminal features (as distinct from the language) of the narrow theory. Nor, with the exception of Gageler J in *Queensland Rail*, does any of the judgments display consciousness of the possibility that constitutional personality might be theorised in different ways. For these reasons, it may be unfair to seek to extrapolate a theory from such usages, and any theory (having been extrapolated) may turn out to be false. It may be that any *apparent* theoretical differences result instead from the ambiguity of the terms 'polity' and 'body politic', the meaning of which clearly shifts in subtle but important ways. The discussion illustrates, at the very least, that such terms should not be used uncritically.

Whether or not any difference in theory is intended as between the judgments, it does seem clear that the view of constitutional personality propounded (or assumed) is broader than was comprehended during the currency of the 'Crown'. The judgments imply that the constitutional person

[570] ibid 254 [205] (Hayne J) (emphasis added).

[571] ibid 254 [207] and 259 [217] (Hayne J) (emphasis added).

comprises (and not just *represents*) either the people making up the Commonwealth of Australia (nation/political community), or the government of the Commonwealth, or perhaps both. These judgments self-consciously emulate a concept, associated with continental European jurisprudence, of the whole 'state' as a juristic person, in preference to the narrow conception that developed in English law, was adopted in the colonies, and applied (with some variations) previously in Australia.

(4) Conclusion to Chapter I

Thus, the 'Crown' became or was recognised as a legal person only relatively recently, and without any associated theoretical exposition. The 'Crown' as corporation really only emerged in the 1860s, as an adaptation of the late medieval notion that the King or Queen was a corporation sole. Twentieth century authority perpetuated the confused status of this constitutional person. Whatever else might be taken from the course of authority, it is otherwise clear that one step was not taken. UK law did not construct the nation or the government, or even the Executive Government, into a legal (constitutional) person; it avoided full development of the 'Crown' into a legal notion of the 'state'.[572] The development of such a notion was inhibited by prevailing understandings of personal accountability, including the development of what is now termed 'public law' by a system of writs that ran against office-holders rather than the 'State'. These developments confined the need for the 'State as

[572] See Cheryl Saunders, 'The Concept of the Crown' (2015) 38(3) *Melbourne University Law Review* 873, 876.

legal person' to the ('private') law of obligations, where it represented only a limited part of the government. Some commentators, notably Professor Loughlin, have decried the stunted legal consciousness of a constitutional order without a developed 'state' notion, without explaining what it involves or how it would improve matters.

The absence of a 'state' notion registered differently in the colonies. Throughout the period for which Australian governments were thought to obtain capacity from the legal personhood of the 'Crown', a distinction was maintained between the 'Crown' and the different 'political organisms' created or recognised by the *Constitution*. At first, that distinction was called in aide of the separate constitutional personalities of the 'Commonwealth Crown' and the 'State Crowns'. Then, when the theory of 'Crown' unity and indivisibility was reasserted, it became necessary to distinguish between the different agents jointly acting for the (unified) 'Crown' in different territorial units: that is, between the 'Crown in right of' separate governments. At all points during this period, Australian law adhered to the English legal tradition of rejecting the group-personality of the government or nation/political community. Whether the constitutional person was seen to represent the government, or the political community/nation, has never seemed to matter. The terms 'Commonwealth Crown', 'Crown in right of the Commonwealth', and more recently 'body politic' or 'polity', have been used successively to designate a constitutional person that can be understood as having had perpetual existence or succession since Federation. At no point has it been suggested that the Commonwealth (constitutional person) lacked capacity.

At no point did alterations in its designation interrupt its corporate life, in the sense of (for example) novating contracts or causing change in a property folio.

The chapter then discussed the cases rejecting the 'Crown' in Australia. The reasons for doing so, although in some respects overstated, were accepted as persuasive. Nothing in the rejection of the 'Crown' was found to require an overhaul of the established relationship between legal person and government or political community. No rationale was presented, and none has since been offered, for adopting a broad theory of constitutional personality. Yet, in misplaced reliance on the views of Sir Owen Dixon and (perhaps) Harrison Moore, it seems that a broad view is now felt to be required by the *Constitution*. The significant consequences of the broad views, in terms of rights and liabilities of the Commonwealth (constitutional person) and the broader corpus of constitutional law, have not been spelled out by their proponents and are explored in particular in chapter III of the thesis.

Finally, it was shown that Justices of the High Court have begun to use the idioms of 'body politic' and 'polity' in connection with constitutional personality, in a way that merges different senses of the word 'Commonwealth', and self-consciously emulates a broader (but unarticulated) conception of the 'state'. The terms 'body politic' and 'polity', although they have never been defined, were themselves shown to have been used in at least three different senses. The chapter provided reasons for thinking that these idioms mask two broader theories of constitutional personality: the theory of nation (constitutional person), and the theory of government (constitutional person). Both theories

purport to be predicated upon the text and structure of the *Constitution*. The next chapter shows, however, that the *Constitution* itself does not dictate or necessitate any particular theory, and suggests reasons for thinking that the older, narrower view of constitutional personality remains preferable.

CHAPTER II: THE 'COMMONWEALTH' IN THE *CONSTITUTION*

The term 'Commonwealth' appears 213 times in the text of the *Constitution*.[573] Whilst it is recognised that the term is used in different senses,[574] and whilst there are many cases considering the use of the term in relation to particular provisions, there is no judicial guidance as to how to assign meaning in cases of ambiguity. That is an important deficit, when it comes to deriving a theory of constitutional personality, and gives rise to the possibility of different theories.

This chapter demonstrates that the term 'Commonwealth' is used in the *Constitution* in at least three ways. Section (1) commences by identifying the provisions and structural features that imply that the 'Commonwealth' has the capacity for legal relations. These provisions, understood in light of their decisional history, confirm that the 'Commonwealth' is a legal person (the Commonwealth (constitutional person)). Section (2) identifies, as a second group of usages, provisions describing the 'Commonwealth' as a nation or political community (Commonwealth (nation)). Section (3) then identifies provisions describing the 'Commonwealth' as the central government of the Federation (Commonwealth (government)). Sections (2) and (3) demonstrate the importance, in particular contexts, of distinguishing between the conceptions of the 'Commonwealth' as nation and as government.

[573] This number excludes section headings.

[574] See Introduction, §(1)(b).

The discussion shows that the *Constitution* itself is inconclusive as to the nature of constitutional personality. The Commonwealth is not in any meaningful way defined or explained in the text, which takes as its central concern the governing organisation of the Commonwealth (government).[575] The text and structure do not necessitate the narrow theory for which this thesis contends, though this thesis identifies features that suggest this is the correct approach. Nor does the *Constitution* necessitate a broad theory. The vagueness of the usage of the term 'Commonwealth', which may even have been deliberate,[576] means that different theories are available, depending upon the way that the senses of the term 'Commonwealth' are understood to relate to each other. Provisions referring to the Commonwealth (constitutional person) might be grouped together with provisions referring to the Commonwealth (nation), or the Commonwealth (government), so as to construe the 'Commonwealth' as a constitutional person made up of or comprising either: a juristic unity of the people of Australia, or the legislative, executive and judicial branches of government. On the other hand, provisions referring to the Commonwealth (constitutional person) might be treated as a self-contained category, consistently with the narrow view. Whilst the chapter presents reasons for

[575] See John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson 1901) 366, saying: 'The "Commonwealth" is not in any way defined or explained by the *Constitution* itself; that deals only with the governing organisation of the Commonwealth.' A related point was made in *James v Commonwealth* (1939) 62 CLR 339, 362 (Dixon J); *Kruger v Commonwealth* (n 45) 190 CLR 1, 46 (Brennan CJ), where it was said that the *Constitution* is 'concerned with the powers and functions of government and the restrains upon their exercise.'

[576] Sawer, *Australian Federalism in the Courts* (n 98) 123, saying that the 'Founders were so uncertain about, or rather uninterested in, such questions that they even left their usage of the words "Commonwealth" and "States" in an ambiguous position.'

preferring the narrow view, it is not suggested that the text of the *Constitution* alone necessitates one theory over the others.

(1) 'Commonwealth' as Legal (Constitutional) Person

This section explores the provisions of the *Constitution* implying that something called the 'Commonwealth' exists and, which is to say the same thing, has capacity for legal relations. The primary claim of this thesis is that these provisions implicitly created a legal person. In a sense, that is not controversial. That the Commonwealth is a legal person has been recognised many times.[577] However, owing to the imprecision with which the Commonwealth's legal personality has been discussed, it is helpful to identify precisely how and where the *Constitution* implies the existence of a legal person. The traditional language of incorporation was not deployed by the framers.[578] Accordingly, it is necessary to traverse the text with some care. This section divides the relevant provisions into three subsets: provisions that imply the capacity of the Commonwealth to contract, own property, and appear in a court.

(a) 'Commonwealth' as Contractor

This section explores provisions of the *Constitution* that imply that the 'Commonwealth' is a legal person with the capacity to contract. Other

[577] See nn 2-6 above.

[578] For chartered companies, eg: 'one body corporate and politic by the name of – and by that name shall and may sue or be sued plead and be impleaded in all courts whether of law or equity … and shall have perpetual succession and a common seal': see Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008) 80.

constitutional controversies concerning the 'power' of the Executive Government to make contracts are explored in chapter III.

(i) Provisions Dealing with Public Debts

Three provisions of the *Constitution* assume the capacity of the 'Commonwealth' (constitutional person) to contract for a debt.

Section 51(vi) of the *Constitution* grants legislative power with respect to 'borrowing money on the public credit of the Commonwealth.' An example of the exercise of that power may be found in sections 52A and 52B of the *Commonwealth Inscribed Stock Act 1911* (Cth),[579] which conferred the borrowing facilities that were exercised with such energy in the expansionary period after the First World War so as to impose a sizeable debt upon the Commonwealth by the 1920s.[580] The debts contracted pursuant to such facilities were binding upon the Commonwealth as a matter of the ordinary law of contract. As Gibbs ACJ said in *Sankey v Whitlam*,[581] laws authorising the *making* of contracts do not otherwise alter the common law operation of the contract, including with respect to breach. Neither the constitutional grant of legislative competence, nor the legislation enacted in pursuance of that grant, were seen as taking the matter outside the framework of the (private) law of obligations.

[579] cf *Commonwealth v Queensland* (1920) 29 CLR 1.

[580] cf Manning Clark, *History of Australia* (Melbourne University Press 1993) vol 6, 348, 513-515, 519.

[581] *Sankey v Whitlam* (1978) 142 CLR 1, 29 (Gibbs ACJ); and see *Re Michael; Ex parte WMC Resources Ltd* (2003) 27 WAR 574 (WASCFC) 579 [22] (Parker J).

Section 105 of the *Constitution* confers upon the Commonwealth Parliament the competence to 'take over from the States their public debts', and provides in return that 'the States *shall indemnify the Commonwealth* in respect of the debts taken over'. By necessary implication, then, the Commonwealth has the capacity to be owed an indemnity. The arrangements contemplated by section 105 were given effect in the Financial Agreement between Commonwealth and States, the history of which was told in *New South Wales v Commonwealth [No 1]*.[582] Section 105A,[583] which made that Financial Agreement 'part of the organic law of the Commonwealth,'[584] authorises 'agreements' between the Commonwealth and the States with respect to the public debts of the States, including with respect to the 'borrowing of money by the States or by the Commonwealth'.[585] Section 105A(5), using language of an 'imperious character',[586] elevates the obligations assumed under the Financial Agreement to the status of obligations imposed by the *Constitution* itself. These obligations, although they have constitutional force, nevertheless take effect as contracts.

Amidst the turmoil of the Whitlam dismissal, it was alleged that Mr Whitlam and members of his cabinet had conspired unlawfully to bring about the borrowing by the Commonwealth of US$4 billion. A private information was

582 *New South Wales v Commonwealth [No 1]* (1932) 46 CLR 155, 235, 246; *Re the State of New South Wales; Ex parte the Commonwealth* (1932) 47 CLR 58.

583 That section was inserted by the *Constitution Alteration (State Debts) 1928* (Cth).

584 *New South Wales v Commonwealth [No 1]* (n 582) 186 (Starke J); and see *Bank Nationalisation Case* (n 65) 279 (Rich and Williams JJ).

585 *Constitution,* s 105A(1)(f).

586 *New South Wales v Commonwealth [No 1]* (n 582) 228 (McTiernan J).

brought and, in *Sankey v Whitlam*,[587] the High Court held that the Financial Agreement did not amount to a 'law of the Commonwealth', for the purpose of a prosecution under section 86(1)(c) of the *Crimes Act 1901* (Cth), because it took its 'binding force' from the law of contract.[588] As Mason J said, it 'remains a contract, though one with very special qualities.'[589] In an interesting passage, Stephen J said:

> The agreements which s 105A contemplates are contracts between quite special parties, each possessing legislative powers and to whose capacity to contract and to perform its obligations constitutional principles and provisions apply.[590]

The language used in this passage implies a theory that the Commonwealth (government) is a legal person, which 'possesses' legislative powers. Such language is common where intergovernmental agreements are concerned,[591] perhaps because the context evokes the position of states in international law.[592] However, to anticipate what is shown below, it is not *necessary* to say that the Commonwealth (constitutional person) 'possesses' legislative power because section 1 of the *Constitution* vests the 'legislative power of the Commonwealth' in the 'Parliament of the Commonwealth'. The references to 'Commonwealth' (constitutional person) in sections 105 and 105A can be treated as denoting the

587 *Sankey v Whitlam* (n 581).

588 ibid 75 (Stephen J), see also 105-106 (Aickin J) agreeing generally with Stephen J and treating the Financial Agreement as a contract.

589 ibid 90 (Mason J).

590 ibid 74 (Stephen J) (emphasis added).

591 See further chapter III, §(1)(a)(iii).

592 ie as constituting 'an indivisible authority in matters of international responsibility': *Enever v The King* (n 57) 982-983 (Barton J).

nation, or the government, or the 'Crown', according to whatever preconception is applied to the text.

(ii) Inter-governmental Agreements

The capacity of the Commonwealth to form agreements or engage in disputes with or against a State or States provides a structural indication, first, that the 'Commonwealth' is a legal person and, second, that the constitutional person is distinct from the nation. The Commonwealth of Australia is 'one indissoluble Federal Commonwealth'. Yet it is also a federation and, in several places, the *Constitution* assumes the possibility for mutual legal relations, including antagonism of right and constitutional authority, between the 'Commonwealth' and the 'States'. These provisions, amongst others explored in this chapter, present the question: 'what are federal relations *between*?'[593] To answer that question by reference to terms like 'Crown', 'polities' or 'bodies politic' is simply to recast the question into one of definition. The text of the *Constitution*, as will be shown, does not control the answer.

Section 51(xxxiii) confers law-making competence on the Commonwealth Parliament with respect to the acquisition of State railways 'on terms arranged between the Commonwealth and the State'. Section 85 erects a regime for the transfer of State property to the Commonwealth and requires, in section 85(iii), that:

[593] Sawer, *Australian Federalism in the Courts* (n 98) 122.

> the Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament. (emphasis added)

Sections 87, 89, 92(ii) and 94 deal with the making of payments between the Commonwealth and the States, including payments on account. Mention has already been made of the two provisions (sections 105 and 105A) that imply the possibility of agreements between Commonwealth and States with respect to taking over public debts, including the possibility of a State's indemnifying the Commonwealth. The judicial interpretation given to these provisions means that agreements made under them are given their legal force by the law of contract. Whilst the range and extent of intergovernmental agreements between the Commonwealth and the States cannot be definitively stated,[594] and many will be of a political rather than legal character,[595] these provisions nevertheless imply that, as between the Commonwealth and the States, there is the capacity for contractually binding agreements.

Furthermore, the *Constitution* implies that the jurisdiction of the High Court will extend to intergovernmental controversies, even where they do not raise constitutional questions.[596] That is because of the breadth of the concept of a 'matter' in section 75, and the conferral of original jurisdiction by section 75(iii) in cases where the Commonwealth is a party. It has been held that section 75(iii)

[594] See Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power' (2005) 16 *Public Law Review* 294, 299.

[595] As to which, see *Railway Standardisation Case* (n 2) 148-149 (McTiernan J); *John Cooke* (n 345) 416 (Knox CJ, Gavan Duffy and Starke JJ). This point is explored in chapter III, §(1)(a)(iii).

[596] cf Campbell, 'Suits between the Governments of a Federation' (n 450).

creates a jurisdiction to hear disputes about a contract between a State and the Commonwealth,[597] as well as tortious disputes, for example arising out of a collision in Sydney Harbour between vessels owned by the Commonwealth and the State of New South Wales.[598] In the latter case the plurality said that the *Constitution*:

> created mutual rights and obligations between Commonwealth and States and foresaw the necessity of some tribunal, not the judicial organ of any one State exclusively, to determine or finally determine possible disputes between Commonwealth and States… The words 'in all matters' are the widest that can be used to signify the subject matter of the Courts jurisdiction in the specified cases.[599]

So far, the 'Commonwealth' might be described without inaccuracy as a legal person having constitutional power subject to the jurisdiction of the High Court of Australia. That is not, however, a complete picture. Not every dispute between the Commonwealth and States will involve justiciable questions;[600] many intergovernmental agreements, for example, concern political rather than legal obligations, and might be understood as agreements between Executive Governments rather than constitutional persons. The Court's approach in such cases is to ask whether the dispute might arise between individuals, and whether it could be determined according to legal principle. Contract and tort certainly

[597] cf *Railway Standardisation Case* (n 2) 148 (McTiernan J).

[598] *Commonwealth v New South Wales* (n 358) 206 (Knox CJ), 207 (Isaacs, Rich and Starke JJ).

[599] ibid 211-212 (Isaacs, Rich and Starke JJ).

[600] However, the question whether such disputes are justiciable is itself treated as a question to be resolved by application of legal principles that, as Enid Campbell said, 'express the Court's judgment on what kinds of issues are appropriate for judicial determination': Campbell, 'Suits between the Governments of a Federation' (n 450) 318.

fall within this approach.[601] However, even in other categories of dispute, impossible as between individuals, the Court has drawn analogies with private law in order that a controversy with predominantly political flavour might be determined judicially.[602]

It is possible to propound different theories to explain mutual federal relations of this character. Both of the main alternative theories present logical problems. If, on the one hand, the Commonwealth (government) is the constitutional person, why are some agreements binding as contracts but not others? If, on the other hand, the Commonwealth (nation) is the constitutional person, how can it make contracts with States comprising 'indissoluble' parts of itself? Each theory may admit of more or less persuasive solutions to those problems. Perhaps the whole government is a legal person, but only some of its agreements are *intended* to be legally binding.[603] Perhaps the 'people' of Australia can combine into, or can be constructed as, different constitutional persons for different purposes—though this would seem to contradict the unitary nature of legal personality. In distinguishing the constitutional person from the government and the nation, this thesis presents a view not confronted with these problems. According to this narrow view, intergovernmental *contracts* are made between constitutional persons, whereas intergovernmental agreements are

601 *Commonwealth v New South Wales* (n 358) 213 (Isaacs, Rich and Starke JJ).

602 See, eg, *South Australia v Victoria* (n 354) 675 (Griffith CJ), 707 and 709 (O'Connor J), 716 (Isaacs J).

603 Possible objections include that: the context of government is always, and inherently, political; and that the intentions of the individuals comprising the respective Executive Governments may not be internally or mutually uniform, and are in any event an unstable fulchrum for constitutional outcomes.

made between Executive Governments, and lack binding force precisely because those governments are not legal persons.

(b) 'Commonwealth' as Proprietor

This section deals with provisions implying that the Commonwealth (constitutional person) has capacity to own realty and personalty, including as a direct consequence of specific constitutional provisions. In all of these provisions, the 'Commonwealth' is treated as a legal person, capable of having 'property', in the sense of a 'legal relationship with a thing'.[604]

(i) Commonwealth as Ordinary Proprietor

In two places, the *Constitution* implies that the Commonwealth is capable of holding the full panoply of legal relations with other legal persons in respect of 'things', including special relationships created by statute.

Section 51(xxxi) confers upon the Parliament a legislative power with respect to the 'acquisition of property on just terms from any State or person'. The term 'property' in this provision has been given a wide meaning, extending to 'any tangible or intangible thing which the law protects under the name of

[604] cf *Yanner v Eaton* (1999) 201 CLR 351, 365-366 [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Plain Packaging Case* (n 45) 32 [37] (French CJ).

property.'[605] The word 'acquisition' has been interpreted to require a corresponding 'benefit' to have accrued to someone.[606] At one time, there was debate about whether acquisition by a legal person other than the Commonwealth would attract the guarantee of 'just terms'.[607] That debate has been resolved in favour of a broad approach, whereby section 51(xxxi) is not 'confined pedantically to the taking of title by the Commonwealth to some specific estate or interest'.[608] What is important for present purposes is the assumed minimum content of this debate. Acquisition connotes a transfer *to* someone; otherwise it would involve 'mere extinguishment'.[609] Where that transfer is to the 'Commonwealth', section 51(xxxi) thus implies the capacity of the 'Commonwealth' to hold a legal interest in, or a legal relation with, a 'valuable species of right and interest'.[610]

A recent illustration of latent ambiguity in the use of the word 'Commonwealth' in the *Constitution* arose in the *Plain Packaging Case*,[611] where the High Court considered the validity of Commonwealth legislation imposing

[605] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 295 (McTiernan J), and see 276 (Latham CJ, dissenting), 285-286 (Rich J), 290 (Starke J), 305 (Williams J); *Bank Nationalisation Case* (n 65) 349 (Dixon J), who said, in an attempt to reconcile these judgments, that the section extends to 'innominate and anomalous interests'; *Wurridjal v Commonwealth* (2009) 237 CLR 309, 421-422 [296] (Kirby J). In recent years, there has been an erosion of the width of property interests protected by the section; eg *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 233-234 [51]-[52] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ), where telecommunications infrastructure was held not to be protected 'property' in the relevant sense because it was originally public property.

[606] See *Plain Packaging Case* (n 45) 33-34 [42] (French CJ), discussing the authorities.

[607] The authorities are collected in *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 215 fn 323 (Heydon J).

[608] *Bank Nationalisation Case* (n 65) 349 (Dixon J).

[609] *Wurridjal* (n 605) 422 [298] (Kirby J).

[610] cf *Dalziel* (n 605) 290 (Starke J dissenting).

[611] *Plain Packaging Case* (n 45).

restrictions and prohibitions on the use by tobacco companies of the textual and graphical content on product packaging. All judges held or assumed that the trademarks and the packages themselves amounted to property,[612] and a majority held that the property had been 'taken' under the legislative regime.[613] A majority held that the property had not been 'acquired', in the relevant sense, because the 'Commonwealth' had obtained no benefit or advantage of a proprietary nature.[614] In dissent, Heydon J held that the Commonwealth had obtained a corresponding 'right to command' and 'rights of control' over what appeared on the cigarette packages.[615]

The majority dealt with this point by distinguishing the 'Commonwealth', which acquired no benefit, from the Parliament of the Commonwealth. Logically, that depends upon distinguishing the Commonwealth (constitutional person) (who, according to this line of authority, must acquire a specific proprietary interest) and the Commonwealth (government) (whose legislature passed the *Tobacco Plain Packaging Act 2011* (Cth)). The majority's approach may or may not have been appropriate to the construction of such an important personal guarantee[616] but at the very least it does usefully illustrate the distinctions that may be drawn between the different senses of the word 'Commonwealth'. The

612 ibid 30-33 [33]-[39] (French CJ), 59 [137] (Gummow J), 66 [164] (Hayne and Bell JJ), 79 [207] (Heydon J), 106 [296] (Crennan J), and 124-127 [345]-[352] (Kiefel J).

613 ibid 34 [44] (French CJ), 60 [141] (Gummow J), 81-82 [216] (Heydon J), 757 [456] (Kiefel J), cf 105-106 [294]-[296] (Crennan J) dissenting on this point.

614 ibid 33-34 [42] (French CJ), 63 [150] (Gummow J), 73 [189] (Hayne and Bell JJ), 110 [305] (Crennan J), 129-130 [362] (Kiefel J), and 78 [200] (Heydon J) dissenting.

615 ibid 82-83 [217] (Heydon J).

616 cf ibid 85 [230]-[231] (Heydon J).

graphic images appearing on cigarette packages were messages required by the legislation, but they did not confer an interest on the Commonwealth as 'body politic' (ie Commonwealth (constitutional person).[617] Furthermore, the benefits accruing to the Commonwealth (government), in the form of discharge of treaty obligations, or in the hypothetical future reduction in health care expenditure, were insufficient to enliven the protection of section 51(xxxi) .[618] The term 'Commonwealth' was acknowledged to be one that may be used in different senses.[619] What was required by section 51(xxxi) was an 'enhancement to the property of the body politic',[620] ie the Commonwealth (constitutional person).

An example of what was meant by enhancing 'the property of the body politic' is afforded by *Newcrest Mining (WA) Ltd v Commonwealth*.[621] Proclamations made under the *National Parks and Wildlife Conservation Act 1975* (Cth) had prohibited mining in the Kakadu National Park. The majority held that the proclamation had conferred a proprietary benefit on the Commonwealth, by freeing its title to the minerals from the burden of Newcrest's right to conduct mining operations.[622] Sterilisation of the plaintiffs' mining tenements had

[617] ibid 72 [187]-[188] (Hayne and Bell JJ), and 132 [369]-[372] (Kiefel J), saying that the only 'benefit' was the fulfilment of legislative goals.

[618] Namely the World Health Organisation Framework Convention on Tobacco Control, done at Geneva on 21 May 2003 [2005] *Australian Treaty Series* 7; *Plain Packaging Case* (n 45) 62 [148] (Gummow J), 70 [177] (Hayne and Bell JJ), 132 [372] (Kiefel J).

[619] *Plain Packaging Case* (n 45) 72 [185] (Hayne and Bell JJ), 33- 34 [42] (French CJ), 63 [150] (Gummow J) agreeing.

[620] ibid 72 [185] (Hayne and Bell JJ).

[621] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (*Newcrest*).

[622] ibid 530 (Brennan CJ), 634-635 (Gummow J), 560 (Toohey J), 561 (Gaudron J), 661 (Kirby J) agreeing, and 573 (McHugh J) dissenting.

augmented the Commonwealth's title to the land in question.[623] *Newcrest* and the *Plain Packaging Case* illustrate by their diversity the implication inherent in section 51(xxxi), or at least in the Court's interpretation of section 51(xxxi) : that the 'Commonwealth' is capable of having a proprietary relationship with the object over which it is said to have use or control.

The second constitutional provision implying that the 'Commonwealth' has the capacity for ordinary ownership rights is section 114, which relevantly prohibits a State Parliament from imposing 'any tax on property *of any kind belonging to the Commonwealth*'. The phrase 'tax on property' has been interpreted to mean an 'exaction made in respect of the holding or ownership of property'.[624] Section 114 thus directs attention to the relationship between the taxed property and the legal person to whom that property belongs.[625] Usually, that will be the Commonwealth (constitutional person), although not always. Statutory legal persons forming part of the Commonwealth (government) but having distinct legal personality from the Commonwealth (constitutional person) might also be protected. An example is the *Superannuation Fund Investment Trust Case*,[626] where the Trust had been established as a body corporate by the

[623] cf *Plain Packaging Case* (n 45) 34 [43] (French CJ), 59 [136] (Gummow J), 72 [185] (Hayne and Bell JJ), and on different grounds 105 [294] (Crennan J).

[624] *Attorney-General of NSW v Collector of Customs for NSW* (1908) 5 CLR 818 (*Steel Rails Case*) 844 (O'Connor J), and see 829 (Griffith CJ), 839 (Barton J), 854 (Higgins J) speaking of a tax on property 'as such'.

[625] cf *Queensland v Commonwealth [First Fringe Benefits Tax Case]* (1987) 162 CLR 74, 86 (Gibbs CJ), 98 (Mason, Brennan and Deane JJ), 104-105 (Dawson J). For a critique of the High Court's interpretation of s 114 in context of property taxation, see Vince Morabito, 'The Constitutional Restriction on Taxes Imposed on Crown Property' (1998) 1 *Journal of Australian Taxation* 41.

[626] *Superannuation Fund Investment Trust Case* (n 343).

Superannuation Act 1976 (Cth) in order to manage and provide superannuation benefits for Commonwealth public servants and employees of Commonwealth instrumentalities. In determining whether the Trust was to be identified with the 'Commonwealth' for the purpose of section 114, some judges concentrated on whether the Trust held property that was beneficially the property of the Commonwealth (constitutional person),[627] whilst others concentrated on the degree of control exerted by the Executive branch, using the language and the concepts of corporate theory. Justice Stephen said:

> If a corporation is no more than the passive instrument of the Crown, subject in a high degree to control by the executive, it is appropriate enough that its acts be viewed as those of its master and that it be itself treated as the alter ego of the Crown, enjoying accordingly those immunities and privileges with which the Crown is clothed.[628]

Justice Mason used similar language. He said that although the Trust was a 'separate corporate entity', nevertheless the control exerted by the Crown was of a quality sufficient to render it an 'alter ego of the Crown'.[629] These passages show that in cases where the protection of section 114 is extended to property not formally owned by the 'Commonwealth' (understood in this case as the 'Crown'), the Court will utilise privity or agency concepts to achieve that extension.

[627] ibid 363-364 (Aickin J), see also 335 (Barwick CJ), saying that the Trust invested 'the property of the Commonwealth.'

[628] ibid 348 (Stephen J).

[629] ibid 354 (Mason J).

That the word 'Commonwealth' in section 114 can embrace activities of entities having separate legal personhood from that of the 'Commonwealth' illustrates the logical necessity of distinguishing the Commonwealth (constitutional person) from the Commonwealth (government). Whilst section 114 assumes the capacity for property rights of the 'Commonwealth', the protection also extends to entities not sharing the Commonwealth's legal personality, but nevertheless having the relevant proximity to the Commonwealth (government). Here arises the logical necessity: if all entities and personalities legally associated with the Commonwealth (government) were enveloped within the Commonwealth's constitutional personality, then there would be no occasion for agency concepts to extend section 114 to protect property owned by the Superannuation Fund Investment Trust. The law does not recognise co-existence in different hands (here the Trust and the central government) of mutually incompatible rights. Thus, the word 'Commonwealth', although it assumes the proprietary capacity of the constitutional person, is also used in section 114 as an umbrella term catching other legal persons distinct from the constitutional person.

(ii) Species of Constitutional Ownership

The phrase 'constitutional ownership' describes a variety of ownership triggered or attended by some constitutionally mandated consequence. In each case the 'Commonwealth' is implied to be a legal person capable of owning property.

The first example of 'constitutional ownership' concerns Commonwealth 'places'. Section 52(i) of the *Constitution* confers upon the Commonwealth

Parliament an exclusive power to legislate with respect to 'all places acquired by the Commonwealth for public purposes'. The words 'acquired by' contemplate the acquisition of a proprietary interest,[630] by any process of acquisition 'known to the law',[631] by something termed 'the Commonwealth'. The ownership of this property by the Commonwealth (constitutional person) has the constitutional consequence of conferring upon the Parliament an *exclusive* law-making competence during the currency of the ownership.[632] Importantly, this does not mean that the land itself is removed from the territory of the State.[633] Commonwealth 'places' are not 'enclaves' in the sense in which that word is used to describe Commonwealth Territories,[634] but the fact of the ownership of the property makes the Commonwealth (constitutional person) immune to the legislative power of the State Parliament during the currency of that

630 cf *Stocks and Holdings* (n 4) 276 (Menzies J).

631 *Worthing* (n 5) 127 (Windeyer J).

632 *Stocks and Holdings* (n 4) 266 (Barwick CJ), 276 (Menzies J), 280-281 (Windeyer J), 289 (Walsh J); *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 219 CLR 235, 352 [49] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

633 cf *Worthing* (n 5) 94 (Barwick CJ).

634 cf ibid 126 (Windeyer J).

ownership,[635] up to and including the execution of a conveyance of the property to a different proprietor.[636]

The second example of 'constitutional ownership' occurs in section 85 of the *Constitution*, which deals with the transfer of departmental property from the new States to the Commonwealth. Section 69 provides that the colonial departments of customs and excise; posts, telegraphs, and telephones; naval and military defence; lighthouses, lightships, beacons, and buoys; and quarantine, are 'after the establishment of the *Commonwealth*' to be 'transferred to the Commonwealth'. Section 85 then deals with the transfer of departmental property to the 'Commonwealth'. Property used exclusively in connection with a transferred department 'shall become vested in the Commonwealth' (section 85(i)). This effects a change in ownership by force of the *Constitution* itself.[637] Property not used exclusively in connection with a transferred department may be acquired by the 'Commonwealth', which in both cases must

[635] *Stocks and Holdings* (n 4) 267 (Barwick CJ), 275-276 (Menzies J), 280-281 (Windeyer J), 285 and 298 (Walsh J). In anticipation of these statements, the Commonwealth enacted the *Commonwealth Places (Application of Laws) Act 1970* (Cth), which provides for the application of State law to Commonwealth places in limited circumstances, including after its transfer from Commonwealth ownership (section 14(2): *Paliflex* (n 632) 339 [13] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ)). On some of the problems inherent in the use that has been made of s 52(i) in an 'age of economic rationalization', see Geoffrey Lindell, 'A Possible Limit on the Use of Commonwealth Places for 'non-Federal' Purposes: from Airports to Shopping Malls' (2004) 15 *Public Law Review* 269; Henry Burmester QC, 'Comment on Lindell on the Use of Commonwealth Places' (2004) 15 *Public Law Review* 275.

[636] It has been held that the *Stamp Duties Act 1920* (NSW) is beyond the legislative competence of the State Parliament to the extent that it purports to apply to a conveyance for the sale of property which was a 'public place' for the purpose of s 52(i): *Chief Commissioner of Stamp Duties v Paliflex Pty Ltd* (1999) 47 NSWLR 382 (NSWSC) (Austin J).

[637] *Newcrest* (n 621) 592 (Gummow J); see also *Municipal Council Case* (n 2) 231 (Griffith CJ).

compensate the State for the value of the property, and shall 'assume the current obligations of the State in respect of the department transferred.'[638]

Another example of 'constitutional ownership' pertains to what is described in the *Constitution* as the 'seat of government'. Section 125 provides that the 'seat of government' must be 'within territory which shall have been granted to or acquired by the Commonwealth, and shall be *vested in and belong to* the Commonwealth'. It has been pointed out that the word 'territory' in this provision is not equivalent to the 'Territory' described in sections 111 and 122.[639] The emphasised words suggest that section 125 requires that the 'Commonwealth' own the land upon which is situated the 'seat of government', and section 52(i) confers upon the Parliament the same exclusive legislative power as it has with respect to Commonwealth places.

The High Court has been required to resolve disputes between the States regarding ownership of land. One example is the boundary dispute[640] before the Court in *South Australia v Victoria*.[641] The suit involved conflicting claims to the title and possession of land, and was resolved by a judgment *in rem* conclusive as

[638] *Constitution*, ss 85(iii) and (iv).

[639] Bernard Sugarman, 'The Seat of Government of the Commonwealth' (1973) 44 *Australian Law Journal* 344, 344-345; and *Svikart v Stewart* (n 639) 561 (Mason CJ, Deane, Dawson and McHugh JJ), 564 (Brennan J). Note that the phrase 'acquired by the Commonwealth' in s 122 of the *Constitution* is not used in the proprietary sense: *Fishwick v Cleland* (1960) 106 CLR 186, 197 (Dixon CJ, McTiernan, Fullagar, Kitto, Menzies and Windeyer JJ).

[640] Boundary disputes were not otherwise regarded as justiciable matters: 1 Bl Comm 237 and 241. This required the Court to treat the dispute as one of trespass and as a controversy relating to the ownership of property.

[641] *South Australia v Victoria* (n 354) 667 (Griffith CJ), 715 (Isaacs J), 742 (Higgins J); see also *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265-266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

between the parties.[642] The two States were treated as proprietor and trespasser respectively. That may be contrasted with the celebrated decision in *Penn v Lord Baltimore*,[643] where a boundary dispute between two of the proprietary colonies was treated as being resolvable as on an agreement falling within the *in personam* jurisdiction of equity.[644] *South Australia v Victoria* is revelatory because it shows the evolution of habits of constitutional thought and expression in order to meet the challenge created by Chapter III of the *Constitution* following the American tradition, namely to resolve legally-textured[645] conflicts about the limits of governmental authority in a judicial forum according to law.[646]

(c) 'Commonwealth' as Litigant

The 'Commonwealth' (constitutional person) is assumed by the *Constitution* to have the capacity to appear in Court and, importantly, is made amenable to coercive jurisdiction. It is a necessary implication of section 75 of the *Constitution*, which subjects the 'Commonwealth' and the 'States' to a coercive jurisdiction and permits them to invoke it, that the Commonwealth and the States are legal persons. This goes beyond the colonial position, where intergovernmental

642 *South Australia v Victoria* (n 354) 675 (Griffith CJ), 707 and 709 (O'Connor J), 716 (Isaacs J), but see 744 (Higgins J), dissenting on the basis that South Australia was not proprietor but donee of a power). cf William Harrison Moore, 'Suits Between States within the British Empire' (1925) 7 *Journal of Comparative Legislation and International Law* 155, 163. Moore appeared as counsel for the defendant in that case.

643 *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 (Ch); 27 ER 1132.

644 See further Edwin Peel, 'The Legacy of *Penn v Lord Baltimore*' in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006).

645 Conflicts not having the requisite legal texture have been held not to be justiciable. See, eg, the *Railway Standardisation Case* (n 2), which is treated more fully in Chaper III.

646 cf Moore (n 642) 160.

disputes were settled by mutual consent.[647] That is so notwithstanding that the word 'Commonwealth' in section 75(iii) of the *Constitution* has been given a broader signification, so that it includes legal persons not sharing the Commonwealth's legal personality but still comprising the government. That may be demonstrated by reference to the provisions of the *Constitution* creating federal jurisdiction. Two sections, out of the nine heads of federal jurisdiction contained in sections 75 and 76 of Chapter III of the *Constitution*, imply that the 'Commonwealth' is capable of appearing in, and is amenable to the jurisdiction of, a court.

The first is section 75(iii) of the *Constitution*, which creates federal jurisdiction to entertain 'matters' in which 'the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.' The word 'matters' has been interpreted to include 'all claims referable to a legal standard of right', including claims for breach of contract and tort, as well as for the breach of any 'constitutional declaration of right or duty'.[648] It is accepted in the jurisprudence that there is a difference between the 'Commonwealth' as the name of the litigant (the constitutional person) in a Chapter III 'matter', and the 'Commonwealth' as an umbrella term capable of embracing other legal persons, both natural and artificial, who are federal instrumentalities (the government).[649] An example of

[647] cf Baty (n 246) 852.

[648] cf Campbell (n 450) 310-311; and *South Australia v Victoria* (n 354), 675 (Griffith CJ), saying that the word was 'in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice.'

[649] *Maguire v Simpson* (1977) 139 CLR 362, 399 (Mason J); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 581-582 [42]-[42] (Gleeson CJ, Gaudron and Gummow JJ); *Goldie* (n 45) 271 [23] (Gummow J).

the latter is Airservices Australia, which was held to be the 'Commonwealth' for the purposes of section 75(iii) of the *Constitution*, even though it had separate legal personhood and would have to be distinguished from the 'Commonwealth' for other purposes.[650] The breadth given to the term is informed by the purpose of section 75(iii), namely to:

> ensure that the political organisation called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction in which it could be impleaded and which it could invoke.[651]

This passage, from the judgment of Dixon J in the *Bank Nationalisation Case*, uses the phrase 'political organism' consistently with government. It does not declare this creature to be a legal person; indeed, Dixon J went on to say that the 'Commonwealth' in this sense was not 'formally' a 'juristic person'.[652] The passage would have been unnecessary were the entire government conceived to be an aggregated legal person. The passage recognises that the word 'Commonwealth' in section 75(iii) of the *Constitution* must be read consistently with the role of the provision in defining the jurisdiction of the High Court.

[650] *Austral Pacific v Airservices Australia* (2000) 203 CLR 136, 143 [14] (Gleeson CJ, Gummow and Hayne JJ) and 153 [48] (McHugh J). Airservices was given separate legal personhood by s 7 of the *Air Services Act 1995* (Cth). The plurality noted that Airservices would not be regarded as the 'Commonwealth' for the purposes of the *Cigamatic* doctrine; as to which see chapter IV.

[651] *Bank Nationalisation Case* (n 65) 363 (Dixon J).

[652] ibid.

Section 75(iii) has been described as existing in a symbiotic relationship with section 75(v) of the *Constitution*.[653] Section 75(v) confers jurisdiction upon the High Court in matters in which a 'constitutional writ or injunction'[654] is sought 'against an officer of the Commonwealth'. The phrase 'officer of the Commonwealth', although it has not been subject to detailed interpretation, was plainly designed to capture a broader notion than the Attorney-General or any other officer 'by or through whom the [Commonwealth] might come or be brought into Court.'[655] Justice Dixon said that an 'officer of the Commonwealth' is a person acting in an official and governmental capacity as an agent or emanation of the 'Commonwealth'. This has been held to include public servants,[656] Ministers and their delegates,[657] and federal judges.[658] The 'Commonwealth' in this sense is the government. That broader conception of the 'Commonwealth' is distinguished for jurisdictional purposes from a narrower conception of the 'Commonwealth' (constitutional person) that appears (represented by a solicitor or barrister) before a federal judge.

The second provision to imply the capacity of the Commonwealth (constitutional person) to litigate is section 78 of the *Constitution*, which provides

[653] cf James Stellios, 'Exploring the Purposes of Section 75(v) of the *Constitution*' (2011) 34 *University of New South Wales Law Journal* 70, 83; relying on *Bank Nationalisation Case* (n 65) 363 (Dixon J).

[654] On the High Court's 'rebranding' of the prerogative writs, see Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (OUP 2009) 70. The 'constitutional writs' are mandamus and prohibition.

[655] *Bank Nationalisation Case* (n 65) 363 (Dixon J).

[656] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Limited [No 1]* (1914) 18 CLR 54, 66 (Barton J); *Church of Scientology v Woodward* (n 34) 65 (Murphy J).

[657] *Church of Scientology v Woodward* (n 34) 66 (Murphy J).

[658] *Brisbane Tramways* (n 656) 66 (Barton J).

that the Parliament has power to 'make laws conferring rights to proceed *against the Commonwealth* … within the limits of the judicial power.' There has been some doubt about the role of section 78. An early draft of the *Constitution* required the Commonwealth's consent before any 'person or corporation' could bring a suit against it.[659] Although the clause was omitted, the idea persisted. In reliance on section 78, the Commonwealth Parliament enacted the *Judiciary Act 1903* (Cth). That Act provides that a person making a claim against the 'Commonwealth' may bring that claim in the High Court or in a State Supreme Court,[660] and in such cases 'the rights of parties shall as nearly as possible be the same'. Prior to the decision of the High Court in *Mewett*,[661] there was some disagreement about whether the 'Commonwealth' would have been liable to the citizen in the absence of such legislation.[662] Some judges viewed the *Constitution* itself as imposing liability upon the Commonwealth. Others had held that the Commonwealth could not have been liable without the *Judiciary Act*, because the Commonwealth otherwise had the benefit of the Crown's prerogative immunity from suit.

659 Constitution Bill (1891), cl 76. This clause was closely based on the Eleventh Amendment to the United States Constitution: cf Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Australian Bar Review* 215, 219.

660 *Judiciary Act 1903* (Cth), s 56. Section 56(2)(a) provides that a State Supreme Court shall be competent to hear the matter where it would have had competence 'to hear the suit if the Commonwealth were, or had at any time been, resident in that city or town, or in a particular area in that city or town'.

661 *Mewett* (n 45).

662 The authorities are collected in *Mutual Pools & Staff Ltd v The Commonwealth* (1994) 179 CLR 155, 217 fn 93 (McHugh J).

The question was finally resolved in *Mewett*.[663] The plaintiff had sustained injuries when the HMAS *Kembla* was swamped by waves whilst proceeding out of Port Phillip Bay off the coast of Victoria. The Commonwealth argued that the plaintiffs' claims had been extinguished by Commonwealth legislation[664] erecting a compensation regime for Commonwealth employees. Ultimately, that argument turned upon the question whether the plaintiff's claim arose under the *Judiciary Act* or at common law.[665] Three judges held that the claim was statutory because, without the *Judiciary Act*, the Commonwealth would have the prerogative immunity from civil suits enjoyed by the 'Crown' in the UK.[666] The 'Commonwealth' was understood to mean the 'Crown in right of the Commonwealth', on the stated basis that to sue the 'Commonwealth' on a contract or in tort was to sue it 'in its executive capacity'.[667] The majority judgments rejected the proposition that the plaintiff's claim arose under the *Judiciary Act*.[668] The Commonwealth's liability was created by the common law, and the *Constitution* operated to deny any doctrine of 'Crown' or executive immunity.[669]

663 *Mewett* (n 45).

664 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 44.

665 The legislative regime had been held invalid in its application to common law causes of action arising before its enactment, because it amounted to an acquisition of causes of action that were 'property', within the meaning of s 51(xxxi) of the *Constitution*, but without providing 'just terms': cf *Georgiadis* (n 420). The Court in *Mewett* rejected a challenge to its previous decision in *Georgiadis*: *Mewett* (n 45).

666 *Mewett* (n 45) 496 (Dawson J), 513 (Toohey J) and 532 (McHugh J) agreeing.

667 ibid 498 (Dawson J).

668 ibid 551 (Gummow and Kirby JJ), 491 (Brennan CJ) agreeing, 531 (Gaudron J).

669 ibid 551 (Gummow and Kirby JJ).

It follows from the reasoning of the majority in *Mewett* that an action may be brought against the Commonwealth by virtue of the common law, operating in conjunction with the *Constitution*, without reference to a federal law created under section 78.[670] Laws enacted in reliance upon section 78 might confer new substantive rights against the Commonwealth, but the legal person implicit within sections 75(iii) and 78 is one whose liability to common law causes of action was entrenched by the creation of federal jurisdiction to entertain such actions.[671] This renders inapplicable to Australian circumstances the old idea that there is a class of imperfect obligations, existing in the contemplation of the law but lacking *vincula juris*, which were binding in moral equity and conscience and had forward-facing legal effect but could not be enforced in a court of law.[672] As Dixon J said in *Werrin*,[673] the duty of imperfect obligation is made perfect by the creation of a jurisdiction in which the Commonwealth may be sued without its consent. This jurisdiction implies the Commonwealth's capacity to be sued, and thus implies the existence of a legal person.

(2) 'Commonwealth' as Nation and Territory

This thesis has identified the Commonwealth (nation) as a united political community comprised of a territory and a population, each of the States and

[670] cf *BAT v WA* (n 62) 57-58 [59] (McHugh, Gummow and Hayne JJ); for a critique, see Graeme Hill, 'Private Law Actions Against the Government (Part 1) – Removing the Government's Immunity from Suit in Federal Cases' (2006) 30 *Melbourne University Law Review* 716.

[671] cf *Werrin v Commonwealth* (n 388) 165-166 (Dixon J), explaining the result of the reasoning in *Commonwealth v New South Wales* (n 358).

[672] cf *Gibson v East India Company* (1839) 5 Bing (NC) 262, 274-275 (CP); 132 ER 1105, 1110 (Tindal CJ); *Cain v Doyle* (n 120) 420 (Starke J).

[673] *Werrin v Commonwealth* (n 388) 168 (Dixon J); this passage was approved in *Mewett* (n 45) 550 (Gummow and Kirby JJ).

Territories, and a government recognised internationally.[674] This section discusses the textual foundation for that conception. Section (a) identifies constitutional provisions referring to the Commonwealth (nation), and demonstrates the textual necessity of distinguishing it from the Commonwealth (government). Section (b) deals with a subcategory of provisions expressly referring to the territory of the Commonwealth (nation). Throughout, reasons are suggested for thinking that the Commonwealth (nation) is not a legal person.

(a) 'Commonwealth' as Nation

Commentators and judges who have explored the usages of the term 'Commonwealth' in the *Constitution* have all agreed that there are at least two separate meanings of that term,[675] described here as Commonwealth (nation) and Commonwealth (government).[676] Professor Lumb, in his 1979 study of this topic, described the two meanings as follows:

> The first meaning refers to the body politic (people, territory, federated States, Territories) established by the Act, the second as describing the central organs of government (legislative, executive and judicial) through which authority is exercised over that body politic.[677]

As this passage indicates, the core reason for distinguishing the Commonwealth (nation) from the Commonwealth (government) is that the 'people' and the

[674] These terms were used respectively in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 111 [315] (Hayne and Kiefel JJ), 200 [573] (Heydon J); and *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 (*AAP Case*) 362 (Barwick CJ).

[675] Further and other conceptions of the 'Commonwealth' have been advanced but are not discussed here, since it has never been suggested that those other conceptions are legal persons.

[676] Quick and Garran (n 575) 366ff; Moore (n 44) 72-73; Sawer, *Australian Federalism in the Courts* (n 98) 123; Lumb (n 45) 289-290.

[677] Lumb (n 45) 289.

'federated States' are parts of the Commonwealth (nation), but not parts of the Commonwealth (government). Quick and Garran said that the Commonwealth (nation) was a 'political entity and a political partnership', which is 'outside of and supreme over the Constitution' and the government.[678] At the time they wrote, the Commonwealth (nation) was subordinate only to the Imperial Parliament, whereas the Commonwealth (government) was subjected to the *Constitution* and the 'amending power'. In that respect, at least, the position has now changed: although it seems not to have had full international legal personality at its birth,[679] by 24 October 1945 the Commonwealth of Australia was capable of becoming one of the 51 original 'member states' of the United Nations; it was an independent sovereign nation,[680] capable of possessing rights and duties as a matter of international law,[681] and with the capacity to maintain those rights in international jurisdictions.[682]

This section groups together 44 occasions where the *Constitution* uses the word 'Commonwealth' to describe the Commonwealth (nation).[683] Section (i) deals with the covering clauses, and section (ii) deals with the balance of the *Constitution*.

[678] Quick and Garran (n 575) 366.

[679] See Leslie Zines, 'Commentary' in Herbert V Evatt, *The Royal Prerogative* (Lawbook 1987), C4-5, discussing the speed at which political events moved between 1910 and 1924 (when Evatt's doctorate was submitted).

[680] Twomey (n 19) 759.

[681] See generally Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 57; and Roland Portman, *Legal Personality in International Law* (CUP 2010).

[682] This thesis does not deal with the concept of international personality.

[683] Where parentheses indicate multiple usages, the provisions are: in the Constitution Act, preamble (2 usages), ss 1, 3 (3 usages), 4 (2 usages), 6 (5 usages), 7, 8, 9; and, in the *Constitution,* ss 2 (2 usages), 5, 24 (2 usages), 25, 49, 51 (chapeau), 51(vi), 51(xxx), 51(xxxii), 52 (chapeau), 68, 69, 70, 73 (2 usages), 84, 85(ii), 86, 87, 88, 96, 106 (2 usages), 107, and 121.

(i) The Nation in the Covering Clauses

The covering clauses to the Commonwealth of Australia Constitution Act 1900 (Imp) use the word 'Commonwealth' 24 times, of which just over three quarters (17) can be seen as evoking the Commonwealth (nation).

The title to the Constitution Act uses the phrase 'Commonwealth of Australia' to describe the new nation called into existence by proclamation, issued under covering clause 3. This provision permits the Queen to declare that the people of the several colonies 'shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia'. The phrase 'Commonwealth of Australia' is used only in the short title and covering clauses 3 and 6, although covering clause 6 provides that the word 'Commonwealth' means 'the Commonwealth of Australia as established under this Act.' Thereafter, the word 'Commonwealth' is used 16 times in proximity to the word 'establishment',[684] usually in the phrase 'establishment of the Commonwealth'. These provisions evoke the legal consequences of a particular moment in time, memorialised by Dixon J as the moment when, like Athena, 'the Commonwealth *uno ictu* sprang from the brain of its begetters armed and of full stature.'[685] The States are part of this 'Commonwealth', but it has been said that the States were not 'established' in the

[684] Namely, in the Constitution Act, ss 6, 7, and, in the *Constitution*, ss 5, 49, 69, 70, 73 (2 usages), 84, 85, 86, 87, 88, 96, 106 and 107. The phrase 'establishment of the Commonwealth' was struck out of s 105 by referendum in 1910.

[685] *Uther* (n 71) 530 (Dixon J).

same sense. Their designation and status changed,[686] but they were not 'established' because they had a prior existence as Colonies.

The preamble to the Constitution Act might be seen as significant to the competing theories about constitutional personality. The preamble records that:

> the people of New South Wales, Victoria, South Australia, Queensland and Tasmania … have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom … and under the Constitution hereby established.

At the very least, this provision is important for the link that it supplies between: first, a *popular* movement establishing a representative form of government (ie 'the people … have agreed to unite'); and second, the acknowledgment of the sovereignty of the Queen ('under the Crown').[687] In the *Engineers' Case*,[688] the plurality emphasised these two 'cardinal features' in the interpretation of the *Constitution*, and said that their 'combined effect' was that the expression 'Commonwealth' comprehended both 'the people of that territory considered as a *political* organism', and the '*strictly legal* conception of the King in right of a designated territory.' The contrast between *political* and *legal* confirms that constitutional personality, such as their Honours perceived it, lay in the King rather than in the people as an 'organism'.

686 cf *Uther* (n 71) 530 (Dixon J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 143 (Brennan J).

687 cf *Thomas v Mowbray* (n 509) 362 [143] (Gummow and Crennan JJ), saying that the preamble supplied 'a link between Tudor conceptions of the State and those of the modern system of representative government.' Compare *Engineers' Case* (n 59) 146 (Knox CJ, Isaacs, Rich and Starke JJ), saying that the two 'cardinal features of our political system' were common sovereignty of all parts of the Empire, and the principle of 'responsible government'.

688 *Engineers' Case* (n 59) 146 (Knox CJ, Isaacs, Rich and Starke JJ) (emphasis added).

With the passage of time, the popular dimension of the preamble has been accorded more importance than the regal dimension. It is sometimes said that the whole purpose of the *Constitution* is to 'give effect to' the 'agreement' of the people.[689] Justice Brennan said the *Constitution* conferred a 'new identity' upon the 'people who agreed to unite … melding their history, embracing their cultures, synthesising their aspirations and their destinies.'[690] Justice McTiernan said that the word 'Commonwealth' ordinarily means 'the whole of the people of Australia'[691] and, referring to the preamble, said that the 'ordinary meaning' of the word 'Commonwealth' is to describe 'a body of people united in a body politic governed on democratic principles.'[692] It is unclear from the context of these utterances whether such usages are intended to import the concept of legal personality. The language of the multitude of 'people' uniting into 'one' entity is reminiscent of the imagery of the Hobbesian 'commonwealth'.[693]

Proponents of the theory of nation (constitutional person) might find support for that theory in the preamble. However, the preamble does not inevitably imply such a theory. The reference in the preamble to 'one indissoluble Federal Commonwealth' founds a strong (perhaps irresistible) implication that the States (and not just the people of all the States) are parts of the Commonwealth

689 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1922) 177 CLR 248, (Brennan, Deane and Toohey JJ); *Payroll Tax Case* (n 312) 394-395 (Windeyer J).

690 *Davis v Commonwealth* (n 52) 110-111 (Brennan J).

691 *Pharmaceutical Benefits Case* (n 67) 273 (McTiernan J).

692 ibid.

693 See, eg, Runciman (n 10) 11; for the concept of the 'Hobbesian state', see n 9 above.

(nation),[694] and must continue to exist as such.[695] If that be right, it throws up a logical difficulty. If the Commonwealth (nation) is a constitutional person, some auxiliary theory is required to explain how: first, the States and the people can be 'indissoluble' parts of the constitutional person, whilst at the same time existing in a state of legal antagonism with it; and, second, how the constitutional person can be subjected to the laws of State Parliaments subsumed within its own 'indissoluble' body. As was noted above, it has actually been held that the Commonwealth (nation) as 'body politic' cannot sensibly be treated as something existing *apart* from those whom it binds together.[696] How then can indissoluble parts of the body sue other parts, and indeed the body itself? The same difficulty arises in relation to the textual indication that the people of the former colonies united '*in*' the Commonwealth (nation); in what sense can the people be said to have united *in* a legal person? If it be analogously to the members of a company, then the theory of Commonwealth (nation) seems to collapse into the notion that the nation is the constitutional person only to the extent that it *represents* the people of Australia.

Finally, the preamble also speaks of the 'admission into the Commonwealth' of other colonies and territorial possessions of the Queen. The imagery of other colonies being 'admitted into' a political community is coherent; less so, the imagery of colonies being admitted into a constitutional person. Covering clause

[694] See, eg, *ABC v Lenah Game Meats Pty Ltd* (n 97) [197] (Kirby J); *Re Wakim* (n 529) 574 [109] (Gummow and Hayne JJ).

[695] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 289 [15] (French CJ); see also *Mobil Oil* (n 66) [104] (Kirby J).

[696] *Thomas v Mowbray* (n 509) 362 [142] (Gummow and Crennan JJ).

8 excludes colonies, which 'become States of the Commonwealth', from the application of the Colonial Boundaries Act 1895 (Imp). These usages reflect what is further shown in Chapter VI of the *Constitution*, namely that the Commonwealth (nation) might have a changing membership.

(ii) The Nation in the Text

There are 22 usages of the word 'Commonwealth' within the body of the *Constitution*, that evoke the nation.

The majority of those usages are made easy to classify by their context. Section 106 refers, for example, to 'each State of the Commonwealth.'[697] This phrase confirms that the States form parts of the Commonwealth (nation)—certainly the States are not part of the Commonwealth (government), and, as noted above, it is hard to make sense of the notion that the States are 'part of' the constitutional person. The word 'Commonwealth' is used 16 times in the *Constitution* in proximity to the word 'establishment',[698] usually as part of the phrase 'establishment of the Commonwealth'. That moment is used as a trigger for certain constitutional events, including: the transfer of departments (section 69); the imposition of a uniform customs zone (sections 86 and 88); the commencement of prescribed time periods, for example as to when the first session of Parliament must be held (section 5), and the period during which surplus revenue from customs and excise duties is to be distributed and financial assistance granted to the States (sections 87 and 96); as a reference point for the

[697] *Constitution*, s 106.

[698] See n 684.

transmutation of legal principles, for example in relation to Parliamentary privilege (section 49), gubernatorial powers (section 70), appeals to the Privy Council (section 73), public service entitlements (sections 84 and 85(ii)), and the continuance of State constitutions and legislative powers (sections 106 and 107). Finally, it is with respect to (amongst other matters) the 'relations of the Commonwealth' with the islands of the Pacific that the federal Parliament has law-making competence.[699]

The phrase 'people of the Commonwealth' is used in sections 24 and 25 of the *Constitution*, and was used in section 127 prior to its repeal by referendum, to identify the citizens of the Commonwealth (nation) who are to choose the members of the House of Representatives. The High Court has held that, owing to the internal structure of Part II of Chapter I of the *Constitution*, the 'people of the Commonwealth' does not include persons resident in the Territories.[700] That is not to say, however, that the people of a Territory are not 'part of the Commonwealth'. Indeed, it was for this purpose that Barwick CJ propounded his notion of 'the fundamental concept of a single Commonwealth'.[701] His Honour rejected the contrast between 'a Commonwealth' containing the States as constituent elements of the Federation, and 'a Commonwealth which includes all the areas over which it can by one power or another legislate.' Thus, his Honour said, the Territories are included within 'the expression "the Commonwealth".'[702]

699 *Constitution,* s 51(xxx).

700 *Western Australia v Commonwealth* (1975) 134 CLR 201, 227 (Barwick CJ), 269- 270 (Mason J), 281-282 (Murphy J); *Newcrest* (n 621) 585 (McHugh J); cf Lumb (n 45) 293.

701 *Spratt v Hermes* (n 65) 247 (Barwick CJ).

702 ibid.

This was not a theory of constitutional personality: his Honour elsewhere used then-current language of the 'Crown in right of' to denote the Commonwealth (constitutional person).

The case of *Berwick Ltd v Grey*[703] illustrates the different roles that the Commonwealth (nation) plays in constitutional law. In that case, a taxpayer attacked a 1973 amendment to the *Income Tax Assessment Act 1936* (Cth) on the basis, inter alia, that the federal taxation power did not apply in external Territories. That submission seems to have rested upon the observation of Latham CJ in *Ffrost v Stevenson*[704] that, although the Territory of New Guinea[705] was 'an integral portion of the Commonwealth' held under mandate from the League of Nations, it was nevertheless not itself 'a part of the Commonwealth' because it was outside the King's dominions. The plaintiff in *Berwick v Gray* relied upon this observation to support the submission that Norfolk Island was not 'part of the Commonwealth *in the constitutional sense*'.[706] Justice Mason, with whom the rest of the Court agreed, rejected that submission on the primary ground that external Territories were part of the Commonwealth of Australia.[707]

Justice Mason relied upon the judgments of Barwick CJ and Menzies J in *Spratt v Hermes*,[708] rejecting the distinction propounded by Isaacs J in *Yee*,[709] between

[703] *Berwick Ltd v Gray* (1976) 133 CLR 603.

[704] *Ffrost v Stevenson* (1937) 58 CLR 528, 557 (Latham CJ).

[705] See generally *Fishwick v Cleland* (1960) 106 CLR 186.

[706] *Berwick Ltd v Gray* (n 703) 604 (report of argument of Cullinan QC) (emphasis added).

[707] ibid 605 (Barwick CJ), 608-609 (Mason J), and 606 (McTiernan J), 611 (Jacobs J) and 611 (Murphy J) agreeing with Mason J.

[708] *Spratt v Hermes* (n 65) 247 (Barwick CJ) and 269-270 (Menzies J).

the 'Commonwealth' and the 'Commonwealth proper'. Barwick CJ said that the difference in the quality and extent of the powers of the Federal Parliament 'introduced no duality in the Commonwealth itself.'[710] The 'Commonwealth', in the sense of 'political entity which the *Constitution* created',[711] had an 'essential unity and singleness'.[712] In *Eastman's Case*, Gummow and Hayne JJ said that the quality of 'unity and singleness' also attended the operation in the Territories of the legislative and executive powers of the 'Commonwealth'.[713] It is difficult to reconcile this quality of 'unity and singleness' with the theory of the nation (constitutional person); a key function of the Commonwealth (constitutional person), which on this theory has a quality of 'unity and singleness', is to have and conduct mutual legal relations with the States, which are part of the 'unity and singleness'.

The necessity of distinguishing the Commonwealth (government) from the Commonwealth (nation) is shown by the provisions of the *Constitution* dealing with naval and military defence.[714] In some of those provisions, it is clear that the States are included within the intendment of the word 'Commonwealth'. For example, the States must be included within the 'naval and military purposes of the Commonwealth' with respect to which legislative power is given over transportation (section 51(xxxii)). Furthermore, supposing that the Parliament

709 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432, 441 (Isaacs J) and see 448 (Rich J).

710 *Spratt v Hermes* (n 65) 247 (Barwick CJ).

711 ibid.

712 ibid.

713 *Eastman's Case* (n 564) 344-345 [50]-[53] (Gummow and Hayne JJ).

714 Namely, ss 44, 51(vi), 51(xxxii), 68, 69, and 114.

of the Commonwealth granted consent for a State to raise and maintain a military force (section 114), it is hard to imagine that such a force would not fall under the command (albeit nominal[715]) of the Governor-General as commander in chief of the 'naval and military forces of the Commonwealth' (section 68). These provisions evoke the Commonwealth (nation), ie in a sense that includes the States. Other provisions evoke the Commonwealth (government), ie in a sense that omits the States. The clearest example is section 51(vi) of the *Constitution*, dealing with 'the naval and military defence of the Commonwealth and of the several States'. It is not to be imagined that the defence of the nation would exclude the States.[716] These provisions show that the *Constitution* sometimes uses the word 'Commonwealth' in a way that includes the States (ie Commonwealth (nation)), and sometimes uses that word in a way that excludes the States (ie Commonwealth (government)).

Finally, in light of the decision in *Street v Queensland Bar Association,*[717] reference should be made to section 117 of the *Constitution*. That provision does not use the word 'Commonwealth'. It indicates that a 'subject of the Queen' shall not be discriminated against by reason of inter-State residence. Three judges recognised that, in the words of Toohey J, 'underlying the section is the notion … that Australia is a commonwealth and its laws are to apply equally to all its

[715] *Lane v Morrison* (2009) 239 CLR 230, 250 [58]-[59] (French CJ and Gummow J); and see generally Ninian Stephen, 'The Governor-General as Commander-in-Chief' (1984) 14 *Melbourne University Law Review* 563.

[716] cf Lumb (n 45) 291.

[717] *Street v Queensland Bar Association* (1989) 168 CLR 461.

citizens.'[718] Chief Justice Mason pointed out that the 'very object of federation was to bring into existence one nation and one people', and that section 117 of the *Constitution* was one of few provisions designed to enhance the unity and identity of the nation.[719] Justice Dawson said that it must be borne in mind that the Commonwealth and States, who '*together*' comprise 'the Australian federation', have separate responsibilities in connection with the section.[720] Read in this way, section 117 of the *Constitution* involves a meaningful distinction between the Commonwealth (nation) and the Commonwealth (government).

(b) 'Commonwealth' as Geographic Area

This section identifies a group of 18 usages of the word 'Commonwealth' to describe the territorial area occupied by the nation.[721] This group is readily distinguishable from other usages of the word 'Commonwealth' by the deployment of prepositions ('from', 'within', beyond', 'throughout', and 'into') to indicate a relationship between the substance of the provision and geography. Although the *Constitution* does not define the territory of the Commonwealth (nation), it is evident that it was to be 'the sum of the colonial territory that had been placed under government by the Imperial authorities, with a territorial boundary ending at low-water mark.'[722]

[718] ibid 559-560 (Toohey J).

[719] ibid 485 (Mason CJ).

[720] ibid 648 (Dawson J) (emphasis added).

[721] Where parentheses indicate multiple usages, the provisions are: Constitution Act, ss 5 (2 usages) and *Constitution*, ss 19, 21, 33, 34(i), 37, 51(iii), 51(xxiv), 51(xxv), 51(xxxviii), 92, 95 (2 usages), 101, 118, 126, 128.

[722] *New South Wales v Commonwealth* (n 47), 372 (Barwick CJ).

Chapter I of the *Constitution* makes provision for the procedure to be followed in the event that the President of the Senate or the Speaker of the House of Representatives happens to be 'absent from the Commonwealth' when a vacancy arises in either Chamber. In such cases, the Governor-General is deputised to accept resignations (sections 19 and 37), to notify the State Governor (section 21), and to issue a writ for vacancy (section 33). Section 34(i) of the *Constitution* uses the phrase 'within the limits of the Commonwealth' as a qualification for election to the House of Representatives. A person must have been for three years 'a resident within the limits of the Commonwealth as existing at the time he is chosen'. The underlined passage embraces the possibility of fluidity in the borders of the geographical area described as the 'Commonwealth'. Fluidity of borders is evidently not a possibility applicable to a legal person, or, in the abstract, to a government. The phrase 'formed within the limits of the Commonwealth' is used as a qualification on the power of the federal Parliament under section 51(xx) to legislate with respect to 'trading and financial corporations'. In the *Incorporation Case*,[723] the High Court held that the word 'formed', described in argument as a 'past participle used adjectivally',[724] described corporations that had been or shall have been created in Australia.[725] It distinguished 'local' corporations from 'foreign corporations'[726] based on the place of formation.

723 *New South Wales v Commonwealth* (1990) 169 CLR 482.

724 ibid 484 (report of argument of Davies QC).

725 ibid 498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ), 504 (Deane J).

726 ibid 497 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

One of the significant factors motivating the Federation movement was the establishment of a free trade area comprising the geographical territory of the uniting Colonies.[727] The provisions of the *Constitution* implementing this free- trade area[728] speak of the 'Commonwealth' in its geographic sense.[729] Thus, the bounties power must be exercised 'uniformly throughout the Commonwealth' (section 51(iii)), whilst section 92 of the *Constitution* provides that 'trade, commerce and intercourse' where it occurs 'among the States', or what the heading to section 92 describes as 'within the Commonwealth', shall be 'absolutely free'. Transitional provisions pertaining to the free trade area—for example the second paragraph of section 92 ('importation of goods into the Commonwealth') and the first and third paragraphs of section 93 ('from beyond the limits of the Commonwealth')—also use the word in this sense.

Section 92 of the *Constitution* provides that trade, commerce and intercourse 'among the States … shall be absolutely free'. In *Lamshed v Lake*,[730] Dixon CJ pointed out that this provision did not in terms protect trade and intercourse 'between two States during its passage through a territory.' However, as was emphasised by the joint judgment in *Capital Duplicators*,[731] the *Constitution* treats the free trade area as extending to the 'entirety of the Commonwealth'. The internal Territories, at least, are 'geographically and politically, constituent parts

[727] *Capital Duplicators Pty Ltd v Australian Capital Territory* (1922) 177 CLR 248, 274 (Brennan, Deane and Toohey JJ).

[728] *Constitution*, ss 88, 90, 92 and 99.

[729] cf *Newcrest* (n 621) 598 (Gummow J).

[730] *Lamshed v Lake* (n 528) 142 (Dixon CJ).

[731] *Capital Duplicators* (n 727) 274-275 (Brennan, Deane and Toohey JJ).

of the Commonwealth of Australia'.[732] They are parts of the Commonwealth (nation), though (in the case of the Australian Capital Territory and the Northern Territory) each is established by statute 'as a body politic under the Crown'.[733] So, too, is the Administration of Norfolk Island.[734] It is accepted, and must be correct, that the Territories as 'bodies politic' are legal persons.[735] They are separate legal persons and yet they are 'parts of the Commonwealth', ie the nation. This presents a problem from the theory of nation (constitutional person): how can the Territories, which are separate constitutional persons, be constituent parts of the Commonwealth (constitutional person)?

There has been some disagreement about whether these geographical usages can be distinguished from the provisions of the *Constitution* describing the Commonwealth (nation). Professor Lumb argued that 'the geographical meaning' was included within the nation concept, or what he defined as 'the body politic (people, territory, federated States, Territories) established by the Act'.[736] He used the example of the phrase 'parts of the Commonwealth', which is used three times in covering clause 6 of the *Constitution*. Later, he argued that the geographical sense of the Commonwealth 'cannot exist apart from the body

[732] *Capital Duplicators* (n 727) 286 (Gaudron J); *Newcrest* (n 621) 597 (Gummow J).

[733] *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 7; *Northern Territory (Self- Government) Act 1978* (Cth), s 5.

[734] *Norfolk Island Act 1979* (Cth), s 5.

[735] *Island Industries Pty Ltd v The Administrator of Norfolk Island* (2003) 177 FLR 269 (NFSC) 276-277 [33] (Wilcox J); *J v Australian Capital Territory* (2009) 234 FLR 399 (ACTSC) 419 [95] (Refshauge J).

[736] cf Lumb (n 45) 289-290.

politic which incorporates both people and territory.'[737] In that argument he followed Quick and Garran, who said that the 'essential attributes and characteristics of the Commonwealth' could be summarised as:

> First, its population basis; secondly, its territorial basis; thirdly its federal principle; fourthly, its Imperial relationship; resulting in the establishment of a united people, upon a defined territory, organised on a federal plan, consistently with the Imperial connection, legally equipped for political action and development.[738]

Quick and Garran warned that this 'Commonwealth' described in section 6 cannot be 'confounded with the *Constitution* or the Government'. Whilst it may not ultimately matter, Moore's account of the different meanings of the word 'Commonwealth' seems preferable.[739] He said that it was 'peculiarly important' to distinguish the nation from its territory, and from the Federal Government, in connection with the different usages that are made of those phrases. In a passage later quoted with approval by Dixon J,[740] he referred to section 95 of the *Constitution* as an example of 'the territory occupied by [the new State or nation]'. The distinction between the Commonwealth (nation) and its territory was adverted to by Williams J and Dixon J in *R v Sharkey*,[741] and was embraced by Latham CJ in the *Pharmaceutical Benefits Case*.[742] There, his Honour said that the word 'Commonwealth' in the chapeau to section 51 of the *Constitution* was 'used

737 ibid 297.

738 Quick and Garran (n 575) 366 [§43].

739 Moore (n 44) 73.

740 cf *R v Sharkey* (n 46) 153 (Dixon J).

741 ibid 153 (Dixon J), 159 (Williams J).

742 *Pharmaceutical Benefits Case* (n 67) 256 (Latham CJ).

to describe the people of the Commonwealth in the area which is the Commonwealth in the geographical sense.'[743]

(3) 'Commonwealth' as Government

The *Constitution* uses the word 'Commonwealth' to describe the powers and organs of the Commonwealth (government) in 105 places. It is not possible to explore each usage. Section (a) develops the notion that the Commonwealth (government) is distinct from the Commonwealth (nation). Section (b) suggests reasons for thinking that the government should be understood separately from the constitutional person.

(a) The Commonwealth (Government) is Distinct from the Commonwealth (Nation)

The primary reason for distinguishing the Commonwealth (nation) from the Commonwealth (government) is that the latter is only one component of the nation: 'it is only the central government in a federal nation.'[744] The six States and ten Territories of Australia are 'parts of the Commonwealth', as is recognised in the covering clauses to the Constitution Act; they are 'parts of' the Commonwealth (nation). But they are not 'parts of' the Commonwealth (government). This point has already been made from the perspective of textual provisions mentioning the Commonwealth (nation), but elaborating it by reference to provisions mentioning the Commonwealth (government) helpfully

[743] ibid. This view about the chapeau was uttered in connection with a view, discredited in *Pape* (n 674), about the meaning of the 'Commonwealth' in s 81 of the *Constitution*.

[744] *Pape* (n 674) 181 [519] (Heydon J); see also *Payroll Tax Case* (n 312) 395-396 (Windeyer J); *Work Choices Case* (n 507) 73 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

illustrates a problem with the theory of nation (constitutional person). If the Commonwealth (nation) is 'indissoluble', if the States are included within the Commonwealth (nation), and if legal personality is unitary, then the theory seems to collapse into a definitional muddle. It cannot explain how the (unitary) constitutional person enjoys legal relations with other legal persons, including States, that are indissolubly 'part of' the Commonwealth (nation).

(i) Antagonism of Power

Justice O'Connor once said that the 'main purpose of the *Constitution* is the distribution between the Commonwealth and the States of all the governmental powers of the people of Australia.'[745] This distribution intrinsically gives rise to antagonism between the components of the Federation, as new political agendas push the boundaries of interlocking constitutional authority. Cooperation between governments may or may not be the norm, depending on the period of history. Even where cooperation exists, it presupposes the prior existence of that antagonism since, without it, cooperation would be unnecessary.

Textually, this state of antagonism is shown in the language of section 74 of the *Constitution*. That provision limits the right of appeal to the Queen in Council from a decision of the High Court involving the 'limits inter se of the Constitutional powers of the Commonwealth and those of any State or States'. Taken together, these are the 'powers of government of the nation',[746] which have been divided and distributed between the institutions and office-holders

[745] *Wire Netting Case* (n 2) 807 (O'Connor J).

[746] *BAT v WA* (n 62) 73 [113] (Kirby J).

comprising the Commonwealth (government) and those of the States. Section 74 shows in express language what is otherwise obvious from the structure of Chapter III of the *Constitution*: the Commonwealth (government) and the States are intended by the *Constitution* to operate together and to co-exist 'within the one federal polity',[747] ie the Commonwealth (nation). This is reflected in sections 75(iii) and 75(iv), which grant jurisdiction to the High Court in 'matters' in which the 'Commonwealth' and a State or several States are parties.

The necessity of distinguishing the Commonwealth (government) from the Commonwealth (nation) is also shown by the interpretation of the word 'Commonwealth' in the phrase 'peace, order and good government of the Commonwealth' in sections 51 and 52 of the *Constitution*. Unlike the reference to the 'legislative power of the Commonwealth' in section 1 of the *Constitution*, the chapeau to section 51 describes, in the words of McTiernan J, 'a state of affairs to be enjoyed by the people of Australia.'[748] His Honour thought that the word 'Commonwealth' was therefore a reference to the 'whole of the people of Australia', in the same sense in which the preamble to the Constitution Act declares that the 'people' of the States have agreed 'to unite in one indissoluble Federal Commonwealth.'[749] Chief Justice Latham, on the other hand, thought that

747 *Henderson's Case* (n 27) 504 (Kirby J).

748 *Pharmaceutical Benefits Case* (n 67) 273 (McTiernan J).

749 ibid.

the word described 'the area which is the Commonwealth in the geographical sense.'[750] He said:

> The laws of the Commonwealth operate directly upon the people of Australia, and it is the good government of those people with which the Constitution is concerned, not the government of the Government itself.[751]

Several years later, Dixon J adverted to this dispute but thought that nothing would follow from adopting either view.[752] Quoting Moore's statement, that the word 'Commonwealth' is used throughout the text 'in several senses connected so closely that it is peculiarly important to distinguish them',[753] Dixon J said that the word should probably be understood 'territorially or, what has much the same result, as referring to the community united as a nation.'[754]

A passage in the judgment of Gummow J in *Newcrest* suggests a reason for rejecting the view of Latham CJ.[755] Justice Gummow was there giving reasons for preferring the view, which prevailed by majority in *Wurridjal*,[756] that the legislative power in section 122 of the *Constitution* was curtailed by the restriction in section 51(xxxi) of the *Constitution*. The judgment suggests that, if the 'Commonwealth' in the chapeau to section 51 were understood as a reference to the geographical area, then a geographical restriction might be imported

750 ibid 256 (Latham CJ).

751 ibid.

752 *R v Sharkey* (n 46) 153 (Dixon J).

753 Moore (n 44) 73.

754 *R v Sharkey* (n 46) 153 (Dixon J).

755 *Newcrest* (n 621) 597 (Gummow J).

756 *Wurridjal* (n 605) 359 [86] (French CJ), 388 [189] (Gummow and Hayne JJ), 419 [287] (Kirby J).

contrary to the intendment of individual subsections. The 'Commonwealth' mentioned in the chapeau was, according to his Honour, the 'body politic' (or Commonwealth (nation)).

Finally, something should be said finally about the role of the High Court in adjudicating disputes about the limits of the constitutional powers of the Commonwealth (government) and of the States. The joint judgment in the *Boilermakers' Case*[757] points out that, in a federal form of government, with a 'rigid' constitution, governments must be incompetent to go beyond their defined powers. Their Honours said:

> The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature.[758]

Their Honours went on to say that the 'constitutional sphere of the judicature of the States' must also be preserved, but that sphere cannot extend to the determination of 'the ambit of the federal power or the extent of the residuary power of the States.'[759] That point was taken up by the High Court in *Lange*,[760] in connection with the constitutionally implied freedom of political communication. It is upon the 'federal judicature' that the *Constitution* places the 'responsibility of

[757] *Boilermakers' Case* (n 538) 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[758] ibid.

[759] ibid 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[760] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

deciding the limits of the respective powers of State and Commonwealth governments.'

(ii) The States Are 'Parts of' the Commonwealth (Nation) but Not the Commonwealth (Government)

The necessity of distinguishing the Commonwealth (nation) from the Commonwealth (government) can be shown by considering the position of the States, which are separate from the 'Commonwealth' (government) but 'part of the Commonwealth' (nation).[761]

Covering clause 6 of the *Constitution* defines '*The States*' to mean 'such of the Colonies' as for the time being are 'parts of the Commonwealth'. The textual idea of the States as 'parts of the Commonwealth' may be contrasted with the reference in covering clause 6 to such Colonies as may be 'established *by* the Commonwealth as States'. That is a reference to section 121 of the *Constitution*, which provides that it is the 'Parliament' that may admit or establish new States. The 'Parliament' described in section 121 is the 'Parliament of the Commonwealth', which is established by section 1 of the *Constitution* and is envisaged by sections 74 and 109 to have constitutional powers that may conflict inter se with those of the States. Thus, the Commonwealth (nation), of which the States are a 'part', is necessarily different from the Commonwealth (government) that is capable of admitting them. That may be contrasted with covering clause 5, which renders laws of the Commonwealth (government) binding upon courts,

[761] cf Cobbett (1904) (n 184) 149, expressing this distinction by saying that the State was a 'separate body politic', even though it was 'only a part of a larger body politic'. That, of course, begs the question as to the meaning of 'body politic'.

judges and people 'of every part of the Commonwealth' in the geographical sense (Commonwealth (geographical area)).[762]

(b) The Commonwealth (Government) is Distinct from the Commonwealth (Constitutional Person)

This section identifies textual features supporting the negative claims in this thesis: namely that the Commonwealth (government) should be distinguished from the Commonwealth (constitutional person). These features suggest that the Commonwealth (government) is not a legal person, and should not be regarded as the constitutional person; whilst the Commonwealth (constitutional person) is not a government. One might compare this to the *familia*, which was not a legal person, but acted as a coherent group: a locus of rights and liabilities, represented by the *paterfamilias*.[763]

In the approach to the provisions explored below, it should be remembered that the Framers and other contemporary commentators operated upon the basis of the British stereotype that the 'Crown' (understood as corporation) provided the legal personality of government, and the 'Crown' as corporation was part of the Executive branch.[764] For example, discussing section 75(iii), Quick and Garran said that, 'being a government', the Commonwealth 'possesses corporate powers'.[765] A subsequent sentence indicates that these 'corporate

[762] cf *Wurridjal* (n 605) 353 [73] (French CJ).

[763] The concepts are helpfully explained in Laurent Waelkens, *Amne Adverso, Roman Legal Heritage in European Culture* (Leuven UP, 2015) ch IV particularly 216.

[764] cf Moore (n 44) 490; Quick and Garran (n 575) 773; and Lumb (n 45) 291.

[765] Quick and Garran (n 575) 773.

powers' derive from the fact that the 'Commonwealth' is also the 'Crown'. Likewise, Moore said:

> The legal personality of the Commonwealth, as of other parts of the Kings' Dominions is in the Crown, and not the Governor-General, or the Executive Government.[766]

A final example is *Commonwealth v New South Wales*,[767] where Isaacs, Rich and Starke JJ said of section 75 that, where 'the Commonwealth and the States are specifically mentioned, it is plain those organisations are bound—that is, the Crown in right of them is bound.' It was the 'Crown' that conducted litigation and owned property.[768] It was the 'Crown' that was bound by statutes of contiguous legislatures.[769] The constitutional provisions were drafted, and have since been interpreted, on the basis of that assumption. This is a significant textual problem for the theory of government (constitutional person), not because it controls the way the *Constitution* is now interpreted, but because it forms a baseline assumption of many other doctrines that would need to be adjusted to fit the theory of government (constitutional person).

(i) The Constitution Uses the 'Commonwealth' to Determine the Identity of Governmental Institutions

By far the most common way that the *Constitution* uses the word 'Commonwealth' is to signify the identity within the Federation of a law, an officer or an institution.

766 Moore (n 44) 490.

767 *Commonwealth v New South Wales* (n 358) 214 (Isaacs, Rich and Starke JJ).

768 cf *South Australia v Victoria* (n 354) 674 (Griffith CJ).

769 cf *Engineers' Case* (n 59) 153 (Knox CJ, Isaacs, Rich and Starke JJ), saying that the *Constitution* and laws 'validly made by authority of the Constitution' can bind 'both Crown and subjects'.

These are genitive (or possessive) usages, denominated consistently with ordinary English language usages by the preposition 'of'. For example, the phrase 'law' or 'laws of the Commonwealth', which appears 9 times in the text,[770] means 'Acts of the Parliament of the Commonwealth'.[771] The term 'Commonwealth' is also used in this genitive sense in the phrase 'Executive Government of the Commonwealth', which is used six times.[772] The *Constitution* speaks of the 'Government of the Commonwealth',[773] the 'departments of State of the Commonwealth',[774] the 'Executive Government of the Commonwealth',[775] the 'armed forces of the Commonwealth',[776] the 'Treasury of the Commonwealth',[777] and the 'Queen's Ministers of State for the Commonwealth'.[778] Section 110 then refers to the 'Governor', 'chief executive officer or administrator of the government of the State.' Similarly, section 119 speaks of the 'Executive Government of the State'. The point of the word, in these provisions, is to

[770] The phrase 'law of the Commonwealth' is used in *Constitution*, ss 41, 44(ii), 67, 80, 109; whilst the phrase 'laws of the Commonwealth' is used in Constitution Act, s 5 and *Constitution*, ss 51(vi), 61 and 120.

[771] *Wool Tops Case* (n 321) 431 (Knox CJ and Gavan Duffy J). cf *Pape* (n 674) 45 [81] (French CJ); see also *Western Australia v Commonwealth [Native Title Act Case]* (1995) 183 CLR 373, 487 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); and *Sankey v Whitlam* (n 581) 91 (Mason J), summarising earlier authorities.

[772] *Constitution*, ss 52(ii), 67, 70, 81, 84, and 86.

[773] *Constitution*, s 51(xxxix). See also s 62, where the phrase is repeated but without capitalising the word 'government'. 'Government' in this provision takes the form of a noun-phrase with a verb-like use.

[774] *Constitution*, s 64.

[775] *Constitution*, ss 52(ii), 67, 70 and 80.

[776] *Constitution*, s 68; compare s 114, which prohibits the States from raising or maintaining any military force without the consent of the Commonwealth Parliament.

[777] *Constitution*, s 83.

[778] *Constitution*, ss 44 and 64.

determine the identity of the government with which the concept, institution or officer is associated.

It is common, when speaking of the Commonwealth (government), to describe it as carrying the authority and executing the functions delegated to it by the *Constitution*. Thus, it is said that the Commonwealth has and discharges the legislative, judicial and executive functions (or 'Constitutional powers'[779]) conferred upon it by the *Constitution*.[780] That language has the effect of making an entity of the Commonwealth (government): making it into a group comprised of its various functionaries, institutions and office-holders and wielding powers as such. There are many contexts in which that idiom might be helpful, or at least convenient. However, it is in important respects misleading: the *Constitution* does not actually vest the governmental powers 'of the Commonwealth' *in* the Commonwealth, in any of its senses. As Moore pointed out:

> The *Constitution* does not commit subjects to 'the Commonwealth' in general; it designates certain organs which are to exercise particular kinds of power over the subjects committed to them.[781]

Sections 1, 61 and 71 speak respectively of the legislative, executive and judicial powers 'of the Commonwealth'. Those powers are not vested *in* the Commonwealth, in any of its senses, but instead in the Parliament, the Queen and the Chapter III judicature. Regarded as an entity, group, or collection of different entities, institutions and legal persons, the Commonwealth (government), per se,

[779] cf *Constitution*, s 74 (first paragraph).

[780] eg *Dalziel* (n 605) 284 (Rich J).

[781] Moore (n 44) 94; quoted in *Eastman's Case* (n 564) 344 [50] (Gummow and Hayne JJ).

wields no constitutional power at all. As Dixon J said, the framers of the *Constitution* 'do not appear to have considered that power itself forms part of the conception of a government.'[782] Nor, as chapter III shows, are the branches of government (the legislature, executive and judiciary) treated as wielding their powers by or through the Commonwealth (constitutional person). Instead they are treated as having and wielding the powers personally or institutionally. This drafting feature militates against the theory that the Commonwealth (government) should be regarded as a legal person, having and wielding constitutional power.

(ii) The Commonwealth in its Own Courts

The constitutional necessity for something called the 'Commonwealth' to be amenable to the coercive jurisdiction of the High Court of Australia provides another reason for doubting the theory of government (constitutional person).

Section 71 of the *Constitution* vests the judicial power 'of the Commonwealth' in 'a Federal Supreme Court, to be called the High Court of Australia'. That is one relevant sense of the word 'Commonwealth': something whose judicial power is being vested in individuals appointed by commission to be judges of the High Court of Australia. Section 75(iii) then provides that this Court shall have original jurisdiction in 'all matters' in which 'the Commonwealth', or a person suing on behalf of the Commonwealth', is a party. The 'Commonwealth' that appears by name in, and is subject to the coercive jurisdiction of, the High Court must be a

[782] *Melbourne Corporation Case* (n 12) 82 (Dixon J).

constitutional person. There is a logical reason for thinking that the concept of the Commonwealth (constitutional person) denoted in section 75(iii) is different from the concept of the 'Commonwealth' denoted in section 71. If it were otherwise—ie if the 'Commonwealths' in sections 71 and 75(iii) denote identical concepts—then by section 75(iii) the 'Commonwealth' would be impleaded in its own Court.

Mark Leeming, now a Justice of the New South Wales Court of Appeal, recognised this difficulty when he said that it was necessary to deal carefully with the 'self-referential subjection of "the Commonwealth" to its own judicial power in section 75(iii).'[783] For that reason, he proposed to read the 'Commonwealth' in section 75(iii) as a reference to the 'executive administration'.[784] With respect, section 75(iii) should not be read as if it used this phrase. The *Constitution* in several places uses the phrase 'Executive Government of the Commonwealth',[785] a phrase which in no other provision describes a legal person contemplated as bearing rights and interests, or appearing in a court. Furthermore, the Executive branch has never been regarded as a legal person and, as was said in *Williams (No 1)*, is not to be regarded as having a legal personality separate from that of the Commonwealth (there described as a 'polity' or 'body politic').[786] The 'Commonwealth' in section 75(iii) is *both* the Commonwealth (constitutional person) *and* the various

[783] Mark Leeming, 'The Liabilities of the Commonwealth and State Governments' (2006) 27 *Australian Bar Review* 217, 224.

[784] ibid.

[785] The phrase appears in the heading to chapter II, and in ss 52(ii), 70, 81, 84, and 86.

[786] *Williams (No 1)* (n 2) 237 [154] (Gummow and Bell JJ).

institutions and officers forming part of the Commonwealth (government). Thus, in *Henderson's Case*,[787] it was held that the Defence Housing Authority, a separate legal person created by statute, fell within the meaning of the term 'the Commonwealth' in section 75(iii). In so holding, the Court was not equating the legal personality 'of the Commonwealth' with the legal personality 'of the Defence Housing Authority'. Similarly to section 114, the 'Commonwealth' in section 75(iii) of the *Constitution* transcends legal personhood.

(iii) Transfer of Departments

The distinction between the Commonwealth (government) and the Commonwealth (constitutional person) is also suggested or implied in a drafting feature of the provisions dealing with transferred departments, which was a major imperative of the Federation movement.[788] Section 69 of the *Constitution* provides that, upon proclamation by the Governor-General, certain 'departments' of the public service in each State 'shall become transferred to the Commonwealth'. It is evident from other provisions of the *Constitution* that the transfer of 'departments', per se, did not carry with it the legal relations or property interests appurtenant to the 'departments'. In particular, sections 85 and 86 of the *Constitution* separately provide for the transfer to the Commonwealth (constitutional person) of the contractual and property rights connected with the departments. As Dawson, Toohey and Gaudron JJ explained in *Henderson's Case*:

[787] *Henderson's Case* (n 27).

[788] cf WG McMinn, *A Constitutional History of Australia* (OUP 1979) 102-103, discussing the manipulation of the question of common naval and military defence by Sir Henry Parkes.

> Since departments of the public service have no legal personality, they consist of serving officers "of the department", property "used…in connection with the department" and "current obligations of the State in respect of the department transferred". This is apparent from ss 84 and 85 which provide for the manner in which each of these aspects of a State department is to be dealt with upon its transfer to the Commonwealth.[789]

Approaching the matter from the point of view that the Commonwealth (government) and State (government)[790] are both legal (constitutional) persons incorporating all departments and powers, sections 84 and 85 would not have been necessary. A theory bundling together governmental power and legal personality would appear to have the logical consequence that the transfer into the Commonwealth (government) of a 'department' should have carried with it all attendant legal relations.

The perceived necessity for sections 85 and 86 reflects the possibility that departments (and legislative competence) might have been transferred without ownership of the underlying departmental proprietary and contractual rights. 'Waste lands', for example, were owned by the (indivisible, Imperial) 'Crown' as a matter of 'title', but were controlled by the colonial legislature 'as a matter of governmental function'.[791] Sections 85 and 86 of the *Constitution* clarify that the 'waste lands' position was not intended in relation to the departments to be transferred to the Commonwealth (government). They imply, however, that the powers of the Commonwealth (government) might *otherwise* have been wielded

[789] *Henderson's Case* (n 27) 436 (Dawson, Toohey and Gaudron JJ).

[790] This argument assumes that which this thesis does not otherwise seek to establish: namely, that the constitutional personality of the States and of the Commonwealth should be understood according to the same theory.

[791] *Williams v Attorney-General for New South Wales* (n 265) 456 (Isaacs J).

by officers or employees of a State,[792] on land owned by a State. These are illustrations of Moore's point, derived from Pollock: '[s]o far as the State governs, we need not invoke the juristic person at all'.[793] They stand against the theory of government (constitutional person): Australian constitutionalism does not arrogate constitutional personality to the government, or require that land held by a constitutional person be subordinated only to the jurisdiction of one (or *its*) government. The contrary is true: constitutional persons can hold land, and enjoy rights in, different legal systems and jurisdictions.

(4) Conclusion to Chapter II

This chapter has shown that the word 'Commonwealth' is used by the *Constitution* in at least four different ways. It describes the nation, and the geographical area occupied by that nation, the central government, and the constitutional person. The chapter has suggested that these usages have a determinate existence within the text, and should not be confused one with the other.

This argument does not resolve the many difficulties that have attended the interpretation of given usages of the word 'Commonwealth' in the *Constitution*.

[792] This was validly done, eg, under the *Income Tax (War-time Arrangements) Act 1942* (Cth), in relation to which Latham CJ said that the Commonwealth could, 'in time of war, compel the services of any person (including State public servants) for any purpose connected with the defence of the country': *South Australia v Commonwealth* (1942) 65 CLR 373, 431 (Latham CJ). Section 77(iii) of the *Constitution* affords another example, namely the 'autochthonous expedient', whereby the judicial power 'of the Commonwealth' can be exercised by State courts: *Boilermakers Case* (n 538) 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). Whether the Parliament of the Commonwealth can impose duties (as distinct from granting powers) on officers of the Executive Government of the States is a question that was raised but not resolved in *O'Donoghue v Ireland* (n 519).

[793] Moore, 'Law and Government' (n 295) 209.

That would not have been possible. Nor has the chapter sought to argue that any particular theory of constitutional personality is compelled by the *Constitution's* usages of the word 'Commonwealth'. Owing to the ambiguity of usage, the provisions implying capacity (ie the Commonwealth (constitutional person)) can be understood as a self-contained category, just as they were when constitutional personality was obtained through the 'Crown in right of the Commonwealth' device. However, those provisions could also be grouped with provisions referring to the Commonwealth (government) or the Commonwealth (nation), so as to support the two broader theories of constitutional personality. The chapter has identified a number of drafting features presenting problems for the broader theories. The problems are most acute for the theory of government (constitutional person), but they were also shown to persist for the theory of nation (constitutional person).

The provisions discussed in the chapter suggest that it is both unnecessary and textually counterproductive to speak of the Commonwealth's legal personality as if it corresponded in some way, or was a quality attaching somehow, to another sense of the word 'Commonwealth (ie government or nation), or to some extra-textual reality. The Commonwealth (constitutional person) should be regarded, consistently with a narrow theory of governmental personality, as existing *only* as a construct of its capacities for legal relations and not otherwise as an incorporation of the Commonwealth (government) or the Commonwealth (nation). The next chapter will argue that this narrow understanding best explains constitutionally influenced 'rules of attribution' by

which members of the government are able (or not) to exercise the capacities of the Commonwealth (constitutional person).

CHAPTER III: THE COMMONWEALTH (CONSTITUTIONAL PERSON) AND THE COMMONWEALTH (GOVERNMENT)

This chapter explores rules of attribution that determine when, and whether, members of the Commonwealth (government) can influence or exercise the capacities of the Commonwealth (constitutional person). In doing so, it explores the relationship between Commonwealth (constitutional person) and the legislative and executive branches of the Commonwealth (government).[794] The chapter demonstrates that the Commonwealth (constitutional person) is distinct from and incompletely *represents* the Commonwealth (government), which is shown not to be a legal person.

The chapter has two sections. Section (1) shows that the actions of human beings (individually or institutionally) comprising the Parliament of the Commonwealth in the exercise of legislative power are not attributed to the Commonwealth (constitutional person). Section (2) shows that, save in relation to what is described as 'agency'-based executive power, the actions of the human beings (individually or institutionally) comprising the Executive Government of the Commonwealth in the exercise of executive power are not attributed to the Commonwealth (constitutional person). Whether the power be legislative or executive (of the common law, constitutional or statutory varieties), the wielder of the power is treated by the law as an institution, individual or office-holder, rather than as a member, agent, or representative of the constitutional person.

[794] The relationship of the constitutional person to the legal system, presided over by the judiciary including Chapter III courts, is explored more generally in chapter IV.

The chapter also presents contexts in which *unlawful* actions of individuals comprising the Parliament and the Executive Government, *colore officii*,[795] are attributed to the Commonwealth (constitutional person).

This, it is submitted, entails the rejection of the theory of government (constitutional person). Whilst the *Constitution* describes the 'Parliament of the Commonwealth' and the 'Executive Government of the Commonwealth' collectively, including as bodies or institutions, they are not legal persons. Those are not the names of 'units' to which capacity is attributed. They are examples of entities or groups, created or recognised by the law, which perform functions of importance to the legal system but which do not have and cannot form legal relations.[796] Recognition of the lack of legal personality of primary governmental institutions, together with the impulse to correlate constitutional personality with other conceptions of the 'Commonwealth', has encouraged statements to the effect that these institutions are 'organs', 'branches', 'aspects' or 'facets' of a 'polity' or 'body politic', which is a legal person. These are words of fluid meaning, but which carry the flavour of the Hobbesian state:[797] a sense that the 'Commonwealth' is a legal person incorporating every aspect of 'its' power and authority, and embracing all those who act on its behalf. The chapter shows that the government is not treated as a unified legal personality, but rather as a construct of multiple different legal persons, one of which is the Commonwealth

[795] In the sense of something done under colour of, but without, legal authority: see, eg, in the context of unlawful demands of money, *Sargood Bros v Commonwealth* (1910) 11 CLR 258, 302 (Isaacs J); and *Mason v New South Wales* (1959) 102 CLR 108, 141 (Windeyer J).

[796] *Queensland Rail* (n 7) [53] (Gageler J), in particular fnn 70 and 71.

[797] Skinner, *Visions of Politics* (n 9) 404; see also n 9 above.

(constitutional person). Constitutional personality, although indispensable to the framework of government, is not involved in the valid exercise of governmental power. The theory of government (constitutional person) is shown to be incapable of explaining this fundamental characteristic of constitutional personality in Australia.

(1) The Constitutional Person and the Parliament of the Commonwealth

This section explores the relationship between the Commonwealth (constitutional person) and the 'Parliament of the Commonwealth'.[798] It shows that the actions or behaviour of the individuals and institutions comprising the Parliament of the Commonwealth, in that capacity per se, are not attributed to the Commonwealth (constitutional person). As Isaacs and Rich JJ said, affirming the submission of Mr Owen Dixon KC in the *Colonial Ammunition Case*:[799] 'Parliament is not the Commonwealth'. The section reasons outwards from certain decisional contexts illustrating that proposition. It demonstrates that, whilst the Parliament of the Commonwealth is a constitutive part of the Commonwealth (government), the Commonwealth (government) is not a legal person; moreover, the Commonwealth (constitutional person) is not a government.

[798] The phrase 'Parliament of the Commonwealth' appears eighteen times in the text of the Constitution Act, ss 5 and 7 and the *Constitution*, ss 1, 7, 9, 14, 29, 41, 51(xxxvii), 91, 105A(5), 107, 108 (twice), 112, 114, 120 and 123. The word 'Parliament' appears alone or in combination at many points.

[799] *Colonial Ammunition Case* (n 346) 222 (Isaacs and Rich JJ).

The Parliament of the Commonwealth is not a legal person. Although for some purposes an 'intention' might be imputed to it,[800] and for others it is capable of giving 'consent',[801] the 'Parliament of the Commonwealth' is an institution, in the sense of a group 'defined and structured by law'.[802] There is no a priori reason why the Parliament should not have been incorporated; Parliaments require Parliamentary houses, the consequences of invalid legislation might have given rise to liability in the Parliament, and Members of Parliaments commit torts justifying (in a normative sense) recourse to public funds.[803] Yet Parliament has not been incorporated.[804] Parliament, per se, has no employees and owns no land, and is not liable for the consequences of invalid legislation.[805] It is comprised of 227 individuals/institutions (the Queen, 150 Members of the House of Representatives, and 76 Senators) occupying constitutionally prescribed offices and grouped (institutionally) as 'the Queen, a Senate, and a House of Representatives'.[806] Acting together in a mandated way, these individuals

[800] See generally Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) and at 14, mentioning Australian authorities.

[801] cf *Constitution*, s 114 which requires the 'consent of the Parliament of the Commonwealth' for the raising or maintenance by a State of any naval or military force.

[802] Jeffrey Goldsworthy, *The Sovereignty of Parliament* (first published 1999, reprint edn, OUP 2004) 14, saying that Parliament is 'not a natural person, but a complex artificial institution that is defined and structured by law.' See Margaret RLL Kelly, 'Historical Review' (2002) 27 *Australian Journal of Legal Philosophy* 156, for an historical account of the definition of 'Parliament'.

[803] cf *Sneddon v New South Wales* [2012] NSWCA 351.

[804] The point is well made by Sawer (n 45) 168.

[805] On the question of employees, the *Parliamentary Service Act 1999* (Cth), s 6 provides that all persons employed in connection with the Parliamentary service are employed 'on behalf of the Commonwealth'. See also *Superannuation Guarantees (Administration) Act 1992* (Cth), s 12(4), which provides that a member of Parliament is (for the purposes of that Act) an employee of the Commonwealth. As for liability for invalid legislation, see the discussion of *Kruger v Commonwealth* (n 45) in section (2) below.

[806] *Constitution*, s 1.

exercise what the *Constitution* describes as the 'legislative power of the Commonwealth', to make laws 'for the peace, order and good government of the Commonwealth'.[807] Although it is a constitutive part of the Commonwealth (government), the Parliament is practically and legally distinct from and independent of the Commonwealth (constitutional person). This section will substantiate that proposition by showing that the actions of this group in exercising legislative power are not attributed to the Commonwealth (constitutional person).

(a) Promises to Secure a Legislative Outcome

This section considers promises made on behalf of the Commonwealth (constitutional person) by the human beings comprising the Executive Government, concerning the course or content of future primary legislation. Such promises are not competent to bind or 'fetter' the Parliament of the Commonwealth. As Brennan J once said, 'legislative authority is not bargained away by executive contracts.'[808] However, from time to time it has been argued that the Commonwealth (constitutional person) should be made liable in damages for breach of these promises. This section shows that, in rejecting these claims, in different ways the courts have distinguished between the Commonwealth (constitutional person) as promisor and the Commonwealth (government) as legislator. The cases show that the behaviour of the human beings comprising the institution(s) of the Parliament of the Commonwealth has

[807] *Constitution*, ss 1 and 51.

[808] *Mutual Pools* (n 662) 180 (Brennan J), discussing *Charles River Bridge v Warren Bridge* 36 US 341 (1837) 431 (the Court); and *Keefe v Clark* 322 US 393 (1944) 397.

not been attributed to the Commonwealth (constitutional person) for the purposes of liability for breach. That this legal rule reflects a core constitutional value[809] does not detract from its relevance to theorisation of constitutional personality. These cases show that the Commonwealth (constitutional person) is a legal person with capacity to contract. They also illustrate the logical boundaries of that constitutional personality. That is because they provide examples in which the conduct of the human beings and institutions comprising the Parliament of the Commonwealth, which is a constitutive part of the Commonwealth (government), is not attributed to the Commonwealth (constitutional person).

Sections (i) and (ii) deal with promises made to private parties concerning legislative outcomes. Section (iii) deals with promises made to other governments concerning legislative outcomes.

(i) The Gold Bond Cases

In *Thomson's Case*,[810] Latham CJ articulated a proposition so obvious that it is otherwise difficult to substantiate in the authorities. In a judgment with which McTiernan J agreed, he said that the 'Parliament of the Commonwealth does not make contracts – it makes laws.'[811] Understood in its decisional context,

[809] *Perpetual Trustee Company (Limited) v Federal Commissioner of Taxation* (1932) 47 CLR 402 (*Haege's Case*) 413 (Rich J); *Magrath v Commonwealth* (1944) 69 CLR 156, 169-170 (Rich J), emphasising the 'legal impossibility of the contract tying the hands of Parliament': *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 25 (Dixon J) (*Thomson's Case*).

[810] *Thomson's Case* (n 809).

[811] ibid 16 (Latham CJ).

Latham CJ's statement shows that the activities of the human beings comprising the Parliament of the Commonwealth are not attributed to the Commonwealth (constitutional person). The context suggests that the Commonwealth (constitutional person) is indeed quite different from the Commonwealth (government), of which the Parliament forms a part.

Thomson's Case[812] concerned the dutiability under the *Estate Duty Assessment Act 1914* (Cth) of a payment made at the direction of the Deputy Federal Commissioner of Taxation to the estate of Christina Thomson. The question whether the payment was dutiable involved the Court in a consideration of the legal validity of a promise that had been made by the Commonwealth (constitutional person) to the holders of what are described in the cases as 'Gold Dollar Bonds' or 'Gold Bonds'. The promise was in terms that interest payments would be made 'without deduction for any taxes now or at any time hereafter imposed by the Commonwealth of Australia or by any taxing authority thereof or therein.'

Mr Tait KC, appearing for the taxpayer, argued that a breach of the promise, as a warranty giving rise to an action for damages,[813] occurred when Parliament amended the *Income Tax Assessment Act 1936* (Cth) so as to introduce residence as the criterion for income tax.[814] The result of the amendment had been to levy

[812] ibid.

[813] ibid 9 (report of argument of Tait KC).

[814] Prior to 1930, there was no federal taxation on income derived from a source outside Australia. Section 4 of the *Income Tax Assessment Act 1930* (Cth) amended s 13 of the *Income Tax Assessment Act 1922* (Cth), to make assessable all income in the hands of a resident Australian taxpayer, regardless of the country from which it was derived.

income tax upon the Gold Bond interest payments. The argument that this amounted to a 'breach' was based upon the earlier decision of the majority of the High Court in *Magrath v Commonwealth*,[815] read with certain statements that had been made prior to that in *Haege's Case*.[816] These decisions form the necessary background to *Thomson's Case*.

The taxpayer in *Magrath* brought an action in the High Court on a contract with 'the Crown in right of the Commonwealth', for breach of what was characterised as a warranty, 'that the Commonwealth Parliament would not exercise its power of taxation in respect of the bonds.'[817] The minority judgments rejected his claim on the ground that a promise to pay 'without deduction' was satisfied if the amount was paid without deduction 'at the time of payment'.[818] This removed the factual substratum of the alleged breach. The majority took a different view, however, preferring to construe the contract as containing a promise not to impose any tax in respect of Gold Bond interest.[819] Having lost the battle on the construction of the promise, the Commonwealth exited the field. Desiring to preserve its credit rating,[820] it declined to contest its ultimate liability for breach.

[815] *Magrath* (n 809).

[816] *Haege's Case* (n 809) 409 (Gavan Duffy CJ, Starke and Evatt JJ), and see 416 (Dixon J).

[817] *Magrath* (n 809) 160 (report of argument of Teece KC).

[818] ibid 165-166 (Latham CJ), and 171-172 (Starke J).

[819] ibid 169 (Rich J), 174 (McTiernan J), 183 (Williams J). This summary of the majority decision emerges from the affirmative answer given to Question 1 of the stated case (ibid 159-160 and 184); see *Thomson's Case* (n 809) 16 (Latham CJ) and 25 (Dixon J).

[820] This motivation is adverted to in *Haege's Case* (n 809) 412 (Rich J); *Magrath* (n 809) 169-170 (Rich J), 175 (McTiernan J), 183 (Williams J); *Thomson's Case* (n 809) 20 (Latham CJ).

There is some sensitivity in the majority judgments in *Magrath* to the different aspects or manifestations of the 'Commonwealth' that were implicated in the litigation. Justice McTiernan said that this was a promise made by 'the Commonwealth … both as the obligor of the bond *and* as an authority having the power of taxation.'[821] Justice Williams said that the promise arose 'between the Commonwealth in its *dual* position of debtor and taxing authority, and the bearers of the bonds or coupons as creditors.'[822] This notion of duality was utilised in the construction of the promise, namely, in determining what impression would be derived in the mind of the promisee. Justice Williams emphasised, by reference to the judgment of Knox CJ in *Commonwealth v Queensland*,[823] that the meaning of the words should follow 'that which would naturally and reasonably be attributed to them' by purchasers of the bonds.[824] The ordinary purchaser, perceiving the 'Commonwealth' as a taxing authority, would credibly interpret the words 'without deduction' to mean that no future tax would be imposed.

After the decision in *Magrath v Commonwealth* was handed down, Christina Thomson's solicitors asked the Commissioner whether the Commonwealth intended to refund the amount of £6,814 that she had paid by way of income tax on the Gold Bond interest, for the years 1939-1943. She had not received a reply at the time of her death but, several months later, the

821 *Magrath* (n 809) 174 (McTiernan J) (emphasis added).

822 ibid 180 (Williams J) (emphasis added).

823 *Commonwealth v Queensland* (n 579) 10 (Knox CJ).

824 *Thomson's Case* (n 809) 180 (Williams J).

executors of her estate received a cheque from the Commonwealth in the amount of £6,814. That payment was assessed by the Deputy Commissioner of Taxation for estate duty. Christina Thomson's executors objected to the assessment on the basis that the payment did not satisfy the description in section 8 of the *Estate Duty Assessment Act 1914* (Cth) of 'personal property'. The payment was not 'personal property' because she was not legally entitled to it at the time of her death.

Counsel for her estate argued that the *Income Tax Assessment Act 1936* (Cth) had breached the warranty contained in the Gold Bonds: 'When such a law was made, there was a breach of the warranty giving a right of action for damages.'[825] Another way of particularising the breach was to say that the Commonwealth's promise had been broken when the Income Tax Commissioner assessed the interest payments to tax. It was on the latter basis that Williams J, in dissent, would have upheld the claim.[826] In his Honour's view, the *Income Tax Assessment Acts* did not intend to 'repudiate the promise contained in the bonds.'[827] Therefore, it was a breach of contract for the Commissioner to include the interest in the taxpayer's assessable income.[828] His Honour said that the broken promise was founded upon 'a separate legal right altogether outside' the scope of the *Income Tax Assessment Acts*.[829] These arguments assumed a personalisation of the whole government. The Commonwealth was contractually accountable for

825 ibid 9 (report of argument of Tait KC).

826 ibid 37 (Williams J).

827 ibid.

828 ibid.

829 ibid 37-38 (Williams J).

the actions, within power, of its Parliament or the actions, without power, of its Executive Government.

The majority in *Thomson's Case*[830] held that the subsequent legislation had 'destroyed' or 'dissolved' the obligation contained in the promise. Justice Dixon explained that a change in the law 'could not amount to a breach of contract for which the Commonwealth would be liable in damages or otherwise'.[831] Chief Justice Latham explained that it was legally impossible for 'any Commonwealth authority', by which phrase he presumably meant to include any member of the Executive, 'to give effect to the promise that tax should not be imposed.'[832] Thus, Christina Thomson had no legal entitlement to a refund, capable of satisfying the description of 'personal property' within the meaning of section 8 of the *Estate Duty Assessment Act 1914* (Cth). At the time of her death, she had 'a mere expectation of a 'voluntary payment by the Crown'.[833]

This ground for the decision, which is considered in more detail below, made it strictly unnecessary to consider the proposition that a Commonwealth contract might be breached by the behaviour of the Parliament of the Commonwealth. Nevertheless, Latham CJ, with whom McTiernan J agreed, went out of his way to explain why that was a misapprehension:

830 ibid 17-18 (Latham CJ), 28 (Dixon J), 32 (McTiernan J) agreeing with Latham CJ.

831 ibid 28 (Dixon J).

832 ibid 17 (Latham CJ). The phrase 'any Commonwealth authority' may be referable to the fact that the refund seems to have been paid to Ms Thomson by the Treasurer rather than the Deputy Commissioner of Taxation. It was for this reason that Dixon J, disagreeing with the minority judgment of Starke J, held that the payment could not be viewed as a refund of overpaid tax under ss 172 and 173 of the *Income Tax Assessment Act 1936* (Cth): compare 22 (Starke J) and 24 (Dixon J).

833 *Thomson's Case* (n 809) 27 (Dixon J).

> A breach of contract can be committed only by a party to the contract. The Parliament of the Commonwealth does not make contracts—it makes laws. It would not be the Parliament which would have broken the contract in the bonds if a tax were imposed upon the bond interest. The position would be that the warranty given by the Executive Government would have been broken.[834]

Chief Justice Latham had dissented in *Magrath* on the construction of the promise. In that case he had used the nouns 'Commonwealth' or 'Commonwealth of Australia' only to describe a borrower, promisor or payer.[835] When it was necessary to describe the administrator, responsible for the collection of revenue, his Honour spoke of the officer, namely the Federal Commissioner of Taxation.[836] In neither *Magrath* nor *Thomson's Case* did he lapse into using the word 'Commonwealth' as a short-hand for the Parliament.

The Gold Bond cases are advanced to illustrate that the word 'Commonwealth' can, if used uncritically, obscure the fact that the behaviour of the individuals comprising the Parliament of the Commonwealth is not attributed to the Commonwealth (constitutional person), here for the purposes of breach of contract. When the 'Commonwealth' makes a promise, for example, that promise cannot be seen as having being breached by actions of the Parliament inconsistent with the promise. That is because Parliament makes laws; it does not make promises and it does not, at least in terms of the ascription of legal responsibility, break promises. That is not to say that the Parliament is not a constituent part of the Commonwealth (government). Nor does it deny that the

834 ibid 16 (Latham CJ).

835 *Magrath* (n 809) 164 (Latham CJ).

836 ibid 164 (Latham CJ) and see also 168 (Rich J).

government can be called the 'Commonwealth'. It simply shows that where the word 'Commonwealth' describes the constitutional person, it should not be pretended that that legal person is the government.

(ii) Decisions Not Involving the Commonwealth

The foregoing discussion relies on one passage in one judgment of one case as disproving the broader theory that the Commonwealth (government) is a legal person. A difficulty here is that decisional contexts elaborating the relationship between the legal (constitutional) person and the Parliament are rare. That may reflect the obviousness of the proposition that Parliament is not 'part of' a legal person; as Dixon J said in *Bardolph*,[837] 'it is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown.' No case since *Thomson's Case* has involved consideration of the proposition that the 'Commonwealth' might breach a contract by legislating. However, the proposition that the behaviour of individuals in Parliament is not attributable to the legal person representing the government finds further support in cases, considered in this section, involving State contracting.

West Lakes v South Australia[838] concerned a development in the 1970s of reclaimed land near Port Adelaide. A dispute arose over the non-compliance with a contractual promise, made in an agreement to which 'South Australia' was a party, to prevent 'the Minister' from varying or revoking certain regulations

[837] *New South Wales v Bardolph* (1934) 52 CLR 455, 509 (Dixon J).

[838] *West Lakes v South Australia* (1980) 25 SASR 389 (SASCB) (*West Lakes*).

without 'the consent in writing of the Corporation'.[839] Following the recommendation of a Royal Commission, the South Australian Parliament proposed to erect floodlight towers, at what is now AAMI Stadium, over the objections of residents of the development. The plaintiff corporation contended that the South Australian Parliament could not, consistently with the contract, introduce a Bill on this topic without its consent and, furthermore, that without such consent any attempt to amend the *West Lakes Development Act 1969* (SA) would be invalid. That claim was rejected by the Supreme Court of South Australia, sitting in banco, as an attempt to fetter the South Australian Parliament's freedom of debate contrary to the Bill of Rights.[840] As King CJ put it, 'Ministers of State' could not, by means of a contract executed 'on behalf of the State', fetter the freedom of Parliament. By itself, that illustrates the disaggregation of 'government' in determining what may or may not be included within a contractually binding promise.

The primary interest of the *West Lakes* decision arises as a consequence of an irregularity in the framing of the special case. Question 1 of the special case asked the Court to determine whether a declaration, that the State was not 'at liberty to be privy to the implementation of [the Bill], would involve a 'breach of the privileges of Parliament'. This phraseology assumed, atypically, that the State of South Australia was involved in promulgating a Bill in the Parliament of South

[839] The contract containing the promise had been entrenched in the *West Lakes Development Act 1969* (SA); s 3(1) provided that the 'Indenture is hereby approved and ratified' and should 'be carried out and have effect as if the provisions thereof … were agreed to between the parties thereto and expressly enacted in this Act.'

[840] *West Lakes* (n 838) 390 (King CJ), 406-407 (Zelling J), and 422 (Matheson J) agreeing with King CJ and Zelling J.

Australia. The legal person known as the 'State of South Australia,' said King CJ, 'is not capable of being involved in steps to propose or further a bill.'[841] Counsel for the plaintiff, Mr Horton Williams QC, was described by Zelling J as having a tendency 'to argue as though the State of South Australia was synonymous with the executive power of the State.'[842] The 'juristic person the State of South Australia' was not synonymous with the executive power of the State, or with the legislative or judicial powers of the State.[843] The 'defendant State of South Australia' was not taking any step in relation to the Bill. Nor were the Ministers of State of South Australia acting as the servants or agents of 'the juristic entity the State of South Australia' in taking steps in connection with the Bill.

Taken together, the *Gold Bond Cases* and *West Lakes* show the duality in the role of a Minister: on one hand a member of Parliament, and on the other hand a member of the Executive Government, capable of binding the 'juristic entity' to a contract. These are separate functions, in that the Parliament does not make contracts, and the legal (constitutional) person does not take any step in relation to a Bill. These cases stand against the theory that government is some monolithic, power-wielding corporation. Government is here seen not as a subject but as a process, carried out not by an artificial legal person but by human beings, offices and institutions, in whom powers are vested. In each decisional context, there is a role for a right-and-duty-bearing unit *associated* in a broad sense with the government. Where rights and duties are necessary, there

841 ibid 399 (King CJ).

842 ibid 407 (Zelling J).

843 ibid 404 (Zelling J).

is a constitutional person to wield those rights and duties; but the constitutional person is not implicated in the exercise of government power.

Another illustrative case is *Rothman's v Attorney-General* (NZ),[844] which concerned a promise, in a contract to which New Zealand was a party, not to legislate on certain matters, in return for provision by a tobacco company of certain marketing information. That promise was broken when, in December 1989, the Minister for Health announced the Government's intention legislatively to abolish tobacco advertising and sponsorship in New Zealand. Justice Robertson held that the contract was not binding because of a want of consideration. Nowhere in its operative provisions were there 'any obligations or undertakings by the Crown.'[845] The only possible consideration was an undertaking not to impose a statutory or regulatory regime during the currency of the agreement. Although he recognised that the executive branch, which had made the promise, also controlled the course of legislation through the Parliament,[846] nevertheless Robertson J denied that an undertaking of that nature could have any value. The promise lacked value because the executive was 'unable to bind the legislature by contract'.[847] This is consistent with what was decided in *Thomson's Case*. The legislature cannot be fettered contractually. 'New Zealand', regarded as a government, is comprised in part by a Parliament. But 'New Zealand', as a right-and-duty bearing unit, could not give a valuable promise

844 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC).

845 ibid 328 (Robertson J).

846 ibid 328 (Roberston J), quoting AE Currie, *Crown and Subject: A Treatise on the Rights and Legal Relationship of the Crown and New Zealand* (Legal Publications 1953) 52-53.

847 ibid 329 (Robertson J).

concerning what would be done by the individuals comprising the Parliament. This shows, at least, that government and constitutional person are separately constituted.

A third case[848] concerned a joint venture agreement to construct the Goldfields Gas Pipeline, which transports natural gas from the Carnarvon basin to Kalgoorlie in Western Australia. The agreement, which was ratified by Parliament,[849] promised that, if any future legislation or regulation were to have an adverse effect on the business interests of the joint venturers, then to that extent it 'shall not have effect'. Justice Parker, with whom Templeman and Miller JJ agreed, denied the legal efficacy of this promise. His Honour said that 'no parties, not even the State acting by its Executive Government, can purport to bind the Parliament in respect of legislative action'.[850] The contractual promise was read as an expression of comfort, 'as to what they each then expected or hoped would be the course of future events.' The promise reflected a moral commitment, but could not amount to a legally binding obligation. Here the Government of Western Australia is made to seem a moral actor but, as a right-and-duty bearing unit, it cannot be sued on a promise about what will be done in Parliament.

The most recent case on this topic concerned the privatisation of the Port of Portland, in Victoria. In a contract signed by the Treasurer 'for and on behalf of

848 *Re Michael; Ex parte WMC Resources Ltd* (n 581).

849 *Goldfields Gas Pipeline Agreement Act 1994* (WA), s 4.

850 *Re Michael; Ex parte WMC Resources Ltd* (n 581) 586 (Parker J).

the Crown in right of the State of Victoria', the State promised that it would 'effect an amendment to statutes' to ensure a favourable valuation to land tax. It promised that, in the event 'the relevant statutory amendments do not become law', it would 'refund or allow to the Purchaser' any additional tax paid. The majority of the Victorian Court of Appeal understood this to embody 'a promise by the State to amend the land tax legislation'.[851] More accurately, said Maxwell P, it was a contract in which 'the executive arm of the state promised to take a step—"effect an amendment to statutes"—which lay within the exclusive province of the legislative arm of the state.'[852]

President Maxwell's language may be contrasted with the recognition in *Rothman's v Attorney-General (NZ)* of the political fact that the Ministers comprising the Executive, who make the promises, also control the course of legislation through the Parliament.[853] The principal officers of the Executive Government are, as a matter of constitutional practice, present in the legislature. It is therefore factually incorrect to suggest that members of the Executive Government cannot take steps in furthering a Bill. There is, however, a conceptual separation of the constitutional roles of a Minister. On the one hand, the Minister makes promises for the constitutional person; on the other hand, he or she takes steps in the promulgation of Bills in the Parliament. The principle of Parliamentary supremacy plays an important role in this conclusion, but it does

[851] *Port of Portland v Victoria* (2009) 27 VR 366 (VCA) 368 [3] (Maxwell P), 376 [43] (Buchanan JA).

[852] ibid 368 [3] (Maxwell P).

[853] ibid 328 (Roberston J).

not dictate the outcome. For example, Nettle JA (now a Justice of the High Court of Australia), in the minority on this point, said that he could:

> 'see no reason in principle … [why] the State cannot, as part of a bona fide commercial arrangement like the sale of public infrastructure comprised in the agreement, covenant to do whatever it can lawfully and effectively do to procure a specific tax concession pertinent to the sale'.[854]

This passage is question-begging. What is meant by the term 'State' and, if the State is the subject of the 'commercial arrangement', what is it contemplated that the 'State' can do to procure a tax concession? It is submitted, on the strength of the *Gold Bond Cases* and the *West Lakes* decision, that the answer to this latter question is: nothing. A Minister does not, by committing the State to a particular contractual promise, fetter the Parliament: this is so not only because of the principle of Parliamentary supremacy but also because the State as a subject is not a part of the Parliament; and the Parliament is not (part of) the State as a legal (constitutional) person.

The Court of Appeal judgments in the *Port of Portland* litigation made general statements about the State's obligations under the contract as if 'Victoria' were an entity that, but for supervening constitutional principles, might have made contractual promises about the exercise of its governmental power. On that theory of constitutional personality, it should have followed (as Nettle JA held in dissent) that the State might validly promise to make best efforts 'to procure' a tax concession. On appeal, the High Court accepted the argument of

[854] ibid 384 [87] (Nettle JA).

Mr JD Merralls QC that the failure to legislate was 'no more than the factum' that operated to trigger an adjustment of the purchase price.[855] This avoided the constitutional point, which their Honours framed as a question whether the contractual promise was 'void as an attempt to fetter by contract the exercise as the State legislature sees fit of the power provided by sections 15 and 16 of the *Constitution Act 1975* (Vic).' Nevertheless, this way of framing the constitutional point is, perhaps, noteworthy for its precision. Their Honours did not speak of the 'State' fettering by contract 'its' legislative power.

These examples are put forward as illustrations of the state of Australian law, established in *Thomson's Case,* on the contractual validity of promises about the exercise of legislative power made by members of the Executive Government in negotiating contracts to which the 'Commonwealth' or a State is to be a party. The promises are held invalid either because the obligation is statutorily overridden, or because of the axiom that the Parliament may not be fettered. Neither point is controversial; in fact, the operation of the relevant principle is stable enough actually to forestall the need to consider the nature of constitutional personality. Within that frame of reference, however, the statements of Latham CJ in *Thomson's Case* and King CJ and Zelling J in *West Lakes,* made in response to misconceptions about constitutional personality implicit within submissions advanced by the parties, support the negative claims made in this thesis: the constitutional person is not the government, and 'government' is

[855] *Port of Portland v Victoria* (2010) 242 CLR 348, 360 [14]-[15] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

not a legal person. Government is represented by a legal person, but not always, and only where rights and duties are necessary.

(iii) Inter-Governmental Agreements[856] Concerning 'Political Powers'

This section examines the High Court's treatment of intergovernmental agreements involving the exercise of governmental power. There is a tendency in such cases to speak of the Commonwealth in terms redolent of the responsibility of States in international law. There, acts of the legislature 'are not regarded as acts of some third party for which the State is not responsible'.[857] That result would evade international obligations. Similarly, in connection with certain types of intergovernmental agreement, the 'Commonwealth' is discussed as if it were an undivided legal person embodying or exercising unified governmental power. Such cases are relevant to this thesis precisely because the intergovernmental agreements, to the extent they involve the exercise of governmental power, are not held to be binding upon the Commonwealth (constitutional person) as contracts.

The ground for distinguishing domestic from international law in this regard is sometimes expressed using the language of 'justiciability', which is a vague and unsatisfactory concept. There is no legal (constitutional) person, capable of being bound by curial order of any Australian court, that wields governmental power of

[856] Professor Saunders has shown that intergovernmental agreements are widespread in the modern landscape of federal cooperation: Saunders, 'Intergovernmental Agreements and the Executive Power' (n 594) 296-302. It is unnecessary for the purposes of this thesis to make a detailed exploration of the various constitutional questions that can arise in connection with these agreements.

[857] Brownlie (n 681) 34-35.

the sort purported to be engaged by inter-governmental agreements. The relevantly undivided 'Commonwealth' does not actually exist as a right-and-duty bearing unit in Australian law. These are seen as 'political' rather than contractual agreements, precisely, it is submitted, because they involve or invoke a government rather than a legal person.

In *John Cooke v Commonwealth*,[858] the plaintiff wool suppliers relied upon the ordinary commercial language that had been used in negotiations, between the Commonwealth and what was described in argument as the 'Imperial Government', for the purchase of the Australian wool clip for use in the Allied war effort. The cables and letters used the language of vendor and purchaser. The plaintiffs' claims to a distribution of the Commonwealth's share of profits from the sale of surplus wool were based in part upon the existence of a contractual relationship between the Commonwealth and the Imperial Government.

Adopting the submission of Mr Owen Dixon KC, the Court observed that the Commonwealth had been requested to perform a service for the Imperial Government 'by the exercise, if necessary, of every power that was available to it.'[859] The correspondence showed that the Imperial Government had addressed itself not to a mercantile agent but to 'a political power, a political entity, with coercive powers available to it'.[860] The dichotomy between the Commonwealth as 'mercantile agent' and as 'political entity' was used in this case to determine

858 *John Cooke* (n 345).

859 ibid 416 (Knox CJ, Gavan Duffy and Starke JJ).

860 ibid 416 (Knox CJ, Gavan Duffy and Starke JJ).

whether the law of contract would operate. The fact of the involvement of governmental power discouraged the impression that a contract had been intended, even though language of a commercial nature had been used. This suggests two things: first, where the Commonwealth is acting and contracting as a 'mercantile agent', 'coercive' governmental power ought not to be involved. Second, where 'coercive' governmental power is involved, there ought not to be a contract.

Their Honours said that the character of the negotiations, the circumstances and purposes for which the wool was required, and 'the steps that might have become necessary in the acquisition of wool' tended to establish that this was 'an arrangement of a political nature'.[861] It was for that reason excluded 'from the region of contract'.[862] On appeal to the Privy Council, their Lordships concluded without elaboration that the agreement was 'not enforceable in any Court.'[863] In 1930, the Privy Council would say that it had not been an arrangement that was 'cognisable in a Court of law.'[864] How the characterisation of the agreement as 'political' resulted in unenforceability was not precisely explained. Implicit within the language of 'cognisance' lies insights supporting the negative claims made in this thesis: legal persons, this case seems to suggest, do not make agreements of a 'political nature', at least where those agreements partake of 'coercive' power. Equally, 'politically entities' do not make contracts.

[861] ibid 418 (Knox CJ, Gavan Duffy and Starke JJ).

[862] ibid.

[863] *John Cooke & Co Pty Ltd v Commonwealth* (1924) 34 CLR 269 (PC) 280.

[864] *Commissioner of Taxes v British Australian Wool Realization Association* [1931] AC 224 (PC) 235.

In the *Railway Standardisation Case*,[865] South Australia sought to enforce against the Commonwealth an intergovernmental agreement[866] for the construction and gauge conversion of a trans-continental railway.[867] The Commonwealth's demurrer to the statement of claim asserted that the agreement placed it under no contractually enforceable obligation. The second ground of the demurrer[868] was that the agreement was 'of a political character and not enforceable in a court'.[869] Counsel drew attention to a clause providing that the time and order of standardisation works 'shall be determined by agreement between the parties'. This clause was said to have a 'political and non-justiciable character'.[870] Again, what was meant by non-justiciability in this context is not clear. Chief Justice Dixon, relying upon the writings of Moore,[871] denied that the law 'between subject and subject' (also termed 'private law') could be applied to an agreement 'assuming to affect matters which are governmental and by nature are subject to considerations to which private law is

865 *Railway Standardisation Case* (n 2).

866 Entrenched in legislation: *Railway Standardisation (South Australia) Agreement 1949* (Cth), s 4(1); *Railways Standardization Agreement Act 1949* (SA), s 4.

867 *Railway Standardisation Case* (n 2).

868 The first ground was that the Agreement embodied an obligation that was 'as yet inchoate', and which would only 'become perfected into a legal obligation' when the works were carried out: ibid, at 135-6 (report of argument). Crucially, the time for performance had been left to future agreement. Justices Taylor (at 150) and Owen (at 157) accepted the proposition that Agreement was nothing but an agreement to agree in the future. The majority held that there would be a contractually enforceable liability once certain works had been performed but, as the time of commencement of the work had not been fixed, the Commonwealth's refusal to do so could not amount to a breach: ibid 146-147 (Dixon CJ), 151 (Menzies J), 153 (Windeyer J).

869 ibid 136 (report of argument of Sir Kenneth Bailey).

870 ibid 137 (report of argument of Sir Kenneth Bailey).

871 William Harrison Moore, 'The Federations and Suits Between Governments' (1935) 17 *Journal of Comparative Legislation and International Law (3rd Series)* 163.

not directed.'[872] This is an important observation, albeit one expressed using an uncomfortable dichotomy (between 'governmental' and 'private law'). The agreement, Dixon CJ had earlier said, was between 'the Sovereign in right of the Commonwealth and the Sovereign in right of the State of South Australia.'[873] Although it was possible, by combination of sections 75(iii) and 78 of the *Constitution*, read with sections 57 and 64 of the *Judiciary Act 1903* (Cth), for the Court to treat an intergovernmental agreement as containing obligations enforceable at law,[874] the Court must be careful not to trespass upon its true function, by considering 'undertakings and obligations depending entirely upon political sanctions'.[875]

The judgments of Taylor J and Owen J, although they had no need to consider the issue, might be seen as concurring in the judgment of Dixon CJ. Both cited the dissenting judgment of Dixon J in *Magennis*,[876] where his Honour had said that the soldier settlement agreement there in question contained many clauses 'not susceptible of legal enforcement' and seemed in its 'general tenor' to be the 'broad outlines of an administrative and financial scheme' rather than a 'definitive contract enforceable at law.'[877] Justice Owen thought that the judgment in *Magennis* had the same effect as *John Cooke v Commonwealth*.[878]

872 *Railway Standardisation Case* (n 2) 140 (Dixon CJ).

873 ibid 130 (Dixon CJ), 149 (Kitto J) agreeing.

874 ibid 139-140 (Dixon CJ).

875 ibid 142 (Dixon CJ).

876 ibid 149 (Taylor J), quoting *PJ Magennis Pty Limited v Commonwealth* (1949) 80 CLR 382, 409 (Dixon J).

877 *Railway Standardisation Case* (n 2) 149 (Taylor J).

878 ibid 157 (Owen J).

Both asserted the 'political character' of the agreement as a full answer to South Australia's claim.

Other judgments seemed to treat the political character of the agreement as evidence that the parties did not intend to create legal relations. That is clearest in the judgment of Windeyer J, who quoted from *Balfour v Balfour*[879] and the *Australian Woollen Mills Case*[880] before pointing out that the 'promises and undertakings of government' will often not be 'enforceable by processes of law.' 'The Commonwealth and the States', he said, 'are juristic persons, capable of being sued in the courts'.[881] The existence of jurisdiction, however, could not perfect an obligation, not intended to have a '*vinculum juris*', undertaken by the Commonwealth 'in its political capacity as the government'.[882] Here is a clearer dichotomy (between the 'political capacity' of the government and its status as a juristic person), albeit one that is still dependent upon the meaning of the word 'political'. The idea of 'justiciability'[883] was enfolded into the determination of the intention of the human beings who were physically present; an intention determined on ordinary contract principles derived from authorities applicable as between individuals. Although less clear, McTiernan J seems to have concurred in this approach. He said that the agreement embodied a plan for public railways,

879 ibid 153 (Windeyer J); quoting *Balfour v Balfour* [1919] 2 KB 571 (CA) 579 (Atkin LJ).

880 *Railway Standardisation Case* (n 2) 153-154 (Windeyer J); quoting *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 457 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

881 ibid 154 (Windeyer J).

882 ibid, quoting *Gibson v East India Company* (1839) 5 Bing (NC) 262 (CP) 274-275; 132 ER 1105, 1110 (Tindall CJ).

883 *Railway Standardisation Case* (n 2), 154 (Windeyer J).

involving mutual promises 'of a political nature', the performance of which 'necessarily requires executive and further parliamentary action.' [884] The agreement was not one 'in respect of which the Court can make any judicial order.'[885] Underlying these reasons, too, was a distinction between the capacity of a legal (constitutional) person to contract, and a 'political' promise of a government, involving its power.

Justices Menzies was satisfied that not all the clauses had the character of enforceable legal obligations. It was difficult to attach legal significance to clauses dealing with finance and clauses anticipating future agreement. His Honour also pointed to clause 23, which required the Commonwealth to 'take all reasonable steps' to ensure that the Silverton Tramway, and its locomotives and rolling stock, should be vested in the South Australian Railways Commissioner. These considerations 'could warrant the conclusion that the true nature of the agreement is a political arrangement contemplating further particular agreements that, when made, will have legal consequences'. [886] The characterisation of the agreement as involving 'political power' served to remove it from the purview of the Court. As Starke J had said in an earlier case, such agreements 'savour too much of the exercise of the political power to be within the province of the judicial department.'[887]

884 ibid 149 (McTiernan J).

885 ibid.

886 ibid 150 (Menzies J).

887 *New South Wales v Commonwealth [No 1]* (n 582) 186 (Starke J).

The law of contract is treated in these decisions as being maladjusted to adjudicate mutual undertakings between governments about the exercise of governmental powers. Government is seen as an actor, but not as the subject of rights and duties enforceable by a court. To use Moore's language, these cases involved 'the Crown as the persona of a community in the plenitude of its governmental powers, legislative or executive.' [888] That abstraction of the government, involving powers, is shown by these cases to beyond the control of the law of contract. An order of specific performance against the legislature would involve an abdication of legislative power,[889] and would assail 'the principle of representative government itself, which is rooted in the freedom of a political community to change its mind.'[890] The need for some sort of distinction here is clear: mercantile agent/political entity, and public law/private law are two examples of that need. This thesis presents, as a simpler solution, a narrower theory of constitutional personality. Contractual agreements involve capacity, and implicate a legal (constitutional) person; political agreements do not, and implicate governments. Government is not a legal person; the constitutional person is not a government.

This section ignores numerous other constitutional problems that have arisen as a result of the widespread use of inter-governmental agreements in Australia. [891] Such agreements can involve questions about the limit of

[888] Moore (n 871) 183.

[889] ibid 186.

[890] ibid 184.

[891] See Saunders (n 594) 296-302.

executive[892] and financial powers.[893] They have also raised questions about the limits of the legislative power.[894] Most recently, the High Court has been confronted with the 'Intergovernmental Agreement on a National Water Initiative', and a consequential funding agreement, under which the Commonwealth financed the acquisition otherwise than on 'just terms' of bore water licenses.[895] Challenges to State administrative action taken pursuant to these arrangements were resolved in such a way as to avoid consideration of the validity or enforceability of the intergovernmental agreements.[896] This section has considered only those cases that have been litigated as broken contracts.

(b) Promises Inconsistent with Statute

This section explores the principle that Commonwealth contracts[897] may be controlled or overridden by statute. That principle is capable of being justified in

[892] cf *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J); *R v Hughes* (2000) 202 CLR 535, 554-555 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *ICM v Commonwealth* (n 607) 165 [29] (French CJ, Gummow and Crennan JJ).

[893] cf *Spencer v Commonwealth* (2010) 241 CLR 140, 133-134 (French CJ and Gummow J).

[894] eg *Magennis* (n 876) where the *War Service Land Settlement Agreement Act 1945* (Cth) was held invalid because the inter-governmental agreement included in its schedule affected an acquisition of property contrary to s 51(xxxi) of the *Constitution*.

[895] *ICM v Commonwealth* (n 607); *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242; *Spencer v Commonwealth* (n 893).

[896] Namely, that the replacement of the plaintiff's bore licenses by aquifer access licenses, issued under the *Water Management Act 2000* (NSW) involved an acquisition of property: see *ICM v Commonwealth* (n 607) 183 [97] and 187 [106]-[107] (Hayne, Kiefel and Bell JJ). That proposition was rejected by the majority on the ground that there was no acquisition.

[897] For the purposes of this section, 'Commonwealth contracts' are those to which the legal person known as the Commonwealth, rather than any other legal person forming part of the Commownealth (government), is a party.

a number of different ways. It might be seen as an aspect of the rule of law,[898] as reflecting the subordination of the executive (by whose agency Commonwealth contracts are made) to Parliament,[899] or otherwise as an instantiation of Parliamentary supremacy.[900] The principle is relevant to this thesis insofar as it has involved, simultaneously, the Commonwealth (constitutional person) and the Commonwealth (government).

Section (i) considers what is perhaps the simplest category of case, namely where a pre-existing Commonwealth contract is destroyed by a subsequently enacted statute. Section (ii) considers what is known as the 'rule against fettering'; namely, that Commonwealth contracts may not restrict or stultify the ambit of a discretion conferred upon a member of the Executive Government by statute. The discussion illustrates the conceptual necessity, in these contexts, of distinguishing the Commonwealth (constitutional person) from the Commonwealth (government).

[898] *A v Hayden* (1984) 156 CLR 532, 562 (Murphy J), 580 (Brennan J), 588 and 592 (Deane J), saying that the executive power must be exercised in accordance with the laws of the land; and *Pape* (n 674) 87 [227] (Gummow, Crennan and Bell JJ), referring to the 'incapacity of the Executive Government to dispense with obedience to the law.'

[899] *Brown v West* (1990) 169 CLR 195, 202 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), saying that, whatever might otherwise be the scope of executive power, it is susceptible to control by statute; Seddon (n 124) 269 [5.14] saying that the rule that 'a government' cannot contractually bind 'itself' to a particular legislative course followed from the separation of powers.

[900] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 76 (Dawson J), saying that 'unquestioned effect' must be given by a court to the true scope and effect of a valid Act of Parliament.

(i) Contracts Discharged by Statute: 'Self'-induced Frustration?

The only reported instance of a pre-existing Commonwealth contract's being discharged subsequently by statute is in *Thomson's Case*,[901] where the High Court applied the decision of the Privy Council in *Reilly v The King*.[902] Those cases involve a rejection of the proposition that a Commonwealth contract discharged by statute involves a species of self-induced frustration. The position achieved in those cases may be contrasted with the law that now obtains in Canada. The cases show that the Parliament of the Commonwealth is, as it were, a stranger to Commonwealth contracts: the Commonwealth (constitutional person) will not be legally responsible for the valid exercise by the individuals and institutions comprising the Commonwealth Parliament of governmental power.

In *Thomson's Case*,[903] Mr Tait KC had argued for the taxpayer that the imposition and levying of a tax contrary to the terms of the warranty, as construed by the majority in *Magrath*,[904] gave rise to an action for damages. The majority rejected that argument on the basis that the imposition of tax by a valid statute destroyed the force of the promise by rendering performance illegal. Chief Justice Latham expressed this by saying that the *Income Tax Assessment Acts* imposed a duty upon the Commissioner of Taxation to assess and collect the tax; in so acting, 'he was acting in obedience to law.'[905] On the assumption that the levying of the tax otherwise could have breached the warranty, Parliament

[901] *Thomson's Case* (n 809); see discussion in the text following n 810 above.

[902] *Reilly v The King* [1934] AC 177 (PC).

[903] *Thomson's Case* (n 809) 9 (report of argument of Tait KC).

[904] *Magrath* (n 809); see text accompanying n 821 above.

[905] *Magrath* (n 809) 17-18 (Latham CJ).

had made 'lawful that which would otherwise have been unlawful', and had legislated 'so as to deprive an act of the character of a breach of contract.'[906] Justice Dixon expressed this conclusion by saying that the legal effect of the promise had been 'dissolved by force of the statute.'[907] The effect of the imposition of the tax was that the contracts had been discharged for supervening illegality or impossibility of performance, rather than for breach.[908]

In coming to that conclusion, the majority relied upon the judgment of the Privy Council in *Reilly v The King*.[909] This was an appeal from the Supreme Court of Canada on a petition of right brought by a barrister, who had been appointed to the Federal Appeals Board for Canada just prior to its abolition by statute. Lord Atkin, delivering the judgment of their Lordships, said that, insofar as the barrister's appointment had created a contract with the 'Crown', the contract was 'discharged' at the moment that further performance was by statute made impossible.[910] This was an 'elementary proposition', and his Lordship said that it was 'perhaps unnecessary to add that discharged means put an end to and does not mean broken.'[911]

The importance of the proposition deducible from *Reilly v The King* is brought into relief by comparing two contributions to the *Australian Law Journal* between

906 ibid 17 (Latham CJ).

907 ibid 28 (Dixon J).

908 ibid 17-18 (Latham CJ), 28-29 (Dixon J).

909 *Reilly v The King* (n 902).

910 ibid 180 (Lord Atkin).

911 ibid.

1970 and 1971. The first was by Dr PW Hogg, at that time a Senior Lecturer at Monash University, on the topic of the doctrine of 'Executive Necessity'.[912] Hogg argued that a 'body' vested with statutory powers should be liable to 'pay damages' if, by exercising its powers inconsistently with a prior undertaking, it broke its contract. He argued that the 'Crown' would not thereby be prevented from taking action, but it would be required to pay the 'true cost' of that action. Professor Enid Campbell, of the same Faculty, objected to the suggestion that compensation could be made available through actions for breach of contract.[913] She pointed out that a contract discharged by 'a valid governmental act' leaves the counterparty without any legal claim to compensation, even when 'the author of the overriding governmental act happens to be the other party to the agreement.' That was partly because of the overriding effect of the governmental act, which, in the context of her article, was the exercise of a statutory power by a Minister. She said that this could not be described as 'self-induced frustration,' because:

> If a Minister concludes a contract on behalf of the Crown and afterwards in the exercise of statutory powers conferred on him as a persona designata makes a decision which has the effect of discharging the contract for impossibility of performance, it could not be said that the Crown was responsible for the frustrating event. The same would be true of a Crown contract discharged by statute procured by the Ministry which authorised the making of the contract.[914]

[912] Peter W Hogg, 'The Doctrine of Executive Necessity in the Law of Contract' (1970) 44 *Australian Law Journal* 154.

[913] Enid Campbell, 'Agreements about the Exercise of Statutory Powers' (1971) 45 *Australian Law Journal* 338.

[914] ibid 342.

The significance of Campbell's assessment, which accords with *Reilly v The King* and *Thomson's Case*, lies in the dichotomy between a 'Crown' contract and a valid exercise of executive or legislative power by a Minister. The 'Minister' was both the 'author' of the contract and the 'author' of the exercise of statutory power. Each action was constitutionally valid, and each involved the same individuals. Campbell pointed out, however, the 'a vast difference' between the statutory or prerogative powers of a Minister, and the 'agency' by which a Minister binds the 'Crown' to contracts.

Campbell did not elaborate on the nature of this 'vast difference'. The burden of her argument was that the framework of contract law could not, given its intersection in this context with public law, provide a satisfactory basis for the award of compensation to an injured counterparty. The dichotomy she articulated, and the 'vast difference' that she assumed to exist, are important threads running through the cases examined in this chapter. *Reilly v The King* and *Thomson's Case* stand as authority for this proposition: the Commonwealth (constitutional person) does not induce the frustration of a Commonwealth contract, even where that contract is frustrated by reason of supervening illegality arising as a result of legislative or executive act procured by the same individuals by whose agency the contract was concluded.

The Canadian Supreme Court has recently rejected the authority of *Reilly v The King*. In *Wells v Newfoundland*,[915] a senior public servant was able to claim damages against the State of Newfoundland as a result of the legislative abolition

[915] *Wells v Newfoundland* (n 15).

of the Public Utilities Board, to which he had been appointed a member. Justice Major, delivering the judgment of the Supreme Court, characterised a submission based on *Reilly v The King* as 'disingenuous', because it amounted to an assertion 'by the Executive' that 'the legislative enactment of its own agenda constitutes a frustrating act beyond its control.'[916] The Court must not be 'blind to the reality of Canadian governance': that the executive exerts '*de facto*' control over the legislature. The same 'directing minds' were responsible for Mr Wells's appointment and for the termination of that appointment. The abolition of his position would, if done 'in the private sector', clearly constitute a breach of his contract sounding in damages.[917] That should also be true in the case of the 'Crown'.

Justice Major used the words 'Government', 'Crown' and 'Executive' almost interchangeably to describe the government both as contractor and as legislator. No distinction is recognised between the Parliament as legislator and the 'Crown' as contractor. That may or may not reflect an underlying theory held by Major J about governmental personality, but it does show that the underlying theory matters. Real, remedial consequences flow (at least in this field) from the different starting points that are adopted. Mr Wells had a remedy in damages for a contract broken by legislation; an Australian plaintiff in the same position would not. This issue recently took on a very real political importance in Australia, as the Victorian public confronted the spectre of a significant termination fee in relation to the cross-city link in Melbourne.

[916] ibid 220 [52] (Major J).

[917] ibid 207-208 [17] (Major J).

The divergence between the law as propounded in *Thomson's Case* for Australia, and in *Wells* for Canada, seems at least partly to reflect a difference of emphasis on questions of 'policy'. The 'policy' influence is visible, for example, in the use of the 'private sector' as a measure of what level of accountability should be achieved by the law of contract in the protection of the expectations of Mr Wells. It is possible that this 'policy' was more deeply felt in 1999 than in the post-war climate of *Thomson's Case*. Nevertheless, it is submitted that the preference for illegality rather than self-induced frustration as the factor discharging a Commonwealth contract rendered impossible to perform because of supervening legislation shows that an Act of Parliament is not legally attributed to the Commonwealth (constitutional person) for the purposes of liability under the law of obligations. Whilst that may disappoint counterparties to Commonwealth contracts, this is as it should be. The constitutional person is a unit of the legal system. Parliament is a primary law-giving institution. The two are logically as well as constitutionally distinct.

(ii) The Rule against Fettering

The 'rule against fettering' is a principle of administrative law preventing the repository of a discretionary power, which is exercisable from time to time, from committing itself to exercise the power in a particular way in the future.[918] This section examines the application of the rule to Commonwealth contracts. It shows that Courts have maintained a distinction, albeit not always clearly,

[918] This definition, taken from *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407 (HL) 496-497 (Lord Browne-Wilkinson), represents the law in Australia as discussed in this section.

between the Commonwealth (constitutional person) and the officer of the Commonwealth (government) whose statutory discretion has been made the subject of a promise.

The first decision to consider this issue was the *Wool Tops Case*.[919] The *War Precautions (Wool) Regulations 1916* (Cth) prohibited the sale of wool tops otherwise than to, through or with the written consent of, the Central Wool Committee.[920] The Commonwealth made a promise to the Colonial Combing, Spinning and Weaving Company Ltd that it would give regulatory consent 'upon request by the Company', in return for an undertaking to hold one half of the net earnings of the Company at the disposal of the Commonwealth. Justice Higgins held that 'the power of the Government' to give or withhold consent 'does not carry with it a power to contract that it will give or withhold consent in the future.'[921] Purporting to exercise the discretion otherwise than when the occasion arises, Higgins J suggested, 'may make the agreement nugatory'.[922] Other judges did not consider the issue.[923]

Justice Higgins's judgment treated 'the Government' or 'the Commonwealth Government' as the 'donee of the power' and also as the party to the contract,

[919] *Wool Tops Case* (n 321).

[920] Regulation 10 of the *War Precautions (Wool) Regulations 1916* (Cth) was enacted together with the *War Precautions (Sheepskins) Regulation 1916* (Cth) under the *War Precautions Act 1914- 1916* (Cth); ibid 458 (Starke J).

[921] ibid 469 (Higgins J).

[922] ibid 470 (Higgins J).

[923] The balance of the Court, holding that this amounted to an unlawful levying of taxation or was not otherwise supported by s 61 of the *Constitution*, did not consider the 'rule against fettering': ibid 445 (Isaacs J), 460 (Starke J), and see 432 (Knox CJ and Gavan Duffy J).

receiving the Company's payments of money. That reflected the language used in the contract, which was executed by the Prime Minister 'for and on behalf and so as to bind the Government of the Commonwealth', and which in its clauses had described the promisor as 'the Commonwealth Government'. Yet 'the Commonwealth Government' was not in terms the 'donee of the power'. Regulation 10 of the *War Precautions (Wool) Regulations 1916* (Cth) vested the consent-giving power in 'the Central Wool Committee' and not, as Higgins J appears to have thought,[924] in 'the Commonwealth Government.' The contract itself acknowledged this, when it provided in clause 17 that 'any consent notice' given 'by the Commonwealth Government to the Company' should be deemed to have been duly signed and served as if 'by John Michael Higgins the Chairman of the Central Wool Committee constituted by the said regulations'.[925] That mistake does not affect the authority of the case.

That this is an important issue in cases applying the 'rule against fettering' to government contracts is shown in the judgment of Mason J in *Ansett Transport Industries (Operations) v The Commonwealth*.[926] That case concerned a set of agreements between Ansett and the Commonwealth implementing the 'Two Airline Policy' over trunk routes. It was alleged that the Commonwealth would breach those agreements, which had been implemented as Schedules to the *Airlines Agreements Act 1952* (Cth), if it 'caused or permitted'[927] the Secretary of

924 cf ibid 468 (Higgins J), where the terms of regulation 10 are misquoted.

925 ibid 458 (Starke J), contra 468 (Higgins J).

926 *Ansett Transport Industries (Operations) v Commonwealth* (1977) 139 CLR 54.

927 ibid 56 (report of argument of Liddell QC).

the Department of Transport to issue permits under the *Customs (Prohibited Imports) Regulations 1956* (Cth) allowing others to operate trunk routes from Tasmania to the mainland. A majority of the Court allowed the Commonwealth's demurrer, on the ground either that the covenant did not exist[928] or that it would not have been contravened by the granting of the permits.[929] A minority would have overruled the demurrer,[930] implying a covenant into the agreements and holding that the question of breach ought to go to trial.

The plaintiff's argument was that an implied covenant 'to secure and maintain' the Two Airline Policy was breached by what is described in the report of argument as the 'actions of the Commonwealth in directing or encouraging the issue of an import permit.'[931] Chief Justice Barwick agreed with Aickin J that it would be a breach of the implied covenant 'for the Commonwealth by any means within its lawful power to enable a third airline operator to carry for reward on a trunk route.'[932] Justice Aickin said that, expressed positively, the Commonwealth must not 'take any step to procure, persuade or encourage', or 'direct or procure', or 'permit, encourage or facilitate'[933] the Secretary to sign the relevant permits.[934] Expressed negatively, the agreements would be breached should the Commonwealth 'fail to use its best endeavours to persuade or procure' the

928 ibid 70-71 (Mason J), 85 (Murphy J).

929 ibid 62 (Gibbs J), 80-81 (Mason J).

930 ibid 116 (Aickin J), 58-59 (Barwick CJ) agreeing.

931 ibid 56 (report of argument of Liddell QC).

932 ibid 61 (Barwick CJ).

933 ibid 107-108 (Aickin J).

934 ibid 106-107, 107-108 (Aickin J).

Secretary not to relax the existing prohibition.[935] To differing degrees, these judgments assumed that 'the Commonwealth' was a promisor which, subject to certain constitutional constraints, wielded and could promise to wield government power. Nevertheless, the judgments preserved the distinction between the Commonwealth as the promisor and the Secretary as the donee of the power.

Justice Mason pointed out that a promise by 'the Commonwealth' could not disable the Secretary of the Department of Transport from issuing import permits for aircraft. That was because the Secretary 'must at all times deal with applications for import permits according to law.'[936] This did not necessarily make the Commonwealth's promise void. Unlike cases concerning statutory bodies entrusted with discretionary powers,[937] or cases where a Minister was named as a party to a contract,[938] a promise by 'the government' was not a promise by the donee of the relevant power. The donee of the power is, instead,

935 ibid 116 (Aickin J).

936 ibid 75 (Mason J).

937 eg *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623 (HL) 634 (Lord Blackburn), and cf 638-639 (Lord Watson), holding that the Ayr Harbour Trustees, incorporated by statute for the purpose of improving the Ayr Harbour, could not fetter future trustees of the harbour in the manner they had purported to do in a minute executed by them. The general principle is stated in its application to statutory bodies in *Birkdale District Electric Supply Co Ltd v Southport Corporation* [1926] AC 355 (HL) 364 (Lord Birkenhead).

938 Justice Mason gave two examples: *Watson's Bay and South Shore Ferry Co Ltd v Whitfeld* (1919) 27 CLR 268; and *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 (PC). There is confusion on the record about the identity of the contractor in the *Watson's Bay Ferry Case*. The headnote to the *State Reports* reflects the view that the Minister as corporation sole was the contractor, as do prominent passages in the trial judgment: (1918) 19 SR (NSW) 98, 99-100 and 101 (Harvey J). One the other hand, the High Court treated the 'Crown' as the contractor: ibid 273 (Isaacs J). The claim in *Cudgen Rutile v Chalk* was brought upon an 'authority to prospect', issued by the Minister under s 23A of the *Mining Act 1898* (Qld). The Privy Council assumed the 'authority' amounted to a contract with the Minister: ibid 532-533.

938 See *Watson's Bay & South Shore Ferry Co Ltd v Whitfeld* (1918) 19 SR (NSW) 98 (NSWSC) 99- 100, 101 (Harvey J).

'an officer who is not a party to the contract.'[939] Assuming 'the government' was authorised to make the promise, and that it did not contradict the statute, there was 'no room'[940] for the 'rule against fettering'.[941] The broken promise could be enforced by damages.[942]

Justice Mason would have held the Commonwealth accountable for its promise, provided that the promise was made consistently with statute. That approach resists the temptation to subordinate the statutory decision-maker to a model of a unified person, sometimes acting through 'public' powers, sometimes through 'private' powers.[943] That may be contrasted with the judgment of Murphy J who, although reaching the same result, did so on the basis that:

> [N]o government would be expected to make a promise which would prevent the exercise of governmental powers across such a broad and indefinite field that it would amount to a far-reaching abdication of governmental responsibility.[944]

'Government' is here treated as a promisor, capable of exercising 'every one of its powers', for example the regulation-making power that is granted by section 270 of the *Customs Act 1901* (Cth) to the Governor-General. Justice Murphy propounded his own view of 'the concept of the Commonwealth' as the source of

939 *Ansett v Commonwealth* (n 926) 76 (Mason J).

940 ibid 77 (Mason J).

941 ibid.

942 ibid.

943 ibid, rejecting the proposition that a decision-maker must comply with 'the policy of the Crown' in exercising a statutory discretion; see contra *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1976) 136 CLR 1, 17-18 (Windeyer J). Justice Mason rejected Windeyer J's statement, preferring instead the view articulated in *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131, 145 (Evatt J).

944 *Ansett v Commonwealth* (n 926) 86 (Murphy J).

a constitutional implication of free intercourse. According to Murphy J, the 'concept of the Commonwealth' embraced a geographical area over which legislative, executive and judicial branches operated against the background of a democratic society.[945] The consequences of that conception on the plane of rights and duties were not spelled out.

A power conferred upon an officer by an Act of the Parliament of the Commonwealth could be characterised, without inaccuracy, as a power 'of the Commonwealth'. Likewise, it may be important to see whether the officer is an 'officer of the Commonwealth'—a description that would activate the original jurisdiction of the High Court in respect of the writs of mandamus or prohibition under section 75(v) of the *Constitution*. These usages of the word 'Commonwealth' should be understood as invoking the Commonwealth (government). They should not be understood as references to a legal (constitutional) person. That is because the outcome of the cases is that the act or omission of the individual, who is an 'officer of the Commonwealth' exercising a power 'of the Commonwealth', will nevertheless not be attributed to the 'Commonwealth' for the purposes of legal liability where that power is an independent statutory discretion.

Approached from the point of view of constitutional personality, the simplest explanation is that the Commonwealth (government) is not a legal person. The actions of the officer of the Commonwealth (government), exercising a power of the Commonwealth (government), are not attributed to the Commonwealth

[945] ibid 87 (Murphy J).

(constitutional person) for the purposes of liability. If that be an accurate way of understanding the legal process, then it supports the negative claims made in this thesis: the government is not a legal person, and the constitutional person is not a government.

(2) The Constitutional Person and the Executive Government of the Commonwealth

Whereas the previous section explored the relationship between the constitutional person and the Parliament of the Commonwealth, this section explores the relationship between the constitutional person and the Executive Government of the Commonwealth. There is an added layer of complexity here, because it is the actions and behaviour of the human beings comprising the Executive Government of the Commonwealth that supplies most of what Professor Sawer called 'the "*sub-stratum*" for government as person.'[946]

The constitutional person is a non-human legal person. It cannot 'eat or drink, or wear clothing, or live in houses'.[947] Like any non-human legal person,[948] the acts and omissions attributed to the constitutional person will inevitably be the acts and omissions of human beings;[949] namely, those comprising the Executive

946 Sawer (n 45) 168.

947 *Darling v Mayor, etc of New York* 31 NY 164 (1865) (NYCA) 197; quoted in Laski, 'The Personality of Associations' (n 174) 406; see also Willoughby (n 47) 197, saying that, although 'real', the State as legal person does not exist in the 'physical world'.

948 See *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 171-172 (Brennan J).

949 cf *Williams (No 1)* (n 2) 257-258 [214] (Hayne J), acknowledging this point with reference to *Clough v Leahy* (1904) 2 CLR 139, 157 and 161 (Griffith CJ).

Government.[950] If the Commonwealth has sworn an affidavit, it will have done so through an authorised officer forming part of the Executive Government.[951] If it has decided to issue a notice to quit,[952] or to erect a fence,[953] or to build a telecommunications tower[954] on or in respect of land that it owns, that will be because officers forming part of the Executive Government have made these decisions.[955] Inversely, if individuals forming part of the Executive Government act unlawfully, then it is the Commonwealth (constitutional person) and not the Executive Government of the Commonwealth that is held liable. These examples illustrate what Sawer meant by 'sub-stratum': whenever the process of government throws up a need for a constitutional person, it is through the human beings comprising the Executive Government that the legal (constitutional) person acts.

The cases discussed in this section, understood consistently with the recent decision of the majority of the High Court of Australia in *Williams (No 1)*, demonstrate five matters of importance to theories of governmental personality

950 See, eg, *Halsbury's Laws* (n 190) [931]; and Alpheus Todd, *Parliamentary Government in England* (Spencer Walpole ed, S Low, Marston & Co 1892) vol 2, 179.

951 See *Commonwealth v Miller* (1910) 10 CLR 742, 753 (O'Connor J) and 758 (Higgins J). The High Court upheld an order made by a judge of the Supreme Court of Victoria, made on a summons for directions, that the Commonwealth should answer interrogatories as provided by r 5 and r 12 of Order XXXI of the *Rules of the Supreme Court 1906* (Vic). The submission of Mr Starke for the plaintiff, that the Commonwealth's position in legal proceedings was the same as that which the Crown occupied in a petition of right, was rejected: ibid 746 (Griffith CJ), 749 (Barton J), 751 (O'Connor J), 756 (Isaacs J), 757-758 (Higgins J).

952 *Sydney Training Dept Snapper Island Ltd v Brown* (n 4).

953 eg *Clamback v Coombes* (n 4).

954 *Johnson v Kent* (1975) 132 CLR 164.

955 See also *Kidman v Commonwealth* (1925) 37 CLR 233, 240 (Knox CJ) regarding the ability of the Attorney-General to bind the Commonwealth to arbitration agreements; and *Mewett* (n 45) 498 (Dawson J), saying that suits against the Commonwealth in negligence or for breach of contract will have been brought in respect of things done 'by executive act'.

in Australia. First, the Commonwealth (constitutional person) is *represented* by, or acts through and in the person of, members of the Executive Government of the Commonwealth. This is termed the relationship of 'constitutional agency'. Second, consistently with the English position, the Executive Government per se is not a legal person, and has no legal personality separately from the Commonwealth (constitutional person). Third, the Commonwealth (constitutional person) is *affected by*, and legally responsible for, civil wrongs committed by members of the Executive Government of the Commonwealth. Yet it is not civilly responsible for wrongs committed in the exercise of governmental power, per se. Fourth, contrary to the English position, the ability (to use a neutral word) of the Executive Government to exercise the capacities of the Commonwealth (constitutional person) is conditional upon the powers that the Executive Government may exercise under section 61 of the *Constitution*. The Executive Government requires *power*, here termed 'agency-based' power, in order to exercise those capacities. Finally, this limitation does not derive from any impairment in the capacities of the Commonwealth (constitutional person), but is inherent to the constitutional limitations upon executive power, both federal and pertaining to responsible government.

Those matters points towards a narrow theory of constitutional personality, because they involve a dissociation of the Executive Government of the Commonwealth from the Commonwealth (constitutional person). The Executive Government acts *for* or *on behalf of*, the Commonwealth (constitutional person), but does so only incompletely and only by exercise of a power that is strictly delimited by other constitutional principles. The Commonwealth (constitutional

person) is in this limited sense *represented by* the Executive Government, rather than being constituted by the Executive Government (alone or as a facet of government more broadly). The Commonwealth (constitutional person) is *affected by* the acts of various governmental persons and entities, in the sense that it is civilly responsible for torts committed within authority. That civil responsibility, however, is limited to circumstances where executive power, per se, is absent. These principles stand against the theory of government as legal (constitutional) person.

Section (a) establishes the framework of the relationship of 'constitutional agency', using paradigm examples to demonstrate that the Commonwealth (constitutional person) has civil responsibility for actions of the Executive only by application of corporate theory, and only when those actions are *outside* power. Section (b) then demonstrates, with particular reference to *Williams (No 1)*, that executive power is required in order to exercise the capacities of the Commonwealth (constitutional person). Sections (a) and (b) therefore present something of a contradiction: power must be *absent* in order for civil liability to attach to the Commonwealth (constitutional person) for wrongs, whereas it must be *present* in order to exercise the capacities of the Commonwealth (constitutional person). This thesis does not seek to resolve that contradiction. The goal is only to demonstrate the incompatibility of these cases with the theory of government (constitutional person).

(a) Liability for Unlawful Conduct

This section explores circumstances in which the Commonwealth (constitutional person) will be liable, or will avoid liability, for unlawful conduct of the Executive Government of the Commonwealth. The section avoids the topics that have historically generated the most interest and enthusiasm, for example: the historical immunity from suit, the role of section 64 of the *Judiciary Act 1903* (Cth), and jurisdictional controversies. The focus of the section (which occasionally digresses into key State cases) are the analytical pathways by which the Commonwealth (constitutional person) is either rendered liable, or permitted to avoid liability, for unlawful conduct of the Executive Government.

Section (i) takes certain paradigm examples of the Commonwealth (constitutional person) being rendered liable for the torts of members of the Executive Government of the Commonwealth. This is a wide category of case, and the discussion is by no means exhaustive. The cases are selected because they exemplify the use of agency and other corporate theory concepts to rationalise governmental liability. The constitutional person is treated, so far as it is made liable, analogously to other artificial legal persons; it is not made to be the object of other or special rules appertaining to government. Section 64 of the *Judiciary Act 1903* (Cth) has had an undeniable influence in this regard. In providing that the rights of the parties, in suits to which the 'Commonwealth' is a party, 'shall as nearly as possible be the same…as in a suit between subject and subject', the legislation has actively encouraged such rationalisation. Nevertheless, whilst section 64 assumes that the Commonwealth is a legal (constitutional) person, it assumes rather than prescribes the nature of that legal personality. Further, as

noted above, the right to proceed against the Commonwealth (constitutional person) derives from the common law, operating in conjunction with the *Constitution*, rather than from a federal law (like the *Judiciary Act*) created under section 78 of the *Constitution*.[956] Section (ii) contrasts such cases with other contexts, where the Commonwealth (constitutional person) has avoided civil liability pursuant to the principle of 'independent discretion'.

(i) Liability for Torts

This section focusses on the decision of Dixon J in *James v Commonwealth*,[957] which establishes that the Commonwealth (constitutional person) is capable (through the Executive Government) of authorising an agent to commit a tort. This was the last of the cases in the great saga of the litigation of Mr Frederic James. Mr James dealt very profitably in dried fruit from the early 1920s[958] but his business operations were dramatically curtailed by co-operative federal and State regulatory intervention, attempting by the introduction of a license regime[959] to stabilise a market collapsing because of a glut in supply.[960] Not until 1936 did Mr James' constitutional campaign against the licensing regime

[956] cf *BAT v WA* (n 62) 57-58 [59] (McHugh, Gummow and Hayne JJ); for a critique, see Hill (n 670).

[957] *James v Commonwealth* (n 575).

[958] ibid 444.

[959] The *Dried Fruits Export Control Act 1934* (Cth) regulated the total volume of dried fruit for export. Section 20 of the *Dried Fruits Act 1924* (SA) facilitated the imposition of marketing quotas and sanctions for breaching those quotas but was held invalid on grounds of s 92 of the *Constitution* in *James v South Australia* (1927) 40 CLR 1.

[960] Veterans of the Great War had been settled on land in the Murray River region and had vastly increased the output of dried fruit, such that only 20% of the domestic production could be sold on the domestic market. The rest was marketed overseas, causing a collapse in international prices and thereby threatening the livelihood of the settled ex-soldiers.

succeed[961] and, in the meantime, his business suffered substantial losses as a result of the actions of the Commonwealth Department of Commerce, coordinating the Dried Fruits Boards of each State, in the administration and enforcement of legislation later held invalid.

Without committing or threatening an illegality, but in the 'vigilant administration' of an invalid Act, shipowners were repeatedly alerted to a non-existent legal duty to refuse to accept carriage of Mr James's fruit, and caused his shipments to be constantly watched with a view to their unlawful seizure.[962] In relation to this conduct, not authorised by the statute but not actually unlawful, Mr James's claims failed: there was no liability under section 92 of the *Constitution*,[963] and there was no general tort of interference with business relations.[964]

This aspect of the decision of Dixon J in *James v Commonwealth* reflects the outcome of the litigation in *Kruger v Commonwealth*,[965] where a group of indigenous Australians sought declarations of invalidity in respect of an Ordinance of the Northern Territory that had authorised the Chief Protector of Aborigines, and his successor in function the Director of Native Affairs, forcibly to

961 The decision of the High Court of Australia in *James v Commonwealth* (1928) 41 CLR 442, upholding the validity of provisions of the *Dried Fruits Act 1928* (Cth) prohibiting carriage of dried fruits interstate without a license, was overruled in *James v Commonwealth* [1936] AC 578 (PC).

962 *James v Commonwealth* (n 957) 351-352 and 372 (Dixon J).

963 ibid 361 (Dixon J).

964 ibid 362-364 (Dixon J).

965 *Kruger v Commonwealth* (n 45).

remove them from their families.[966] Chief Justice Brennan noted that the revelation of the manner by which the powers conferred under that Ordinance had been exercised in many cases had 'profoundly distressed the nation'.[967] Nevertheless, in addition to upholding its constitutional validity under section 122 of the *Constitution*,[968] a majority rejected the plaintiffs' submission that the *Constitution* created private rights, enforceable by an action for damages, for exceeding the powers it conferred.[969] Chief Justice Brennan said that the 'government' could only be made liable for the consequences of the invalidity of a statute or other action 'under the general law'.[970] 'General law' here means the law of obligations, or 'private law' as it is sometimes called; the law as it exists between citizens. There was no basis, said Gaudron J, for construing the *Constitution* as conferring additional rights over and above those provided by the common law.[971]

An example of what Brennan CJ meant by the phrase 'general law' may be seen in the success enjoyed by Mr James in another aspect of his case. Five consignments of his dried fruit had been seized, between October 1932 and April 1936, by the various State Dried Fruit Boards, acting with the allowance, under

[966] Namely, the *Aboriginals Ordinance 1918* (NT), authorised by the *Northern Territory Acceptance Act 1910* (Cth), the *Northern Territory (Administration) Act 1910* (Cth), s 13(1) and the *Northern Australia Act 1926* (Cth), s 4U.

[967] *Kruger v Commonwealth* (n 45) 36 (Brennan CJ).

[968] *Kruger v Commonwealth* (n 45) 45 (Brennan CJ), 53-54 (Dawson J), 79 (Toohey J), 104 (Gaudron J), 141 (McHugh J) agreeing with Dawson J, 155 (Gummow J).

[969] ibid 46 (Brennan CJ), 73 (Dawson J) not deciding, 93 (Toohey J), 125 (Gaudron J), 146- 148 (Gummow J).

[970] ibid 46 (Brennan CJ).

[971] ibid 125 (Gaudron J).

the direction, and with *de facto* authority of the official head of the Commonwealth Department of Commerce.[972] The consignments had been seized by officers of the various State Dried Food Boards acting under colour of regulations subsequently held invalid. The seizures were 'undoubtedly wrongful against the true owner of the fruit,'[973] and where Mr James could demonstrate ownership of the goods at the time of seizure he recovered a sum equivalent to the value of the goods as damages for conversion.[974]

Justice Dixon held that the Commonwealth had granted to the State Dried Fruit Boards a *de facto* authority, within the scope of which the tort had been committed, to convert Mr James's fruit. His Honour said:

> [T]he Commonwealth department directly sanctioned each of the seizures. The communications passing between the dried-fruits boards and the secretary of the Commonwealth department … suggest that report, consultation, instruction and authorisation were frequent. I think there is enough circumstantial evidence to warrant the inference that the secretary, who is the official head of the Commonwealth department, knew the course followed by the Dried Fruit Board of South Australia in policing the regulations, was kept acquainted with the facts ascertained by that board with respect to the plaintiff's attempts to ship or deliver fruit into other States, and approved of what was done by officers of the board. In not a few instances I believe that the approval of the Minister himself was obtained for particular steps.[975]

[972] *James v Commonwealth* (n 957) 355 (Dixon J). These findings were relevant to (and necessitated the rejection of) the submission that the Dried Fruits Board acted with 'no other authority from the Commonwealth than that which the void regulation attempted ineffectually to confer'; see also 360, 388, 389, and 394 (findings in relation to each specific seizure).

[973] ibid 360 (Dixon J).

[974] ibid 385, 389, 393 and 394 (Dixon J).

[975] ibid 359-360 (Dixon J).

Thus, in finding the Commonwealth liable, Dixon J attributed to the Commonwealth (constitutional person) the knowledge and conduct of the 'official secretary', as head of the relevant Commonwealth department, and of the Minister himself. That is so notwithstanding that there was no statutory or other basis for the actions in question. The doctrine of *ultra vires* was not used, Dixon J emphasised, 'to produce the same immunity as formerly arose from the incompetence of an officer at common law to bind the Crown by his tortious acts.' [976] Thus, tortious actions of Commonwealth officers acting *outside* governmental power can be attributed to the Commonwealth (constitutional person).

There is a clear analogy,[977] in his Honour's reasoning process, with corporate agency theory.[978] That is an analogy that has been developed and applied in other cases involving knowledge and intentionality of constitutional persons. In *HMS Truculent*,[979] Willmer J thought that there was an analogy between the Board of Admiralty and the Board of Directors of a limited company: 'Just as a limited company acts and transacts its business through its Board of Directors, so His Majesty, in relation to His Majesty's ships, acts through the Board of Admiralty.' In *Western Australia v Watson*,[980] the Full Court of the Supreme Court of Western Australia applied that analogy to the Cabinet or the Executive Council,

[976] ibid 360 (Dixon J).

[977] Sawer (n 45) 173.

[978] For a summary, see *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 225 FLR 1 (WASC) [6142]ff (Owen J).

[979] *HMS Truculent: The Admiralty v The Divina (Owners)* [1951] 2 All ER 968 (PDA) 979 (Willmer J).

[980] *Western Australia v Watson* [1990] WAR 248 (WASCFC).

for the purposes of attributing knowledge of one government department to the State. Their Honours said:

> If one applies the corporate analogy to the Government or the State, it follows that the knowledge of any Minister of the Crown acquired by him in that capacity will be regarded as knowledge of the Government as a whole and, therefore, of the State.[981]

The principle in *Western Australia v Watson* has been applied to cases involving the Commonwealth.[982] It requires a plaintiff to identify an officer or person of sufficient standing to constitute, for a given purpose, the 'very ego and centre of the personality' [983] of the Commonwealth (constitutional person). That necessarily involves a conceptual division between the mass of functionaries and employees comprising the Commonwealth (government), on one hand, and the constitutional person on the other. This is required in order to establish that knowledge of an identified individual or institution is knowledge of the 'Commonwealth as a legal entity separate from its employees and officers'.[984]

Importantly, this principle does not apply where statutory corporations are involved. Statutory corporations are constituted for the very purpose of performing, in the public interest, public or governmental functions. They are for this reason indisputably part of the government. Yet as separate legal persons,

[981] ibid 270 (Malcolm CJ, Brinsden and Seaman JJ).

[982] *Zentai v Honourable Brendan O'Connor (No 3)* (2010) 187 FCR 495 (FCA) 587 [353] (McKerracher J); *Danthanarayana v Commonwealth of Australia* [2014] FCA 552, [111]-[112] (Foster J).

[983] cf *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) 713 (Viscount Haldane LC).

[984] *Danthanarayana* (n 982) [112] (Foster J).

they can sue each other[985] and have a legal existence distinct from the Commonwealth (constitutional person). In *Launceston Corporation v The Hydro- Electric Commission*,[986] the High Court had held that the occupation of land by a statutory corporation was not 'occupation on behalf of Her Majesty or for the purposes of Her Majesty.' As Allsop P said in a recent case, the status of statutory corporations, as 'representing' the 'Crown,' does not deny their 'separateness as a corporate personality.'[987] In a 2003 case,[988] the New South Wales Court of Appeal held that the knowledge of a responsible Minister could not be attributed to the Electricity Commission, a body corporate established by statute to perform public services.[989] Merely because the Electricity Commission might *represent* the 'Crown', for some purposes, 'did not render the Electricity Commission the representative of the Crown for all purposes and did not deem it to be the Crown'.[990]

These cases show that intentionality and knowledge are attributed to the Commonwealth (constitutional person) by analogy with corporations, and that the knowledge of the Commonwealth (constitutional person) is not the knowledge of every one of its employees, nor every other institution or officer

985 *Commonwealth v Silverton Ltd* (1997) 130 ACTR 1 (ACTSC) 13–18 (Higgins J); *Ex parte Workers' Compensation Board of Queensland* [1983] 1 Qd R 450 (QSC).

986 *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654, 661 (Dixon CJ, Fullagar, Menzies and Windeyer JJ).

987 *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60, [30] (Allsop P).

988 *Babcock International Ltd v Babcock Australia Ltd* (2003) 56 NSWLR 51 (NSWCA).

989 *Electricity Commission Act 1950* (NSW), s 6(1): the Commission 'shall be a body corporate'.

990 *Babcock International Ltd v Babcock Australia Ltd* (n 988) 61 [107] (Ipp JA), with whom Heydon and Sheller JJA agreed.

forming part of the Executive Government. The constitutional person is a separate entity, and its state of mind must be identified by reference to a human being having sufficient internal standing to constitute the *mind* of the Commonwealth (constitutional person) for that purpose. This stands against the theory of government (constitutional person). The Commonwealth (constitutional person) is manifestly not treated as having incorporated every dimension of the government, or more particularly of the Executive Government. Its liability for civil wrongs depends upon the existence of a cause of action arising at 'general law', and factors capable of achieving the identification (analogously to corporate theory) of acts or intentions of a specific individual or institution with the constitutional person.

(ii) The Principle of Independent Discretion

It was seen above, in connection with the principle in *Reilly v The King*, that valid exercises of legislative power are not regarded as the actions of the Commonwealth (constitutional person) for the purposes of legal liability for breach of contract. The same is shown in this section to be true of valid exercises of executive power. The effect of the principle of 'independent discretion' is that the consequences of the exercise of an independent statutory discretion are attributed to the office-holder as principal, and are not attributed (for legal

liability purposes) to the Commonwealth (constitutional person).[991] This stands against the theory of government as legal (constitutional) person. The acts or omissions of the officer are indisputably part of the Commonwealth (government), but they are not the actions of the Commonwealth (constitutional person) for the purposes of legal liability.

The first decision of the High Court of Australia considering this principle was *Enever v The King*.[992] The plaintiff, who had been wrongfully arrested, sought to sue the State of Tasmania, arguing that the arresting officer had acted as 'an officer, agent or servant of the Government'.[993] The litigation was conducted on the footing that section 4 of the *Crown Redress Act 1891* (Tas) imposed upon the 'Crown' the same liability, for the acts and defaults 'of any officer, agent or servant of the Government of Tasmania', as would attach at common law to an employer for the acts of its employee.[994] The High Court accepted that the police constable satisfied the description of 'an officer of the Government of Tasmania'.[995] Justice O'Connor noted that the *Police Regulation Act 1898* (Tas) 'gave the Government power to employ, to pay, and to dismiss him', and for many

[991] *Enever v The King* (n 57); *Baume v Commonwealth* (1906) 4 CLR 97, 110–12, 122–3 (customs officers); *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 (shipping pilots); *Cubillo v Commonwealth* (1999) 163 ALR 395 (FCA) 443–4; Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (Lawbook Co 1982) 23–6. See generally Steven Churches, 'Bona Fide Police Torts and Crown Immunity' (1980) 6 *University of Tasmania Law Review* 294; Susan Kneebone, 'The Independent Discretionary Function Principle and Public Officers' (1990) 16 *Monash University Law Review* 184, 198. See also Bradley Selway, 'Of Kings and Officers—The Judicial Development of Public Law' (2005) 33 *Federal Law Review* 187, 226.

[992] *Enever v The King* (n 57).

[993] Section 4 of the *Crown Redress Act 1891* (Tas) allowed recovery against the State in those terms.

[994] *Enever v The King* (n 57) 989-990 (O'Connor J), noting that this construction of the statute was 'properly admitted by the appellant's counsel'.

[995] ibid 982 (Barton J) and 990 (O'Connor J).

of his everyday functions the State would no doubt be liable for neglect or default in the course of his employment.[996] The question was whether the wrongful exercise of the power to arrest, which had been conferred upon the officer directly by statute,[997] could be attributed to the 'Government of Tasmania' analogously to the ordinary law applicable between master and servant.[998]

Counsel for the plaintiff, Mr Herbert Nicholls (later Chief Justice of Tasmania), submitted that the fact that the power to arrest was vested in the office of the constable by statute was immaterial. The argument is reported as follows:

> The legislature is one branch of the Government and the Executive is another… to obey either is to obey the Government. It is the State which gives the constable his power and authority, and therefore the State is responsible for its proper exercise.[999]

This is a concrete account of the theory of government (constitutional person). It presents an image of the 'Government' as a complete unity for the purposes of legal responsibility:[1000] it was 'the public, ie, the State, who are liable'[1001] for the actions of the police constable. 'Government' had enacted the statute. 'Government' had committed the tort.

The claim was rejected by the High Court on the basis that, because the constable had acted in the exercise of a power conferred upon him personally by

996 ibid 990 (O'Connor J).

997 Namely, the *The Police Act 1865* (Tas), s 179.

998 *Enever v The King* (n 57) 975 (Griffith CJ), 982 (Barton J), 990 (O'Connor J).

999 ibid 971 (report of argument of Nicholls).

1000 cf Sawer (n 45) 165.

1001 *Enever v The King* (n 57) 972 (report of argument of Nicholls).

statute, any action must be brought against him personally.[1002] Chief Justice Griffith said that the powers of a constable are 'exercised by him by virtue of his office'.[1003] Justice O'Connor said:

> [T]he authority to arrest is not conferred on the Government, nor is it to be exercised on behalf of the Government, it is conferred on the constable as the holder of a recognised public office to which well known duties and responsibilities are attached. He made the arrest in the discharge of his duty as holder of the office of constable, and not by the direction or under the control of the Government. His act was thus not the act of the Government by its servant, but was his own act, done in the exercise of his duty as constable, and in the doing of it the relation of master and servant between him and the Government cannot be implied.[1004]

This was a much narrower conception of 'Government' (here meaning constitutional person) than that which had been propounded by Mr Nicholls. The result was that the 'Government of Tasmania' could not be made liable under the terms of the *Crown Redress Act*. The 'personality of the employer', said Griffith CJ with reference to the submission of Mr Nicholls, could not have the effect of creating 'a *new* kind of liability which had never existed as against any subject exercising similar powers.'[1005]

Justice Barton agreed[1006] but placed added emphasis on the fact that, although the constable was 'in a sense an officer of the Government', he was not in the relevant sense a 'servant of the Crown' because he could not be said to be

[1002] ibid 979 (Griffith CJ), 982 (Barton J), 994 (O'Connor J).

[1003] ibid 977 (Griffith CJ).

[1004] ibid 994 (O'Connor J) (emphasis added).

[1005] ibid 979 (Griffith CJ) (emphasis added).

[1006] ibid 985 (Barton J).

'under the control of the Government'.[1007] If the constable's superiors had ordered him not to comply with the statute, those orders would have 'no weight or validity'. Meanwhile, any 'order of the Executive Government' to adhere to the statute would give 'no added force'.[1008] With reference to the submission of Mr Nicholls, his Honour said:

> Counsel endeavoured to remove [this difficulty] by the argument that the State, that is to say, the Government as a whole, is one and indivisible in relation to what we understand to be its three branches, the Executive, the Legislature and the Judiciary. In other words … if what was done, was done under the authority of an Act of Parliament, then it was done under the authority of the State in its legislative capacity, and that the State was equally responsible whether the person whose act was complained of was obeying the State in that or in any other of its three capacities. This contention raised the argument that the State, which is of course recognised as between Government and Government as an indivisible authority in matters of international responsibility, is in the same position as to remedies sought in an action by a subject against it.[1009]

Justice Barton described the argument as 'bold and novel', but having 'not a shred of authority in its support' and attended by consequences not merely 'novel and curious', but ultimately involving 'the whole fabric of the State in confusion and disaster.'[1010] The result, his Honour later said, would 'interfere seriously with the ordinary administrative work of the Government', such as the military, the justice system, prisons, 'lunatic asylums', and public schools, as distinct from the types of work ordinarily 'left to private enterprise'.[1011]

[1007] ibid 984-985 (Barton J).

[1008] ibid 983 (Barton J) and 993-994 (O'Connor J) making the same point.

[1009] ibid 982-983 (Barton J).

[1010] ibid 983 (Barton J).

[1011] *Farnell v Bowman* (1887) 12 App Cas 643 (PC) 649; *Enever v The King* (n 57) 988 (Barton J).

The decision in *Enever v The King* was applied to the situation of Commonwealth customs officers in *Baume v Commonwealth*.[1012] Sections 56 and 64 of the *Judiciary Act 1903* (Cth) would render the 'Commonwealth', which Griffith CJ had earlier said to mean the 'Crown as representing the whole community',[1013] liable for the actions of its officers in circumstances where the maxim *respondeat superior* would apply. The Commonwealth was not liable for 'every wrongful act done by its servants', including where the person doing the act had been charged by the statute 'with an independent discretion'.[1014] Justice O'Connor said:

> [T]he liability of the Commonwealth for the acts of its servants depends altogether upon the relation of the Commonwealth to its servants in regard to the particular matter in question. No doubt there are many cases in which the Commonwealth is liable for all the acts of its servants when acting within the scope of their authority. … If the Statute imposes a duty upon the Commonwealth, the Commonwealth is liable for the breach of that duty by its servants. But it does not follow that because the Statute imposes a duty upon the servants of the Commonwealth the Commonwealth is liable for the breach of the servant's duty.[1015]

In this case, the actions of the Collector of Customs Duties, breaching the duty to provide copies of impounded books and documents imposed upon him directly by sections 214 and 215 of the *Customs Act 1901* (Cth), could not be attributed to the Commonwealth for the purposes of liability. Justice O'Connor explained that, as the duty was 'imposed upon the collector and not upon the Commonwealth',

[1012] *Baume v Commonwealth* (n 991).

[1013] cf *Commonwealth v Baume* (n 2) 413 (Griffith CJ).

[1014] *Baume v Commonwealth* (n 991) 110-111 (Griffith CJ).

[1015] ibid 123 (O'Connor J).

therefore the Commonwealth was not liable for his failure to come to a correct conclusion.

The rule established in these cases was described by Gibbs CJ in 1986 as 'firmly established as part of the common law of Australia.'[1016] That it has been modified in particular contexts by statute[1017] does not detract from its expository significance. The rule shows the fallacy of the theory of government (constitutional person): the actions of a human being acting as the 'government', within the power conferred upon him by the 'government', are not attributed to the 'government' for the purposes of liability. They are instead regarded as the individual's own actions, even where they are *ultra vires*, such that the Commonwealth (constitutional person) escapes liability. This confirms the distinction between the constitutional person and the government.

(b) *Legal Personality and Section 61 of the* Constitution

Although this is not a thesis about the executive power of the Commonwealth, it is necessary to explore the suggestion that section 61 of the *Constitution* confers a 'category' of 'power' derived from, or understood or constituted by reference to, the 'mere capacities of the kind which may be possessed by persons other than

[1016] *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 637 (Gibbs CJ); see also *Field v Nott* (1939) 62 CLR 660, 675 (Dixon J); *Cubillo v Commonwealth* (n 991) 443-444 (O'Loughlin J). The decision in *Enever v The King* (n 57) was also approved by the Privy Council in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 (PC) 120.

[1017] eg *Law Reform (Vicarious Liability) Act 1983* (NSW), ss 6 and 8, deeming a police officer to be a person in the service of the 'Crown', and rendering the 'Crown' vicariously liable for torts committed by such persons in the course of service: see generally *New South Wales v Ibbett* (n 62).

the Crown.'[1018] The suggestion, put in various forms over time, is that the Commonwealth, as a legal person, can do whatever any other legal person can do. This is perhaps the area of constitutional law most overtly influenced by the proposition that the Commonwealth is a legal person, and the 2012 decision on this topic, in *Williams (No 1)*, furnished the most recent occasion for the High Court to consider the Commonwealth's legal personality.

This 'category' of executive power has had almost unanimous support in the literature,[1019] by reason of a line of cases, prior to *Williams (No 1)*, considered in section (i) below. *Williams (No 1)*[1020] represents a radical departure from what had been assumed to be the orthodoxy. The ratio decidendi of that case is not clear, save that four Justices held that this 'category' of executive power does not authorise certain types of payment out of the Consolidated Revenue Fund, nor funding arrangements consequential on such payments. That finding involved the rejection of a submission that the Commonwealth (constitutional person) had the 'same capacities to contract and spend' as a human being. This was a

[1018] *Davis v Commonwealth* (n 52) 108 (Brennan J); *Pape* (n 674) 60 [126] (French CJ), noting controversy about the source; *Williams (No 1)* (n 2) 185 [22] fn 71 (French CJ) and 342 [484] (Crennan J), cf 253 [203] (Hayne J), 320-321 [405] (Heydon J) and 374 [595] (Kiefel J); see Anne Twomey, 'Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 316 fn 25, noting the different designations that have been given to this power.

[1019] See MP Crisp, 'Contracts of the Executive Government' (1952) 26 *Australian Law Journal* 129, 133, saying that the 'correct approach' was to see government contracts as 'valid unless prohibited'; Enid Campbell, 'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14, 15- 17; Enid Campbell, 'Federal Contract Law' (1970) 44 *Australian Law Journal* 580, 580; Kanwal K Puri, *Australian Government Contracts: Law and Practice* (CCH 1978) 44-46; Geoffrey Sawer, *Federation Under Strain* (Melbourne University Press 1977) 70-71; Winterton (n 121) 44-45; Leslie Zines, *The High Court and the Constitution* (5th edn, Federation Press 2008) 346 and 349- 350; Twomey (n 1018) 316, 321-322, 326.

[1020] *Williams (No 1)* (n 2).

submission[1021] that elicited certain statements concerning the relationship between the Executive Government of the Commonwealth and the Commonwealth (constitutional person). The decisional context, and the judgments, are explored in sections (ii) and (iii) below respectively.

A subsequent challenge to the authority of *Williams (No 1)* was recently rejected, in *Williams (No 2)*.[1022] The effect of the *Williams* cases is to place the Commonwealth (constitutional person) in a position materially different from other non-human legal persons. The rules of attribution applicable to companies, for example, do not require the identification of a 'power' vested in an authorised officer before the behaviour of that officer will count as the acts of the company.[1023] This presents a conceptual complexity that confronts each theory of constitutional personality, derived as it must be from the federally-influenced interpretative rules that are applied (in effect) to the constitutional person's charter (the *Constitution*). A particular type of executive power, here termed 'agency'-based executive power, is required in order for the Executive Government to activate or avail itself of the capacities of the Commonwealth (constitutional) person. The decisions require a distinction to be drawn between the capacity of the Commonwealth (constitutional person) to contract, and the

[1021] cf ibid 416 [21] (French CJ) and 458 [154] (Gummow and Bell JJ). The Plaintiff's Supplementary Submission in Reply to the Further Submissions of the Defendants (filed on 12 September 2011 in matter number S307 of 2010) 3 [13] contains the following passage: 'when the Commonwealth executive enters into a contract, it is the Commonwealth of Australia which is a party to that agreement, not some separate legal person called the Executive Government of the Commonwealth.' This passage notionally refuted an assumption that it identified in the submission made by the Commonwealth Solicitor-General in this case.

[1022] *Williams (No 2)* (n 129).

[1023] cf *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) 506 (Lord Hoffmann).

executive power that is needed to bind the Commonwealth (constitutional person) to a contract.

(i) Authorities Prior to Williams (No 1)

This section deals with a line of authority, prior to *Williams (No 1)*, which must now be understood as showing that a person, officer or institution purporting to bind the Commonwealth (constitutional person) to a legal relationship with another legal person must, if he or she is to engage the undoubted capacity of the Commonwealth to form such relationships, have 'power' to effect in the Commonwealth (constitutional person) a liability.

The first case in which it was argued that the Commonwealth's legal personhood itself furnishes a source of executive power was the *Wool Tops Case*.[1024] The argument of Mr Owen Dixon KC in that case is not reported in the *Commonwealth Law Reports*, and is only scantily described in the judgments.[1025] The full significance of what was decided in that case can be appreciated by recourse to the transcript of argument, obtained at the National Archives in Canberra. The transcript of the second day of the hearing before the Full Court, on Tuesday 17 October 1922, shows that Mr Dixon was surprised by the Court's resistance to what he called 'the ordinary common law power of the Government

[1024] *Wool Tops Case* (n 321).

[1025] cf ibid 438 (Isaacs J), 452 (Higgins J).

to make an agreement with anybody ready to make an agreement with it'.[1026]

There occurred the following exchange:

Isaacs J: Where do you find the common law power?

Mr Dixon: Where there is a common law power – I admit I have never seen it. It is an every day experience. …

Higgins J: Where do you get the power of the Executive to make an agreement for any purpose?

Mr Dixon: I should say the King has full capacity to contract in common law and that is not controlled by any Statute and never has been controlled by any Statute. …

Higgins J: Where do you get Executive power for the Crown to enter into an agreement for any purpose?

Mr Dixon: I can only say the Crown is a legal entity and there is no law which circumscribes its power. It has never been put in the category of people who cannot contract. You will not find the Crown included with criminals and lunatics.

Higgins J: Any contract which is made by a corporation except for certain purposes is void.

Mr Dixon: That is not correct in common law operation.

Higgins J: The Crown acting for the Commonwealth is a statutory operation.

Mr Dixon: I take the Crown to be a one indivisible Crown and the Commonwealth Constitution merely directs how it would exercise certain powers.

Duffy J: This question now raised is merely a question of the power under the Constitution.

Mr Dixon: Yes, it goes to the construction of the Constitution, certainly.

Isaacs J: In cases of contract I have always tried to find authority for them.

[1026] National Archive of Australia, *Transcript of Proceedings in the Full High Court of Australia*–The Commonwealth and Central Wool Committee versus the Colonial Combing, Spinning and Weaving Company Ltd [A456, W29/15/487] (*Wool Tops Transcript*).

Mr Dixon: That may be wisdom instead of law.

Duffy J: Is it not a question of the Constitutional power if it is seriously raised that there is a nullity?

Mr Dixon: The rights to make it an agreement I base upon the ordinary common law power of the Crown suggesting that there is no power to control it in any way. Just as the Crown can make agreements with Managers of Ammunition Factories and Woollen Mills. That is the substance of that part of the agreement. It does not fall within any contention founded on Clause 10. That is all I desire to say as to the agreements and their validity.

Isaacs J: Your view then is that the Commonwealth can make an agreement with any manufacturer?

Mr Dixon: Yes.[1027]

Later in the afternoon, Mr Dixon referred the Court, 'as authority for the position I was putting before', to the statement of Rowlatt J in *The Amphitrite*[1028] that 'the Government can bind itself through its officers to a commercial contract'.

After this exchange, the matter was taken up when the Court resumed sitting on 9 and 10 November 1922 by junior counsel for the Commonwealth, Mr Ernest Mitchell.[1029] Mr Mitchell referred to a number of authorities, including the *Banker's Case*, [1030] *Macbeath v Haldimand* [1031] and *Attorney-General v Lindegren*,[1032] to establish 'the common law power of the Crown' to make

[1027] ibid 136-138 (17 October 1922).

[1028] *Rederiaktiebolaget 'Amphitrite' v The King* [1921] 3 KB 500 (KB) 503 (Rowlatt J); *Wool Tops Transcript* (n 1026) 148 (17 October 1922). See also *Bardolph* (n 837) 508 (Dixon J), relying on the same passage.

[1029] *Wool Tops Transcript* (n 1026) 80 (9 November 1922), 184-187 (10 November 1922).

[1030] *The Bankers' Case* (n 146) .

[1031] *Macbeath v Haldimand* (n 146) .

[1032] *Attorney-General v Lindegren* (1819) 6 Price 287 (Exch); 146 ER 811.

contracts in the UK. He then relied upon the judgment of Griffiths CJ in *O'Keefe v Williams*,[1033] as showing the applicability of the English position to Australia. Those cases were said to establish that there was 'a common law power in the King to make contracts'. Once the King had 'any common law power', Mr Mitchell argued, there must be conceded 'the same power as the subject'.[1034] This was an early example of the type of reasoning that was to be rejected in *Williams (No 1).*

A fuller appreciation of what was argued by the Commonwealth in the *Wool Tops Case* clarifies the intended target of certain elliptical statements that appear in the judgments.[1035] The joint judgment of Knox CJ and Gavan Duffy J asserted that 'an act not authorised by section 61 is not within the legal power of the Commonwealth Executive Government'.[1036] That statement is best understood as a rejection of the above-described submissions. Similarly, it was to this submission that Isaacs J can be understood as having addressed the statement that there could not be an unlimited application in Australia 'of the common law *as exercised by* the King's Government in England'.[1037] Mr Dixon's submissions, described by Higgins J as 'startling', provoked his Honour to ask rhetorically:

> If the Government has power to contract to the effect of these agreements, it would seem to have power to contract for any purpose not prohibited by statute, as contended by counsel. What is there to prevent the Government

[1033] *O'Keefe v Williams* (1907) 5 CLR 217, 226 (Griffith CJ). See *Wool Tops Case* (n 321) 455-456 (Higgins J), holding that the statement of Griffith CJ in this case was inapplicable to the executive power under the *Constitution*.

[1034] *Wool Tops Transcript* (n 1026) 190 (10 November 1922).

[1035] *Williams (No 1)* (n 2) 314 [388] (Heydon J), pointing out the obscurity of the passages; compare *AAP Case* (n 644) 379 (Gibbs J) and 396-397 (Mason J).

[1036] *Wool Tops Case* (n 321) 432 (Knox CJ and Gavan Duffy J).

[1037] ibid 440 (Isaacs J) (emphasis added).

> from contracting to supply coal to all the factories in Australia? There might be no appropriation of moneys in Parliament; but the Commonwealth might be rendered liable in damages amount to millions of pounds, if it broke the contract…[1038]

The transcript shows that Higgins J saw the Commonwealth as 'a fictitious entity' which, like any corporation created by statute, had a contractual capacity constricted to defined purposes.[1039] That view was later adopted by Rich J.[1040] In his judgment in the *Wool Tops Case*,[1041] Higgins J expressed this view by describing the Governor-General and the Executive Government as 'creatures of the Constitution', the latter having 'no powers except such as are conferred by or under this British Act, expressly or by necessary implication.' Justice Starke broadly agreed.[1042] So understood, the *Wool Tops Case* shows that it is the executive power of the Commonwealth that is limited, rather than the capacity of the Commonwealth (constitutional person). The result is the same: no valid contract. By clarifying this distinction, however, it is possible to see that the Commonwealth (constitutional person) is here conceptually disjoined from the human beings through whom it acts, and from the powers separately vested in them.

[1038] ibid 452 (Higgins J).

[1039] *Wool Tops Transcript* (n 1026) 108 (9 November 1922), describing the Commonwealth as 'a creature of statute, a fictitious entity', and 137 (17 October 1922), saying that 'The Crown acting for the Commonwealth is a statutory operation.' The latter statement occurs in the context of the exchange that is extracted above.

[1040] cf *Attorney-General (Vic) v Commonwealth* (1935) 52 CLR 533 (*Clothing Factory Case*) 562 (Rich J).

[1041] *Wool Tops Case* (n 321) 453 (Higgins J).

[1042] ibid 461 (Starke J).

That impression is confirmed by the treatment of Mr John Latham KC's submission in the *Clothing Factory Case*,[1043] which was the attempt by the Victorian Chamber of Manufacturers to ease the competitive pressure exerted on local businesses in Melbourne by a government-sponsored clothing factory whose operations had been expanded from the production of military uniforms during First World War to include supply of uniforms to State and other Commonwealth Government Departments, as well as municipal bodies. Mr Latham was led in the *Clothing Factory Case* by Sir Edward Mitchell, who had successfully resisted Mr Dixon KC's submissions in the *Wool Tops Case*, and who based his successful defence of the expanded operation of the clothing factory squarely upon section 63 of the *Defence Act 1903* (Cth).[1044] It was Mr Latham KC alone who advanced the submission that, because the expanded operation of the factory did not involve 'any interference with the right of any individual in the community',[1045] there was no obligation 'to prove affirmatively that there is a power'.[1046] That submission treated the Commonwealth (constitutional person) as if it were any other artificial legal person, capable of wielding capacities through or by employees or directors. So long as the exercise of the capacity did not interfere with individual rights, no power was required.

The error of this submission, as *Williams (No 1)* would ultimately clarify, was to ignore the role of the Executive Government, and the limitations on Executive

[1043] *Clothing Factory Case* (n 1040).

[1044] ibid 556 (Gavan Duffy CJ, Evatt and McTiernan JJ), 563 (Rich J).

[1045] ibid 550 (report of argument of Mr Latham KC).

[1046] ibid 552-553 (report of argument of Mr Latham KC).

power, in wielding the capacities of the Commonwealth (constitutional person). Whilst it was unnecessary for the majority to consider Mr Latham's submissions,[1047] Starke J, who dissented from the majority on the applicability of section 63 of the *Defence Act 1903* (Cth),[1048] rejected them. The narrower operations of the factory, namely to supply uniforms and clothing to government departments, fell within the executive power, since they were 'incidental to the administration of the various departments of State'.[1049] In its broader operation, however, the attempt to support the *civilian* contracts of the clothing factory failed. With reference to section 61, Starke J said that the *Constitution* contained no power, whether express or implied, that enabled the Commonwealth 'to establish and maintain clothing factories for other than Commonwealth purposes'.[1050] That did not mean that the Commonwealth was deprived of ownership of surplus stock but merely to own that stock did not give power to dispose and manufacture.[1051]

The same attitude seems to underlie the judgment of Rich J, who said that he was not at that time prepared to accept that the Commonwealth Executive could 'enter into business operations simply because it is a juristic entity'.[1052] His Honour was also sceptical about the proposition that, 'in conducting business',

[1047] ibid 559 (Gavan Duffy CJ, Evatt and McTiernan JJ).

[1048] ibid 566 (Starke J).

[1049] ibid 564-565 (Starke J).

[1050] ibid 567 (Starke J).

[1051] ibid 569 (Starke J).

[1052] ibid 562 (Rich J).

the Commonwealth was 'not exercising governmental power over the subject.[1053] Neither Starke J nor Rich J denied that the Commonwealth had 'juristic' status, nor that it had capacity. The judgments denied both the existence of a separate power derived from that capacity, and the proposition that no power was required at all.

At this point, at least three factors conspired to withdraw this question from the purview of the courts. The first was the Commonwealth's aversion, which is exhibited in two places in the *Commonwealth Law Reports*,[1054] to contesting liability on grounds putting into issue the executive power to contract. The second was the assumption, rejected by the High Court in *Pape*,[1055] that sections 81 and 83 of the *Constitution* conferred a broad 'power' to spend money including in connection with contracts. A third factor was an assumption about the 'breadth' dimension of the executive power (ie the subjects (topics) over which the executive power extends consistently with federal considerations[1056]), namely that Commonwealth executive power to contract and spend extended at least to the heads of Commonwealth legislative power. The parties in *Williams (No 1)* conducted the litigation on the basis of that assumption all the way up to the hearing, when they suddenly withdrew it in response to questions from the bench, leaving the High Court 'as on a darkling plain'.[1057] Ultimately, a majority of French CJ, Gummow and Bell JJ, and Crennan J rejected that

[1053] ibid 562 (Rich J).

[1054] eg *Woollen Mills* (n 880); *Thomson's Case* (n 809).

[1055] *Pape* (n 674).

[1056] Winterton (n 121) 29-30 and 40-44.

[1057] *Williams (No 1)* (n 2) 296 [343] (Heydon J).

assumption,[1058] and an application to reopen the decision was rejected recently in *Williams (No 2)*.[1059]

Finally, and before turning to the *Williams* decisions, it is relevant to note that a related question was agitated in the 1975 decision of the High Court in *Johnson v Kent*.[1060] A group of local residents had challenged the proposal of the Minister for Works to build, on behalf of the Post-Master General, a telecommunications tower at the summit of Black Mountain in Canberra.[1061] Funds were duly appropriated, but there was found to be no statutory authority for the project.[1062] The High Court upheld the development on the basis of section 61, which, at least in relation to the Territory,[1063] included 'traditional executive power broadly embraced in the description of "the prerogative"'.[1064] Chief Justice Barwick, with whom McTiernan J and Stephen J agreed,[1065] noted that the Commonwealth owned the land; but what the 'executive does upon and in respect of such lands will be done by virtue of the prerogative and not by virtue of proprietorship.'[1066]

[1058] ibid 419 [27] (French CJ), 453-454 [134]-[137] (Gummow and Bell JJ), 550-551 [544] (Crennan J).

[1059] *Williams (No 2)* (n 129).

[1060] *Johnson v Kent* (n 954) .

[1061] ibid 172-173 (Jacobs J).

[1062] By reason of the fact that the tower was also to accommodate a restaurant and viewing facilities for the public, which were intended to generate sufficient revenue to reimburse the Commonwealth for the capital outlay: see ibid 169 (Barwick CJ).

[1063] As to which, see ibid 169 (Barwick CJ), saying that the executive power was not 'federally restrained' in relation to the Territory because the legislative power derived from s 122 is 'non- federal', and see 172 (McTiernan J), 172 (Stephen J) and 174 (Jacobs J) agreeing.

[1064] ibid 169 (Barwick CJ).

[1065] ibid 172 (McTiernan J) and 172 (Stephen J).

[1066] ibid 170 (Barwick CJ) and see 174 (Jacobs J), saying that the doing of acts upon its own lands within a Territory would be valid 'if those acts are of the kind which lie within the prerogative of the Crown.'

Again that involved no denial of capacity; nor, by implication, of legal personhood. What it denied was the derivation of power from capacity, or the ability of those comprising the Executive Government to act as if they were the managers of a company.

In none of these cases was the distinction between the powers of the Executive and the capacities of the Commonwealth (constitutional person) very clearly articulated. Nevertheless, each case can be understood as having rejected submissions that were framed on the assumption that the Executive Government could wield the capacities of the Commonwealth (constitutional person) (whether to spend, to contract, or to build property on land owned by the Commonwealth) merely because the Commonwealth was a legal person. As *Williams (No 1)* would clearly show, the Executive Government requires power under the *Constitution* (primarily section 61) or a valid statute before it can exercise those capacities.

(ii) Williams (No 1)

Williams (No 1) was a challenge to the provision, through the Department of Education, Employment and Workplace Relations, of funding to the Darling Heights State School under the National School Chaplaincy Program. The funding was provided through an agreement between the Commonwealth and a company incorporated under the *Corporations Act 2001* (Cth).

The Commonwealth Solicitor-General defended the constitutionality of the payments and the agreement in issue on two distinct grounds. The 'narrow submission' was based upon an assumption, described above, that the 'breadth'

of the executive power followed the contour of the legislative competence of the Parliament of the Commonwealth, with some narrowing and some widening. As noted above, a majority of French CJ, Gummow and Bell JJ, and Crennan J rejected the assumption (that executive power maps onto legislative competence).[1067] The validity of the assumption was left open by Hayne J and Kiefel J, who held in any event that the contract and payments fell outside the 'breadth' of the executive power.[1068] Justice Heydon, dissenting, would have upheld the payments on the ground that they could have been authorised by legislation enacted by the Parliament in reliance on section 51(xxiiiA) of the *Constitution*.[1069]

As an alternative to the 'narrow submission' described above, the Commonwealth Solicitor-General advanced a 'broad submission', that the 'Commonwealth' (government) had an ability to contract and pay money that was relevantly unlimited by reference to considerations of 'breadth'. The basis for this submission was that to contract and spend were activities taking effect under the 'general law', for which no specific source of executive power was required. This submission was understood by their Honours to involve the proposition that, because it was a legal person, the Commonwealth has a 'relevantly unlimited power to pay and to contract to pay money', analogous to that of a natural person.[1070]

[1067] *Williams (No 1)* (n 2) 419 [27] (French CJ), 453-454 [134]-[137] (Gummow and Bell JJ), 550- 551 [544] (Crennan J).

[1068] ibid 467 [194] (Hayne J) and 556 [569] (Kiefel J).

[1069] ibid 319 [403] (Heydon J).

[1070] *Williams (No 1)* (n 2) 191-192 [35] (French CJ), 236 [150] (Gummow and Bell JJ), 244 [180] (Hayne J), 344 [489] (Crennan J), 368 [576] (Kiefel J).

There is a strong resemblance between this 'broad submission' and the submissions that were rejected in the *Wool Tops Case* and the *Clothing Factory Case,* detailed above. There is also a strong resemblance between the interjections of the High Court, as recorded in the transcript of the *Wool Tops Case*, and the following exchange occurring during the hearing of *Williams (No 1)*:

> Gummow J: Insofar as you are enlisting the common law, common law does not give unlimited capacity to artificial legal persons, does it?
>
> Mr Gageler: No.
>
> Gummow J: It does not give them to natural persons either.
>
> Mr Gageler: No.
>
> Gummow J: … What is the unlimited nature of the Commonwealth capacity as an artificial person?
>
> Mr Gageler: Pardon, your Honour?
>
> Gummow J: The Commonwealth is an artificial legal entity, obviously.
>
> Mr Gageler: Yes.
>
> Gummow J: In what sense does the common law endow it with any capacity? You cannot use a natural person as an analogy and if you use other artificial persons as an analogy, you run into the problem which Justice Hayne has been asking you about, I think. …
>
> Mr Gageler: …what one has in the spending of money and in the entering into a contract is the exercise of a capacity in common with a natural person.[1071]

The rejection of the 'broad submission' in six separate majority judgments[1072] presents a number of seemingly competing approaches to the relationship

[1071] *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 199 (10 August 2011).

between executive power and the legal (constitutional) personality of the Commonwealth. The judgments are explored below.

Common between the majority judgments is the acceptance of three propositions or premises. First, a power to spend, and to contract to spend, appropriated moneys must be found in the *Constitution* or in otherwise valid statutes.[1073] In this connection, a number of their Honours indicated that the Executive Government was not, itself, a legal person. Second, section 61 of the *Constitution* would authorise a contract or expenditure if the 'breadth' dimension were otherwise satisfied.[1074] In other words, and perhaps uncontroversially, the executive power of the Commonwealth (government) does support expenditure and contracts, where it is found to exist. Third, the agreement and payments in question were invalid, as being beyond the executive power of the Commonwealth under section 61 of the *Constitution*.[1075] Beyond that, different reasons are advanced for rejecting the 'broad submission', each containing interesting but occasionally competing insights about legal personality. Nevertheless, even taken alone, those propositions stand against the theory that the Commonwealth (government) is a legal person. The requirement to locate a

[1072] *Williams (No 1)* (n 2) 186-187 [26]-[27] and 191-193 [35]-[38] (French CJ), 236-239 [150]- [159] (Gummow and Bell JJ), 270-271 [251]-[253] (Hayne J); 343- 344 [488] and 355 [534] (Crennan J), and 373-374 [595] (Kiefel J).

[1073] cf *Williams (No 2)* (n 129) 455 [25] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[1074] Examples of contracts falling within the 'depth' dimension of s 61 are: the wartime contract for the construction of cargo barquentines in *Commonwealth v Kidman* (n 347); and the contracts made in the administration of departments under s 64, as to which see *Williams (No 1)* (n 2) 211- 212 [74] (French CJ), referring to *Bardolph* (n 837) 496 (Rich J), 502 (Starke J), 508 (Dixon J). This thesis has rejected the proposition that *Bardolph* can be relied upon to confine the power of the State executive to bind the 'Crown' to contracts.

[1075] *Williams (No 1)* (n 2) 210 [71] (French CJ), 222 [103] (Gummow and Bell JJ), 273 [260] (Hayne J), 358-359 [545]-[547] (Crennan J), 374 [596] (Kiefel J); and see *Williams (No 2)* (n 129) 454 [24] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

positive source of power involves, inherently, a dissociation of the Executive Government from the Commonwealth (constitutional person).

Chief Justice French accepted that the executive power 'extends to … powers defined by the capacities of the Commonwealth common to legal persons'.[1076] Moreover, his Honour accepted that the executive power would occasionally support the making of contracts without legislation.[1077] The Solicitor-General's 'broad submission' was rejected, essentially on two grounds. The first was that the authorities showed that this 'aspect' of executive power was 'not open-ended.'[1078] The second ground for rejecting the broad submission can be understood as an attack on its tendency towards anthropomorphism. At one point in his judgment, his Honour said that the Commonwealth 'is not just another legal person like a private corporation or a natural person with contractual capacity.[1079] This was so for two reasons.

The first reason was the potential for regulatory outcomes to be achieved through a Commonwealth contract. This was elaborated by a quotation of Professor Winterton that strained against the author's meaning. Winterton elsehwere stated that the power to contract outside the sphere of legislative power existed, and indeed 'should not be underrated,' precisely because of the 'ability of governments to use their contract power to achieve *de facto*

[1076] *Williams (No 1)* (n 2) 184 [22] (French CJ).

[1077] ibid 216-217 [83] (French CJ).

[1078] ibid 183 [38] (French CJ).

[1079] ibid.

regulation'.[1080] The second was the 'impact of the Commonwealth executive power on the executive power of the States.'[1081] Earlier in the judgment, French CJ had said:

> It should be emphasised at the outset that the executive power of the Commonwealth is to be understood as a reference to that power exercised by the Commonwealth as a polity through the executive branch of its government. It is, as the plaintiff submitted, an error to treat the Commonwealth executive as a separate juristic person. The character of the executive government as a branch of the national polity is relevant to the relationship between the power of that branch and the powers and functions of the legislative branch and, particularly the Senate.[1082]

The plaintiff's submissions, adverted to in this passage, had characterised the 'broad submission' as proceeding on the false premise that the 'Executive Government' was a legal person independently of Parliament. The reference to a 'national polity' suggests that a federally restrained executive power was the animus behind the rejection of the 'broad submission'. Relevantly to constitutional personality, and as noted above, the passage seems to conceive of the Commonwealth (government), acting through *its* 'executive branch' which in turn has a relationship with 'the legislative branch', as the constitutional person.

It is convenient next to consider the judgment of Crennan J, since her Honour was the only other judge overtly to state that the executive power included 'the powers which derive from the capacities of the Commonwealth as a juristic

[1080] Winterton (n 121) 47.

[1081] *Williams (No 1)* (n 2) 183 [38] (French CJ).

[1082] ibid 184 [21] (French CJ) (emphasis added).

person'.[1083] Her Honour rejected the Commonwealth's 'broad submission' for a number of different reasons, each of which essentially reduces to the proposition that the executive power does not permit contract and expenditure outside the permissible 'breadth' of section 61 of the *Constitution*. Thus, her Honour held that the case did not involve the species of executive power involved in the protection or benefiting of the 'body politic or nation of Australia'.[1084] The analogy between the Commonwealth and a human being was rejected essentially for three reasons. The first was the principle of Parliamentary control, by which the executive is made accountable to Parliament for expenditure.[1085] The second was the capability of Commonwealth contracts to be used 'to regulate activity in the community'.[1086] The third was the potential that 'citizens would be unable to avail themselves of the constitutional protection in s 109 against inconsistent legislation', in cases where Commonwealth executive acts collided with State legislative acts.[1087] These reasons required rejection of the submission that legal personality could itself furnish the executive with power to bind the Commonwealth to contracts and expenditure.

[1083] ibid 342 [484] (Crennan J).

[1084] ibid 346 [495] and 346-347 [497]-[507] (Crennan J).

[1085] ibid 349-352 [508]-[520] (Crennan J). The same point was made in two different ways: first, the CRF is distinguishable from the funds of 'non-governmental juristic persons'; and second, unlike 'private parties', the CRF may not be appropriated otherwise than for 'purposes of the Commonwealth'.

[1086] ibid 352 [521] (Crennan J).

[1087] ibid 353 [522] (Crennan J).

The joint judgment of Gummow and Bell JJ accepted that the Commonwealth was a legal person.[1088] Their Honours also accepted that the executive power would, within its appropriate sphere, support the making of a contract. For what may be reduced to two reasons, their Honours rejected the Commonwealth's 'broad submission'. The first was that it conflated the capacities of the 'Commonwealth' to contract and spend with the 'distinct and special financial privileges associated with the prerogative'.[1089] This *dictum* is a little elusive, but the implication seems to be that executive powers (including prerogatives pertaining to finance) must be distinguished from the capacity of the Commonwealth (constitutional person). The second denied the analogy to a human being, similarly to the above-quoted passage of French CJ, on the basis that executive power must be understood in the federal setting of the *Constitution*:

> [T]he Commonwealth parties' [broad submission] appears to proceed from the assumption that the executive branch has a legal personality distinct from the legislative branch, with the result that the executive is endowed with the capacities of an individual. The legal personality, however, is that of the Commonwealth of Australia, which is the body politic established under the Commonwealth of Australia Constitution Act 1900 (Imp), and identified in covering cl 6.[1090]

This passage is subtly different from the passage extracted above from the reasons of French CJ. Although it may be erroneous to read it too closely, it does

[1088] ibid 237 [154] (Gummow and Bell JJ).

[1089] ibid 238 [156] (Gummow and Bell JJ), referring to 227-228 [122]-[124] (Gummow and Bell JJ), in which may be found a reference at fn 270 to *Ling v Commonwealth* (1994) 51 FCR 88 (FCAFC) 92-94 (Gummow, Lee and Hill JJ), where the prerogative right to grant or receive a chose in action by assignment was discussed.

[1090] *Williams (No 1)* (n 2) 237 [154] (Gummow and Bell JJ) (fn omitted).

not speak of the Executive Government as a 'branch' of the legal (constitutional) person. Instead, as noted above, it seems to conceive of the Commonwealth (nation) as the legal person, capable of being affected in discrete instances by the Executive Government. Their Honours later said that questions of the contractual and spending capacities of the Commonwealth must take into account the fact that the law of contract was 'fashioned primarily to deal with the interests of private parties, not those of the executive government'.[1091] Where 'public moneys are involved', their Honours said, questions about the Commonwealth's 'contractual capacity' are 'to be resolved "through different spectacles".'[1092]

Justice Hayne saw the concentration on the Commonwealth's 'capacity' to contract as a distraction. 'As a polity', Hayne J said, 'the Commonwealth is not under any disability preventing it from making a contract or a disposition of property.'[1093] That was, however, irrelevant, and the language of 'capacity' distracted from the question whether the Executive had any 'power' to make the payments.[1094] His Honour said:

> There is no basis in law for attributing human attitudes, form or personality either to the federal polity that was created by the Constitution or, as the Commonwealth parties sought to do, one branch of the government of that polity—the executive. The argument asserting that the executive government

[1091] ibid 236 [151] (Gummow and Bell JJ), referring to *Woollen Mills* (n 880) 461 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

[1092] *Williams (No 1)* (n 2) 236 [151] (Gummow and Bell JJ), quoting the discussion in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51 (Mason J) of the considerations governing the protection by equitable injunction of the information of government. One example of what is to be seen through these 'spectacles' is the debate about the extent to which a Commonwealth contract could 'fetter executive action in a matter of public interest.' Their Honours referred to the other examples given in the judgment of Crennan J.

[1093] *Williams (No 1)* (n 2) 252 [201] (Hayne J).

[1094] *Williams (No 1)* (n 2) 253 [203] and 259 [217] (Hayne J).

> of the Commonwealth should be assumed to have the same capacities to spend and make contracts as a natural person was no more than a particular form of anthropomorphism writ large. It was an argument that sought to endow an artificial legal person with human characteristics. The dangers of doing that are self-evident.[1095]

His Honour later said that the Executive Government of the Commonwealth was the 'executive government of an artificial legal entity – a polity.'[1096] The 'polity' was later said, confusingly, to be what is described in the preamble as the 'indissoluble Federal Commonwealth under the Crown'.[1097] The difficulties with that conception were identified above, and can be put aside as distracting from the federal and financial orientation of the reasons. The proposition that the executive power could authorise unlimited spending was inconsistent with the 'carefully crafted checks' effecting parliamentary control over the raising and expenditure of 'public moneys'.[1098] Emphasis is placed in his Honour's reasons, and in the subsequent joint judgment in *Williams (No 2)*,[1099] on the adjective '*public*' in the phrase 'public moneys'. That, with respect, does not advance the question: any asset or right of the Commonwealth (constitutional) person is in a sense 'public'.

Justice Heydon accepted the submission that, subject to immaterial exceptions, section 61 of the *Constitution* has a 'breadth' that is coterminous with the areas of Parliament's legislative competence, whether or not that competence

[1095] ibid 253-254 [204] (Hayne J).

[1096] ibid 254 [205] (Hayne J).

[1097] ibid 254 [206] (Hayne J).

[1098] ibid 258-259 [216] (Hayne J).

[1099] eg *Williams (No 2)* (n 129) 456 [35] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

had been exercised.[1100] Because the contracts and payments in this case could have been authorised by a law enacted under section 51(xxiiiA) of the *Constitution*,[1101] the 'breadth' element had therefore been satisfied. His Honour noted that, in written submissions and during argument, counsel for the plaintiff had conceded the existence of an 'executive power to contract without statutory authorisation when there is no abrogation of rights'.[1102] His Honour pointed out that very little attention had been given to the 'depth element' of executive power, being the things that the Executive may do—breadth' having been established, during argument. Prima facie, the statements of Brennan J in *Davis v Commonwealth*[1103] and French CJ and the plurality in *Pape*[1104] supported the proposition that the executive power includes within its appropriate 'breadth' the 'capacities' that may be possessed by persons other than the Executive. A prime example was the 'capacity to contract'.[1105] Since the plaintiff had not demonstrated any supererogatory cause for invalidity, it would be inappropriate in the absence of full argument 'to narrow the executive power of the Commonwealth to an extent sufficient to find for the plaintiff.'[1106]

Similarly to Hayne J, Kiefel J also saw the language of 'capacity' as a distraction. Her Honour said that 'capacity of the Commonwealth Executive to

[1100] *Williams (No 1)* (n 2) 295 [340] and 319 [403] (Heydon J).

[1101] ibid 333 [441] (Heydon J).

[1102] cf ibid 318 [399] (Heydon J).

[1103] *Davis v Commonwealth* (n 52) 108 (Brennan J).

[1104] *Pape* (n 674) 60 [126] (French CJ) and 83 [214] (Gummow, Crennan and Bell JJ).

[1105] *Williams (No 1)* (n 2) 320 [405] (Heydon J).

[1106] ibid 321 [406] (Heydon J).

contract' was irrelevant to the question whether the Executive had a 'power to spend'.[1107] The question was 'not one of the Executive's juristic capacity to contract, but its power to act.'[1108] A difference between the contracts of the 'Commonwealth executive' and those of a 'natural person' was that, when the 'Commonwealth contracts, it may be committing to the expenditure of public moneys.'[1109] The primary consideration, however, was that the power of the executive to spend was limited to 'the confines of some power derived from the *Constitution*.'[1110] Examples of the extent of the executive power were the prerogative, the subject matters of express legislative powers, and 'matters which are peculiarly adapted to the government of a nation.'[1111] Because the payments and the contract in this case fell within none of those aspects of 'breadth', they were invalid.

The conclusion relevantly deducible from *Williams (No 1)* is that the Commonwealth's legal personality neither broadens nor trumps the 'breadth' dimension of executive power. The majority judgments advanced diverse reasons justifying this conclusion, and were expressed using language that occasionally distracted from the true issue relevantly presented by the case; an issue that is best appreciated by considering the nature of the submission that was rejected, and the authorities upon which their Honours relied. The 'broad submission' was treated as a syllogism, because it sought to infer the existence of the necessary

[1107] ibid 368-369 [577] (Kiefel J).
[1108] ibid 374 [595] (Kiefel J).
[1109] ibid 368-369 [577] (Kiefel J).
[1110] ibid 373-374 [595] (Kiefel J).
[1111] ibid 373 [594] (Kiefel J).

'power' from the premises: (a) that the Commonwealth is a legal person, with capacities no less extensive than those of human beings; and (b) that human beings have full dispositive and relational capacities. Each judgment accepted that the 'Commonwealth' had capacity to contract, at least according to the definition used in this thesis, and therefore each judgment accepted, whether overtly or implicitly, that the Commonwealth is a legal person.

The outcome of the majority judgments in *Williams (No 1)* was that the actions of human beings comprising the Executive Government of the Commonwealth, over three separate administrations, in pursuance of a policy agreed between Commonwealth and State authorities, were not attributed to the Commonwealth (constitutional person). They were not attributed in the sense that the contract and the payments were held invalid, an outcome in respect of which restitutionary consequences could legally follow. The case confirms that the Commonwealth is a legal (constitutional) person. It confirms that the Commonwealth (constitutional person) has capacity to contract. Furthermore, by refusing to treat the human beings comprising the Executive Government as capable of contract and expenditure merely in right of that legal personality, the decision dissociates the Executive Government from the Commonwealth (constitutional person), and to that extent confirms the negative claims made in this thesis: the government is not a legal person, whilst the constitutional person is not the government.

(3) Conclusion to Chapter III

The cases discussed in the chapter necessitate the rejection of the broad theory that the Commonwealth (government) is a legal person. The Commonwealth (constitutional person) was shown never to wield governmental power, and was frequently seen not to be liable for the acts or omissions of members of the Commonwealth (government). The Commonwealth (government), by contrast, was shown to be comprised of multiple distinct legal persons, and institutions not having legal personality, which exercise power and accrue rights and liabilities separately from the Commonwealth (constitutional person). That shows the necessity of a theory delimiting the Commonwealth (constitutional person) from the Commonwealth (government).

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CHAPTER IV: THE COMMONWEALTH (CONSTITUTIONAL PERSON) AND THE LEGAL SYSTEM

The Commonwealth's legal personality has often been perceived as having importance for determining the extent to which 'it' may be subjected to the legislation of State Parliaments.[1112] To that extent alone, the *Cigamatic* doctrine would merit exploration here.[1113] Unfortunately, however, this doctrine is notoriously difficult and, in significant respects, it remains unsettled.[1114]

This chapter surveys the views of the *Cigamatic* doctrine that have been advanced since Federation. Where relevant, it examines those views alongside the principles of statutory construction, traditionally known as 'Crown immunity',[1115] by which courts construe whether a State Act intends to bind the Commonwealth. It will emerge, however, that a different vision of the Commonwealth's legal personality has been projected from each of the different postures that have been adopted with respect to the doctrine. The implications for a theory of constitutional personality shift according to which view of the doctrine is taken. This makes very difficult any attempt to reason outwards from

[1112] eg *Bogle* (n 2) 259 (Fullagar J); see generally *Municipal Council Case* (n 2); *Wire Netting Case* (n 2); Colin Howard, *Australian Federal Constitutional Law* (3rd edn, Lawbook Co 1985) 220, 227; Sawer (n 99) 585-586; and Gabriël Moens and John Trone, *Lumb & Moens Annotated Constitution of the Commonwealth of Australia* (7th edn, LexisNexis Butterworths Australia 2007) 507. For a critique, see Zines (n 1019) 493-494.

[1113] *Cigamatic* (n 93). Except where directly relevant to the Commonwealth's legal personality, this chapter does not consider the inverse principle protecting States from Commonwealth laws, associated with the decision in *Melbourne Corporation Case* (n 12).

[1114] *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 78 [52] (Gummow J), saying that the doctrine remains unsettled.

[1115] Except where directly relevant to the Commonwealth's legal personality, this chapter does not consider the associated 'shield of the Crown' doctrine, which governs the application of the rule to Commonwealth agencies having separate legal personality.

the *Cigamatic* doctrine. It also suggests that, to some extent at least, the Commonwealth's constitutional personality may be derived from or necessarily influenced by *ad hoc* findings concernings its immunity. The utility of the *Cigamatic* doctrine to theories of constitutional personality is therefore largely inductive and oblique.

Although it is not necessary to take a stance on the *Cigamatic* doctrine, the chapter advances reasons for preferring the view propounded by Gummow J in *Henderson's Case*.[1116] There, his Honour held that the *Cigamatic* doctrine protected members of the Executive Government of the Commonwealth from State legislation trespassing upon what his Honour described as its 'exclusive domain'.[1117] The doctrine thus completes the scheme established by the *Constitution* for the protection of the governmental power of the Commonwealth from State interference; legislative power is protected from State interference by section 109 of the *Constitution*, the jurisdiction of the High Court is protected from State interference by implication from Chapter III of the *Constitution*,[1118] whilst the *Cigamatic* doctrine protects exercises of the executive power falling within what might be called the zone of exclusivity. On that reading, the critical

[1116] *Henderson's Case* (n 27) 463-464 (Gummow J).

[1117] ibid 473 (Gummow J).

[1118] ibid 463 fn 184 (Gummow J), referring to: *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168, 169 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ); *John Robertson & Co Ltd (in Liq) v Ferguson Transformers Pty Ltd* (1972) 129 CLR 65, 79 (Menzies J), 84 (Walsh J), 87 (Gibbs J), 93 (Mason J). These cases show that the Parliament of a State is unable to affect the exercise of the Commonwealth's judicial power.

issue is how best to characterise the nature and type of executive power in each case.[1119]

This view of the immunity will be shown to involve a rejection of the *dictum* of Fullagar J in *Bogle*:[1120] that the Commonwealth 'is not a juristic person which is subjected … to the legislative power of any State Parliament.' Stated affirmatively, the Commonwealth (constitutional person) is capable of being the object of State laws. That proposition is highly significant to this thesis, because it does not hold true of the Commonwealth (government), or the Commonwealth (nation). Neither of those conceptions is a legitimate object of State regulation. Once Fullagar J's proposition is rejected, it becomes necessary for a proponent of either of the broader theories of constitutional personality to explain this paradox. The Commonwealth (constitutional person), consistently with the unitary nature of legal personality, is a unit of the 'integrated'[1121] legal system. How, then, could it also embody the central law-giving institutions of that system, or the 'indissoluble' nation bound together by that system? Put another way, how can the judicial power 'of the Commonwealth' be used to adjudicate on the rights and duties 'of the Commonwealth', where those rights and duties can be modified

[1119] See *Mining Act Case* (n 62) 431 [108] (Gummow J), referring to *Jacobsen v Rogers* (1995) 182 CLR 572, 593-594 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ), saying that the question whether a State Act 'binds' the Commonwealth 'invites, if not requires, identification of the particular activities and interests of government which would be affected if the law in question has the operation it is said to have.'

[1120] *Bogle* (n 2) 259 (Fullagar J).

[1121] 'Integrated' in the sense explained in *Breavington v Godleman* (1989) 169 CLR 41, 120 (Brennan J), 134-135 (Deane J); *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 46 (Brennan, Dawson, Toohey and McHugh JJ), 52, 53 and 55 (Deane J); *Stevens v Head* (1992) 176 CLR 433, 461-462, 463 (Gaudron J); *Street v Queensland Bar Association* (n 717) 485 (Mason CJ), 512 (Brennan J), 531 (Deane J) 559-560 (Toohey J); *Kable* (n 900) 112 (McHugh J).

in discrete instances by State Parliaments? The way through is to recognise that distinct concepts are involved: the Commonwealth is a right-and-duty bearing entity (the Commonwealth (constitutional person)), it is separately a government (the Commonwealth (government)), and it is separately a nation (the Commonwealth (nation)). This is a further reason for preferring the narrow theory of constitutional personality.

(1) The Immunity of the 'Commonwealth Crown'

This section studies the immunities doctrine as it obtained in Australian law in the first twenty years of Federation, from the decision of the Supreme Court of Victoria in *Wollaston's Case*[1122] through to the decision of the High Court in the *Engineers' Case*.[1123] During this period, the doctrine was premised upon what would later be described as the 'multi-cellular corporate character of the "Crown"'[1124] being the theory that the 'Commonwealth Crown' was a separate legal person from each 'State Crown'. The immunity doctrine was at this time 'mutual':[1125] it protected States from Commonwealth legislation to the same (or at least to a similar) degree to which it protected the Commonwealth from State legislation.

[1122] *Re Income Tax Acts [No 4]* (1902) 28 VR 357 (VSC).

[1123] *Engineers' Case* (n 59).

[1124] Postle (n 278) 110.

[1125] The 'mutuality' of the doctrine was propounded in *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 (*Railway Servants Case*) where it was held that railway servants of a State were outside the jurisdiction of the Commonwealth Conciliation and Arbitration Court. The concomitant of mutuality was an approach to Commonwealth legislative powers described as a 'rule of construction founded upon necessity': *Steel Rails Case* (n 624) 833 (Griffith CJ). This principle was rejected in the *Engineers' Case* (n 59); but cf *Henderson's Case* (n 27) 451 (McHugh J).

The theoretical justification for the immunity at this time was the notion that the Commonwealth and States were 'sovereign' in their respective spheres. The following sections suggest that this notion of sovereignty, which served as the fulcrum for the operation of the immunity of the Commonwealth, inherently involved a distinction between the Commonwealth (constitutional person) and the Commonwealth (government). Section (i) will describe cases in which the doctrine applied to strike down a State law. Section (ii) will describe cases in which the Commonwealth was held validly bound by a State law. The analysis shows that the quality of sovereignty attached to the government, not the constitutional person, and pivoted on a characterisation of the nature of the activity undertaken in any given case. In attaching the quality of 'sovereignty' to the Commonwealth's *powers*, rather than to its legal personhood per se, the doctrine of mutual freedom from interference disjoined constitutional personality from governmental power. The discussion is structured so as to expose an underlying dichotomy in the way that the Court viewed the 'Commonwealth'. On the one hand was the broad conception of the Commonwealth and States as governments, or what Sawer characterised as 'discrete, autonomous units of governmental powers'.[1126] On the other hand there was the 'Commonwealth Crown', which was a legal person *representing* the government.

[1126] Sawer (n 98).

(a) Immunity Protects 'Sovereign' Power

The doctrine of immunity of instrumentalities was premised upon the notion that each component government was 'sovereign'. The doctrine assumed that the *Constitution* redistributed and channelled the King's 'sovereign power' to the Commonwealth and to the States,[1127] and imputed to the Commonwealth and the States a quality of 'sovereignty' in their relations to each other.[1128] Because 'a right of sovereignty' could not be subject to extrinsic control, the Commonwealth must be permitted to exercise its legislative and executive powers 'in absolute freedom, and without any interference or control whatever, except that prescribed by the Constitution itself.'[1129] In the exercise of their derivative sovereignty, neither could be 'interfered with by any external power'.[1130]

The quality of sovereignty primarily protected the 'free exercise of the legislative or executive power of the Commonwealth'.[1131] It was applied to strike down the levying of municipal rates on Commonwealth departmental property,[1132] and the imposition of State stamp duty on a conveyance of land to

[1127] cf *D'Emden v Pedder* (n 436) 111 (Griffith CJ); *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1121 (Griffith CJ); *Wire Netting Case* (n 2) 809 (Isaacs J).

[1128] cf Moore 'The Crown as Corporation' (n 248) 421-422; and *D'Emden v Pedder* (n 436) 109- 110 (Griffith CJ).

[1129] *D'Emden v Pedder* (n 436) 110-111 (Griffith CJ).

[1130] ibid 110 (Griffith CJ); *Baxter* (n 1127) 1121 (Griffith CJ). cf *Municipal Council Case* (n 2) 239- 240 (O'Connor J): 'the sovereignty of each within its sphere should be absolute … no conflict of authority within the same sphere should be possible.'

[1131] *D'Emden v Pedder* (n 436) 111 (Griffith CJ).

[1132] *Municipal Council Case* (n 2).

the Commonwealth.[1133] Each of these cases protected Commonwealth officers, employees or property from State taxation. In *D'Emden v Pedder,* [1134] the High Court invalidated legislation making it an offence for a Commonwealth civil servant to submit a receipt for salary to the Commonwealth without paying Tasmanian stamp duty. It was not the proprietary capacity of the Commonwealth (constitutional person) that was protected, but rather the officer himself.[1135] Subsequent decisions invalidated State income taxes in their applications to the salary of members of the Federal Parliament, [1136] and legislation criminalising the removal by the employee of a Commonwealth contractor of 'night soil' from a federal post office.[1137] These were all cases in which the object of the State law was not the Commonwealth (constitutional person), but rather a person involved in the exercise of governmental power in some way. As the Court said in *Roberts v Ahern,* the Executive Government 'cannot be controlled either in its choice of agents or in the form of their appointment or mode of their remuneration.'[1138]

In the *Municipal Council Case*, Griffith CJ said that the question whether a State Parliament had the power to tax 'the Commonwealth regarded as a juristic person' depended upon whether the activity in question was done by officers of the Commonwealth in the 'performance of the duties cast upon them by the

[1133] *Commonwealth v State of New South Wales* (1906) 3 CLR 807.

[1134] *D'Emden v Pedder* (n 436) 111 (Griffith CJ).

[1135] That is shown by the rejection of submissions based on s 114 of the *Constitution*: ibid 232- 233 (Griffith CJ).

[1136] *Deakin v Webb; Lyne v Webb* (1904) 1 CLR 585; aff'd *Baxter* (n 1127).

[1137] *Roberts v Ahern* (1904) 1 CLR 406.

[1138] ibid 421 (Griffith CJ, Barton and O'Connor JJ).

Constitution or by laws of the Commonwealth.'[1139] Municipal rates imposed on departmental property owned by the Commonwealth would have been invalid, not only under section 114 but also by the immunities doctrine.[1140] Furthermore, the State could not impose stamp duty upon a conveyance of land to the Commonwealth because, in the words of O'Connor J, that would be 'inconsistent with the full and unfettered use of the power conferred by the *Constitution* and embodied in the *Property for Public Purposes Acquisitions Act 1901*.'[1141] The 'juristic person', here, is something protected by the doctrine but only to the extent that the activities of the officers of government could be characterised in the relevant way. Inherent in that view is an understanding of governments ('sovereign bodies') as being protected by the doctrine, and of the 'several juristic persons' as *representing* those bodies. As Griffith CJ said:

> It is manifest from the whole scope of the Constitution that, just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea.[1142]

Whilst the notion of 'several juristic persons' would ultimately be rejected by the High Court, the conceptual division (between the King/Crown as a 'juristic person' and the body or entity which it *represented*) was to persist.

[1139] *Municipal Council Case* (n 2) 233 (Griffith CJ).

[1140] ibid 233 (Griffiths CJ) and 239-240 (O'Connor J).

[1141] *Commonwealth v New South Wales* (n 358) 826 (O'Connor J), and see 815 (Griffiths CJ).

[1142] ibid 231 (Griffith CJ).

(b) Immunity Does Not Protect the Constitutional Person

Although the notion of '*free* exercise' was one of significant width, the doctrine of immunity of instrumentalities was not all-encompassing. The Commonwealth and States would be bound by each other's legislation in cases where the 'free exercise' of government power was not involved. In that connection, the Court developed a distinction between activities of the Commonwealth that were *governmental,* and those that approximated the behaviour of other corporations or individuals. Insofar as the former was concerned, State laws were invalid since, as Moore explained, government is not 'the proper object of commands or prohibitions.[1143] Where the Commonwealth engaged in 'corporate action', it was prima facie subject to the laws of the States.

The decision in the *Wire Netting Case*[1144] was the most prominent example of this, in part because it involved a State (constitutional person) being bound in the importation from abroad of property that would be deployed for purposes that might have been characterised as 'governmental'. It was not the 'governmental' quality of the purpose, however, that was determinative. Rather, it was the non-governmental quality of the action: namely, the purchase of moveable property from abroad. The question in the *Wire Netting Case* was whether the machinery provisions of the *Customs Act 1901* (Cth) bound the State of New South Wales, which had imported a large quantity of wire netting from the UK. The Commonwealth Customs Officer, insisting upon the observation of Part III of the *Customs Act*, refused to admit the goods duty free. After a few days, the Premier

[1143] Moore, 'Law and Government' (n 295) 209.

[1144] *Wire Netting Case* (n 2).

of New South Wales, acting pursuant to a minute by the Governor in Council, ordered a contractor to remove a portion of the wire netting over the objection of the Customs Officer. The contractor was then charged with breach of section 33 of the *Customs Act*, which prohibited 'goods subject to the control of the Customs' from being 'moved' without authority.

The contractor's first line of defence was that the *Customs Act* was not intended to apply to the 'Crown'. Mr Pilcher KC, leading Mr Adrian Knox KC, argued that 'the King is the same throughout the Empire', and the immunity ought not be affected by 'the fact that in the particular instance only part of the Crown's functions are exercised by the authority representing the Crown.'[1145] This argument failed on the grounds that: first, the Commonwealth had exclusive constitutional control over customs,[1146] and; second, that State immunity would functionally destroy the national customs regime.[1147] The unlamented result was that the contractor had no defence to his prosecution.[1148] Thus, 'Crown immunity' did not apply 'to every person who in any part of the world represents the Crown' but applied only for the benefit of those with authority in the place where the law applied, in respect of matters to which the executive authority extends.[1149] Therefore, for the purpose of Customs administration, four judges said words to the effect that 'the State Governments are in no better position than private

[1145] ibid 792-793 (Pilcher KC, with him Knox KC).

[1146] ibid 797 (Griffith CJ), 803 (Barton J), 808 (O'Connor J), 814 (Isaacs J), 816 (Higgins J).

[1147] ibid 801 (Barton J), 808 (O'Connor J), 812 (Isaacs J), 815 (Higgins J).

[1148] ibid 798 (Griffith CJ), 802-803 (Barton J), 814 (Isaacs J).

[1149] ibid 796 (Griffith CJ), 806 (O'Connor J).

persons.'[1150] Here, the analogy with a human being is used to explain the State's subjugation to Commonwealth law. As government, the State is immune; as constitutional person, it is bound.

Justice Barton's approach was different. His Honour defined 'King' and 'Crown' to mean the Executive Head of State.[1151] He therefore ignored the earlier pronouncements about the separate legal personality of Commonwealth and States. His Honour held that the benefit of 'Crown immunity' could not run where the State Executive was 'not the King's agent',[1152] because in that field, the Federal executive was the King's agent and there was 'no room for State Parliaments or Executives.'[1153] In such a case, 'no citizen can justify under an authority purporting to be granted him by a State Executive, for that is no authority at all.'[1154] By that he meant, quoting Professor Thayer, that in the matter of customs 'it may be said that "there is no State"'.[1155] In exclusively Commonwealth matters, 'there are not seven Executive Governments, but only one'.[1156] 'And', he added, 'this is also true of the Australian Government in its turn.' [1157] The effect of Barton J's judgment is that the State (and the Commonwealth) does not exist to the extent of its subjugation to Commonwealth law, and vice versa.

[1150] ibid 797 (Griffith CJ), see also 808 (O'Connor J), 814 (Isaacs J), 818 (Higgins J).
[1151] ibid 800 (Barton J).
[1152] ibid 801 (Barton J).
[1153] ibid 802 (Barton J).
[1154] ibid 802-803 (Barton J).
[1155] ibid 803 (Barton J).
[1156] ibid 803-804 (Barton J).
[1157] ibid 802 (Barton J).

That approach can be contrasted with the majority judgments. Chief Justice Griffith said that 'for the purposes of Customs administration the State Governments are in no better position than private persons.'[1158] Justice O'Connor said that the goods of the State were, under the *Customs Act*, 'in the same position as the goods of any citizen of New South Wales'.[1159] Justice Isaacs said that the Commonwealth Parliament could, by appropriate legislation, 'prohibit the importation of goods by the State Governments.'[1160] Justice Higgins felt no doubt as to the power of the Commonwealth and State Parliaments to 'expressly bind the Crown by [their] acts.'[1161] In these judgments, the analogy with a human being was used to explain the State's subjugation to Commonwealth law. As government, the State is immune; as legal person, it is bound.

Justice Isaacs emphasised the 'fundamental difference between exercising *sovereign power* over property within the territorial limits … and insisting upon a *right* to bring property there from abroad'.[1162] The contrast of 'sovereign power' and 'right' is important. The importation of goods was not a 'sovereign power;' therefore, the Federal Parliament was authorised to prohibit it.[1163] In his Honour's expression may be seen the influence of three illustrative cases, cited in his judgment. The first was the decision in the *Magdalen College Case*,[1164] where

[1158] ibid 797 (Griffith CJ).

[1159] ibid 808 (O'Connor J).

[1160] ibid 811 (Isaacs J).

[1161] ibid 818 (Higgins J).

[1162] ibid 811 (Isaacs J) (emphasis added).

[1163] ibid.

[1164] ibid 813-814 (Isaacs J); *Magdalen College Case* (n 144) 70a; ER 1235.

the Court of King's Bench held that an Act applying generally to 'any person or … body politic' would bind the Queen, because she was both person and body politic. The second was the decision of the High Court of Admiralty, on appeal from the Vice-Admiralty Court in Jamaica, in *The 'Swift'*.[1165] In that case, Sir William Scott said that navigation laws, prohibiting the transportation of goods from one Colony to another, might be binding upon the King if he 'traded, as some sovereigns do…[for the] purpose of pecuniary advantage'.[1166] The third case was *South Carolina v United States*, where a majority held that, where a State 'engages in a business which is of a private nature', it is susceptible to federal taxation.[1167]

Justice Isaacs's distinction, between sovereign power and non-sovereign activity, is also manifested in certain judgments in the *Steel Rails Case*,[1168] which concerned the dutiability of steel rails purchased in the UK and imported into New South Wales for use in the construction of State railways. The Attorney-General for New South Wales urged that the acquisition of rails for the purpose of constructing State railways was a governmental function, which should be immune from Commonwealth interference.[1169] Railways had already been held to be a sovereign function of the State,[1170] but the Court held that the importation of goods, even for an avowedly governmental purpose, did not attract the

[1165] *The 'Swift'* (1813) 1 Dods 320 (Adm); 165 ER 1325.

[1166] ibid 339, 1334 (Sir William Scott).

[1167] *South Carolina v United States* 199 US 437 (1905) 463 (Brewer J).

[1168] *Steel Rails Case* (n 624).

[1169] ibid 820-821 (Pilcher KC).

[1170] *Railway Servants Case* (n 1125) 539 (Griffith CJ).

immunity. Some judges viewed the non-application of the immunity as a function of the ambit of Commonwealth power.[1171] Other judges focused on the juridical quality of the behaviour. Sir Samuel Griffith CJ said that the purchase of goods outside territorial borders was not a function '*qua* Government'.[1172] Justice Barton said that:

> to sustain the claim made, the very purchase of the rails in England, or perhaps Belgium, and their transmission, would have to be considered as exercises of governing power.[1173]

His Honour went on to describe as 'quite unwarranted' the suggestion that, merely because they had been purchased abroad, steel rails could be a 'means of Government'.[1174] Justice Isaacs reaffirmed, without further comment, his judgment in the *Wire Netting Case*.[1175] Justice Higgins went further, doubting even that railways were a 'State governmental function', in the sense of a 'strictly governmental function' like 'the legislature, the executive and the judiciary are governmental functions.'[1176] In different ways, each of these judgments supports the distinction drawn in this thesis between government and constitutional person: the former comprised of human beings in institutions wielding governmental power with immunity from State law; the latter subject to regulation by the *Customs Act*.

[1171] *Steel Rails Case* (n 624) 837 (Barton J), 841 (O'Connor J), 853 (Higgins J).

[1172] ibid 833 (Griffith CJ).

[1173] ibid 836 (Barton J) (emphasis added).

[1174] ibid 836-837 (Barton J).

[1175] ibid 844 (Isaacs J).

[1176] ibid 852 (Higgins J).

The same distinction may be found in the judgments of Griffith CJ and Powers J in *Heiner v Scott*,[1177] where the High Court held that the *Stamp Act 1894* (Qld) applied to cheques issued by the Commonwealth Bank of Australia. One question raised by the case was whether the 'general business of banking' amounted to a governmental function, such as to invoke the immunities doctrine. Chief Justice Griffith said that the carrying on of an ordinary banking business was 'not a function of the executive Government of the Commonwealth conferred by the *Constitution*.'[1178] That was not to say that it was beyond power; merely that it was 'permitted' in the sense that it was not 'prohibited by positive law.' It was a 'faculty … common to all *such persons*.'[1179] Here, it is the absence of governmental function that renders the Bank susceptible to regulation by State legislatures. The plurality reached the same conclusion on the separate basis that the Bank could not avail itself of the immunity because it had its own legal personality. Justice Powers agreed with Griffith CJ: because the Commonwealth had no '*special* power to establish an ordinary trading bank for profit', it should be subject to State law.[1180] The judgments of Griffith CJ and Powers J were misunderstood, in *Williams (No 1)*,[1181] to be authorities for the proposition that the power of the Executive derived from the capacity of the Commonwealth was 'not-open ended'. The judgments were not directed to that issue but, rather, to

[1177] *Heiner v Scott* (1914) 19 CLR 381.

[1178] ibid 393-394 (Griffith CJ).

[1179] ibid 393-394 (Griffith CJ) (emphasis added).

[1180] ibid 402-403 (Powers J) (emphasis added).

[1181] *Williams (No 1)* (n 2) 193 [38] and 207 [64] (French CJ).

the question of whether State law would be invalidated because of the presence of 'special' executive power.

The distinction is also reflected in the judgments in *R v Registrar of Titles for Victoria; Ex parte Commonwealth*.[1182] That case involved an application by the Commonwealth for mandamus to compel the Registrar of Titles in Victoria to register an instrument by which it purported to lease land for naval and military purposes from the municipality of Coburg in Victoria. The Registrar refused to register the lease on the ground that it had not been authorised by the *Local Government Act 1903* (Vic) or the *Lands Acquisition Act 1906* (Cth). A majority of the High Court upheld that conclusion.[1183] For the minority, who rejected it, there was a further need to consider whether the High Court could, at the instance of the Commonwealth, issue mandamus to a State officer. A suit by the Commonwealth, described by Griffith CJ as being for this purpose 'a private suitor', could not intelligibly be called an interference with the executive functions of the State.[1184] Justice Isaacs agreed, emphasising that the claim by the Commonwealth was 'not made in any governmental capacity, but in its proprietary capacity, just as any private individual would claim in a similar case.'[1185]

[1182] *R v Registrar of Titles for Victoria; Ex parte Commonwealth* (1915) 20 CLR 379.

[1183] ibid 398 (Higgins J), 403-404 (Gavan Duffy and Rich JJ), 404-405 (Powers J) agreeing with Higgins J.

[1184] ibid 387 (Griffith CJ).

[1185] ibid 390 (Isaacs J).

There are other germane statements in the jurisprudence of Isaacs J, both before and after the *Engineers' Case*. In the *Municipal Employees' Case*, Isaacs and Rich JJ said that government control of the conduct of individuals is 'undoubtedly of a different nature from trading functions, and both are distinct from power to contract for road making.'[1186] In the *Teachers' Case*,[1187] Isaacs J described the distinction as a 'line of demarcation inherent in all British Constitutions'. On the one hand were the 'primary and inalienable functions of a constitutional Government', which were incapable of performance by private individuals. On the other hand, were voluntary functions, 'ordinarily or primarily the subject of private individual enterprise'. His Honour's point was that, where engaged in the latter, a State '*acts simply as a huge corporation*.'[1188] The immunity protected *governmental* actions but did not protect the actions of the Commonwealth *quoad* its activities as corporation.

These cases are interesting because they show the confluence of two streams of thought; which in turn are primary tributaries of the modern immunities doctrine as propounded by Gummow J. Where the legal persons bound by a law are bound in the exercise of government power conferred upon them, they are immune. Inversely, where members of the Executive branch are exercising the species of executive power permitting engagement of the capacities of a constitutional person, represented in these cases by their description as 'ordinary activities', then it is the Commonwealth (constitutional person) that is

[1186] *Municipal Employees' Case* (n 331) 536 (Isaacs and Rich JJ).

[1187] *Federated State School Teachers' Association of Australia v Victoria* (1929) 41 CLR 569.

[1188] ibid 584-585 (Isaacs J) (emphasis added).

seen to be bound (and no immunity applies). In the latter category, the Commonwealth (constitutional person) is distinguished from the government and found to be analogous in its behaviour and appearance to a private citizen or 'huge corporation'—in short, an ordinary legal person. In the former category, legal personality is not implicated at all. Putting aside the significant difficulties that were caused by the over-zealous protection of 'sovereignty', this resembles the 'exclusive zone' view of the doctrine propounded by Gummow J.

The narrow theory of constitutional personality is the simplest way of understanding the complexities of these cases. The Commonwealth (constitutional person) is bound by State laws. The Commonwealth (government), per se, is not the proper object of commands: it is not a legal person, and such commands directed to its officers or institutions would interfere with constitutional allocations of authority and function. The next sections show that this account holds true during subsequent iterations of the doctrine. Moreover, they also show the difficulties that attend any other account. The primary source of confusion, in each phase of the immunity, arises from a failure to delineate government or nation from constitutional person.

(2) The Post-*Engineers'* Immunity of the Commonwealth

In the *Engineers' Case*, the High Court of Australia rejected the particular notion of sovereignty upon which the doctrine of mutual freedom from interference was premised. The Court reasserted the *common* sovereignty of every part of the indivisible British Empire. Because it had rejected the notion of divided sovereignty, the *Engineers' Case* seemed afterwards to have obliterated any

immunity that the Commonwealth (government) enjoyed formerly. This section is designed to show that, notwithstanding the demise of this notion of sovereignty, the necessity of distinguishing the Commonwealth (government) and its governmental power from the Commonwealth (constitutional person) remained.

This section treats the post-*Engineers*' survival of the Commonwealth's immunity in two parts. Section (a) tracks the immunity through the cases in which it was discussed, from 1920 up to its revival in the decision in *Cigamatic* in 1962. Section (b) examines that decision, but with a focus on Sir Owen Dixon's understanding of the doctrine. Two trends are identified. First, individual judges' understandings of the Commonwealth's legal personality were implicitly shaped by their views of the extent of the immunities doctrine. That will be elaborated with particular reference to the views of Sir Isaac Isaacs and Sir Owen Dixon, which have proved to be the most enduring. This trend buttresses the argumentative premise of the chapter: that it is both necessary and permissible to draw theoretical conclusions about the Commonwealth's legal personality from the nature of its immunities. Second, amongst those judges who embraced a continuing role for the doctrine during this period, there were various attempts to articulate clearly the line of demarcation between permissible and impermissible interference with Commonwealth activities by State law. Justice Gummow's formulation of the doctrine is shown to be the best representation of the ideas at the heart of these attempts. Their importance for present purposes is that they confirm the negative claims made in this thesis: the Commonwealth

(government) is not a legal person, whilst the Commonwealth (constitutional person) is not the government.

(a) The Immunity Suppressed

The *Engineers' Case* was seen as having impliedly overruled the doctrine of mutual freedom from interference. It expressly rejected both the interpretative principle upon which the 'mutuality' of the doctrine depended,[1189] and the application to Australia of the notion of 'sovereignty', by analogy to which it had reasoned.[1190] The 'emphatic repudiation' of what Postle helpfully termed the 'multi-cellular' view of the 'Crown' was seen as having overruled critical parts of the *Wire Netting Case*,[1191] and the substituted concept of an 'ubiquitous and indivisible' Crown[1192] was described in the *Engineers'* judgment as being bound by all laws made under the authority of the *Constitution*.[1193] Thus, the judgment seemed to establish a 'convertible presumption'[1194] that the 'Crown in right of the Commonwealth' or a State was bound by any and all validly enacted statutes.

[1189] Namely, the principle that Commonwealth legislative powers should be read restrictively where they impeded on State instrumentalities: *Engineers' Case* (n 59) 141-142 and 150-152 (Knox CJ, Isaacs, Rich and Starke JJ); cf *Work Choices Case* (n 507) 119-120 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[1190] Namely, by reasserting the common sovereignty of Commonwealth and States: *Engineers' Case* (n 59) 146-147 (Knox CJ, Isaacs, Rich and Starke JJ); see *Payroll Tax Case* (n 312) 395-396 (Windeyer J); *Commonwealth v New South Wales* (n 358) 218 (Higgins J); *Mewett* (n 45) 541 (Gummow and Kirby JJ).

[1191] cf *In re EO Farley Ltd* (1940) 40 SR (NSW) 240 (NSWSC) 246-247 (Jordan CJ).

[1192] *Engineers' Case* (n 59) 152 (Knox CJ, Isaacs, Rich and Starke JJ).

[1193] Namely, the passage at ibid 153 (Knox CJ, Isaacs, Rich and Starke JJ) ending halfway down the page.

[1194] Sawer (n 99) 580.

That result seems not to have been intended by Isaacs J, who is seen as the main author of the plurality judgment.[1195] The Commonwealth's immunity came before the Court again in 1925, in the controversial decision in *Pirrie v McFarlane*, explored in section (i) below.[1196] Whereas the majority judgments regarded the *Engineers' Case* has having abolished the immunity,[1197] Isaacs J said in dissent that the result of the case was 'utterly ridiculous'.[1198] Gradually, the perception that the *Engineers' Case* had stifled any immunity was corrected by Dixon J in a series of cases described in section (ii) below. By the time the Court decided *Bogle*, in 1953, a majority appeared to have adopted Dixon J's position. Justice Fullagar's judgment in that case, which has given rise to its own set of problems, is explored at section (iii) below. The Commonwealth's immunity was finally given the authority of law in *Cigamatic*, which is explored in section (b).

The progression of authority is significant to this thesis in a number of respects. In the judgments suppressing the Commonwealth's immunity, there tended to be either a marginalisation or an anthropomorphic treatment of the Commonwealth (constitutional person): legal personhood was either ignored altogether, or government was made to seem analogous to a citizen. In the judgments preserving the immunity, there remained a need to demarcate permissible from impermissible interference. In these judgments persisted ideas about governmental/non-governmental functions, and later the dichotomy

[1195] cf *Pape* (n 674) 174 [526] (Heydon J); and Sawer, *Australian Federalism in the Courts* (n 98) 130.

[1196] *Pirrie v McFarlane* (1925) 36 CLR 170.

[1197] ibid 181 (Knox CJ), 213-214 (Higgins J), 226-227 (Starke J).

[1198] ibid 201 (Isaacs J).

between laws binding and laws affecting the Commonwealth. These ideas are discussed here as illustrations of two inter-linked doctrinal demands: first, to delineate agency-based executive power; and, second, to distinguish government from the constitutional person.

(i) Pirrie v McFarlane

On 18 December 1924, Mr Thomas McFarlane was charged at the Court of Petty Sessions in Melbourne with having driven a motorcar on St Kilda Road without a licence. He gave evidence that he was a leading aircraftsman of the Royal Australian Air Force and that, when asked to produce his licence, he was driving an Air Force car, under orders and on Air Force business. The Magistrate dismissed the information on the principle, derived from *D'Emden v Pedder*, that a conviction would involve an interference with the executive power of the Commonwealth. The appeal from that decision, removed to the High Court, required the resolution of two distinct issues.

The first was the question whether the Victorian Parliament had intended its legislation to apply to 'persons in the public service of the Commonwealth'.[1199] Section 24 of the *Motor Car Act 1915* (Vic) had followed English legislation[1200] in expressing an undifferentiated intention to apply to 'persons in the public service of the Crown'.[1201] Justice Isaacs, with whom Rich J agreed,[1202] thought that the

[1199] ibid 180 (Knox CJ).

[1200] *Motor Car Act 1903* (Vic), s 16; cf *Pirrie v McFarlane* (n 1196) 217 (Higgins J) and 228 (Starke J).

[1201] *Motor Car Act 1915* (Vic), s 24: 'It is hereby declared that this Act applies to persons in the public service of the Crown as well as to other persons.'

Commonwealth was intended to be bound, since the 'Crown itself is indivisible'.[1203] Justice Starke, with whom Chief Justice Knox agreed, accepted that conclusion but felt the indivisibility of the 'Crown' to be irrelevant.[1204] Justice Higgins also agreed but, contrary to Isaacs J, affirmed the judgments in the *Wire Netting Case*.[1205] His Honour emphasised that, consistently with the indivisibility of the 'Crown', a distinction could be maintained in the Federation between 'the King in his Federal capacity and the King in his State capacity'.[1206]

The unanimous conclusion that the *Motor Car Act* was intended to bind the Commonwealth raised a second question: whether the Victorian Parliament was constitutionally competent so to bind it. The majority judgments rejected any continuing role after the *Engineers Case* for the doctrine of implied freedom, propounded in *D'Emden v Pedder*.[1207] Furthermore, they held that the *Defence Acts*, to the extent that they authorised the use of motorcars, were consistent with the requirement to obtain a State licence. In holding that the *Motor Car Act* validly applied to Mr McFarlane, their Honours ignored the fact of his employment with the Commonwealth Department of Defence. Because he was a citizen as well as a soldier, he shared the citizen's obedience to the civil law, notwithstanding that he was on Commonwealth business.[1208] It was the citizen,

[1202] *Pirrie v McFarlane* (n 1196) 220-221 (Rich J).

[1203] ibid 189 (Isaacs J).

[1204] ibid 226 (Starke J), 179-180 (Knox CJ) agreeing.

[1205] ibid 218-219 (Higgins J).

[1206] ibid 218 (Higgins J).

[1207] ibid 181 (Knox CJ), 214-217 (Higgins J), 228 (Starke J).

[1208] ibid 182 (Knox CJ), 219 (Higgins J), 228 (Starke J).

rather than the Commonwealth, who was bound. It was the citizen, rather than the Commonwealth, who was prosecuted.

The dissenting judgments would have invalidated the legislation because of its impact upon the Commonwealth, rather than out of consideration for the citizen. Justice Rich, who agreed generally with Isaacs J, said that he was 'unable to see how a State law can validly dictate to the Commonwealth' the manner and conditions under which it was to 'perform the executive functions *expressly and exclusively* committed to it by the Constitution.' [1209] Here it was the Commonwealth (government), rather than the citizen, that was seen as the object of the law's command. What attracted invalidity was not the operation of the law on the Commonwealth (constitutional person), but rather its operation on 'executive functions *expressly and exclusively committed*'. Justice Isaacs's judgment pivoted on the distinction between 'governmental powers … expressly conferred' and other types of action. Mr McFarlane was acting, at the time he was stopped by Victorian police, '*as a soldier*'.[1210] He was engaged in what his Honour, quoting Lord Watson,[1211] called a '"primary and inalienable function of the constitutional government" of the Commonwealth'. These were functions that '*no individual could exercise as a private citizen* or otherwise than as representing His Majesty the King.'[1212]

[1209] ibid 221 (Rich J) (emphasis added).

[1210] ibid 198 (Isaacs J) (emphasis in original).

[1211] *Coomber v Justices of the Country of Berks* (1883) 9 App Cas 61 (HL) 74 (Lord Watson).

[1212] *Pirrie v McFarlane* (n 1196) 199 (Isaacs J) (emphasis added).

The dissenting judgments thus conjured an image of the 'Commonwealth' for the purpose of holding the *Motor Car Act* inapplicable to Mr McFarlane. That 'Commonwealth' was a government. There was no legal person called the 'Commonwealth' involved in this. Mr McFarlane was immune to the extent that he performed 'executive functions expressly and exclusively committed'.[1213] This presaged the view of the immunities doctrine ultimately adopted by Gummow J, and preferred in this thesis. Here, the doctrine was made to pivot on a distinction between different qualities of action: only those characterised as 'primary and inalienable' were protected from State law. Equally, although it was the 'Commonwealth' that was described as immune, in fact it was Mr McFarlane whose prosecution was dismissed. It was the officer, rather than the constitutional person, who was immune.

(ii) Sir Owen Dixon's Revival

This section describes the position taken by Dixon J with respect to the Commonwealth's immunity, in a series of judgments commencing in 1936 and leading up to his Honour's dissent in *Uther*, which is considered together with the *Cigamatic* judgment in section (b) below. These judgments are important because of the importance that would later be attached to Dixon J's views in refurbishing the doctrine. They are an important part of the narrative of the immunity. Finally, they are important because of the attempts that his Honour made to describe the spheres of permissible application to the Commonwealth of

[1213] ibid.

State laws. In those attempts, which continued the pattern present in the dissents in *Pirrie v McFarlane,* lie insights that are important to this thesis.

The first step in the revival was to pierce the mystique of the *Engineers' Case* by reducing it to the form of a simple legal proposition, in order better to explore or propound its boundaries. Justice Dixon said that the case was authority only for the proposition that a power to legislate with respect to a given subject enables the Parliament to affect the operations of the States and their agencies.[1214] This proposition was subject to exceptions. The *Engineers' Case* had not dealt with the question whether the Commonwealth could affect State prerogative powers, nor with the question whether the Commonwealth could discriminate against the States.[1215] It did not deal generally with implications.[1216] In *West*,[1217] the High Court held that a State could tax a pension paid to retired Commonwealth public servants. Justice Dixon said that it was an implication of the grant of Commonwealth executive power that its 'incidents and consequences … shall not be made the subject of special liabilities or burdens under State law.'[1218] These were the seeds of what was to come.[1219]

[1214] *Farley's Case* (n 311) 78 (Dixon J).

[1215] *West* (n 525) 682 (Dixon J); *Melbourne Corporation Case* (n 12) 78-79 (Dixon J).

[1216] *Railway Standardisation Case* (n 2) 447 (Dixon J); *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1, 22 (Dixon J).

[1217] *West* (n 525).

[1218] ibid 681 (Dixon J).

[1219] cf John Doyle, '1947 Revisited – The Immunity of the Commonwealth from State Law" in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press 1994) 53.

The next step was taken in *Farley's Case*, which concerned the competition in a winding-up between debts due to the State of New South Wales for income tax, and debts due to the Commonwealth for income and sales tax. The Court held that, where the debts ranked equally, they should be paid *pari passu*.[1220] Justice Rich hinted, and Dixon J firmly argued, that State law could not competently abolish or postpone the priority of the Commonwealth's debt, where that priority was conferred by prerogative.[1221] Justice Dixon emphasised that in 'many respects the executive government of the Commonwealth is affected by the condition of the general law.'[1222] He gave as an example the 'general law of contract', which 'might incidentally apply in the case of the Commonwealth *alike with the citizen*.'[1223] It is of course the Commonwealth (constitutional person) that would be the party to a contract made by the Executive branch: for this purpose, the Commonwealth is compared by his Honour to a human being ('alike with the citizen'). Speaking more generally, Dixon J distinguished between 'Commonwealth administrative action', which could be regulated by the States, from 'governmental rights and powers belonging to the Federal executive *as such*', which could not.[1224] Here, it is the Executive Government that is immune. There is a family resemblance between this distinction and the idea of 'exclusive domain', later propounded by Gummow J. 'Administrative actions', instantiated

[1220] The High Court held unanimously that neither State nor Federal legislation had purported to affect the priority of either government: *Farley's Case* (n 311) 289 (Latham CJ), 292 (Rich J), 297- 299 (Starke J), 312 and 317 (Dixon J), 326 (Evatt J), 327-328 (McTiernan J).

[1221] ibid 291 (Rich J), 308 (Dixon J).

[1222] *Farley's Case* (n 311) 308 (Dixon J).

[1223] ibid (emphasis added).

[1224] ibid (emphasis added).

as contracting (rather than administrative action in the public law sense), were vulnerable to State laws; 'governmental rights and powers' were not.

In *Uther*,[1225] the High Court held by majority that the Parliament of New South Wales could validly defer the Commonwealth's priority of payment in a liquidation under the *Companies Act 1937* (NSW). The case involved sales tax, which had been given the character of a debt 'due to the King on behalf of the Commonwealth' in order to invoke the royal prerogative. Chief Justice Latham characterised a legislative provision for the ranking of debts inter se as a 'common feature of ordinary company law', as much a part of the 'general law of the community as a traffic law'.[1226] His Honour said:

> The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established. To much of that law the Commonwealth is necessarily subject; for example, the Commonwealth has no general power to legislate with respect to the law of property, the law of contract, the law of tort. In relation to those subjects, speaking generally, *it lives and moves and has its being* within a system of law which consists of the common law (in the widest sense) and the statute law of the various States.[1227]

The underlined words give human, or at least organic, qualities to the Commonwealth in order to explain its subjugation to State law. The law was said to apply 'to the Commonwealth where the Commonwealth is a creditor *in the same way as other creditors*.'[1228]

[1225] *Uther* (n 71).

[1226] ibid 521 (Latham CJ).

[1227] ibid 521 (Latham CJ) (emphasis added).

[1228] ibid 522 (Latham CJ) (emphasis added).

Justice Starke, echoing *Pirrie v McFarlane,* said that the Commonwealth would only be immune from State law in respect of functions *expressly* conferred by the *Constitution.*[1229] Proving in a wind up was not such a function. Justice Williams said that it was 'usual' for legislation relating to bankruptcy or liquidation to bind the 'Crown'. A law with respect to the priority of unsecured debts was not a law that 'intended to interfere with the *essential* governmental functions of the Commonwealth.'[1230] With the exception of Rich J,[1231] each of these judgments contemplated ongoing scope for the immunities doctrine. The doctrine would protect Commonwealth functions that were 'essential',[1232] or in matters *entirely* beyond State legislative power.[1233] These are formulations of distinctions best rendered by Gummow J in *Henderson's Case.*

(iii) Fullagar J's Dichotomy: Commonwealth v Bogle

Justice Dixon's views were to command a majority of the High Court in *Cigamatic.* Prior to that, however, was the judgment of Fullagar J in *Bogle,*[1234] with which four judges including Dixon CJ agreed.[1235] The judgment of Fullagar J is important to this thesis primarily because of the following passage:

[1229] ibid 525-526 (Starke J).

[1230] ibid 539-540 (Williams J) (emphasis added).

[1231] Justice Rich held that the Commonwealth's prerogative could be modified by the State, since 'there is but one Crown from the whole Empire': ibid 523.

[1232] eg the Commonwealth's ability to impose and collect of taxation: ibid 538 (Williams J).

[1233] ibid 521 (Latham CJ), giving the example of the functions of the Governor-General in relation to the summoning and the dissolution of the Commonwealth Parliament.

[1234] *Bogle* (n 2). Three distinct proceedings, raising similar issues, were argued together in *Bogle*.

[1235] ibid 267 (Fullagar J), cf 249 (Dixon CJ), 255 (Webb J), 274 (Kitto J), 284 (Taylor J) agreeing.

> The Commonwealth – or the Crown in right of the Commonwealth, or whatever you choose to call it – is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament.[1236]

This passage is significant for three reasons. First, it lends the authority of five justices of the High Court[1237] to the proposition that the Commonwealth is a legal (constitutional) person. Second, it lends the same authority to the proposition that this legal person has had an uninterrupted existence, in spite of differences in the designations that may be attached to it over time (ie 'whatever you may choose to call it'). The third ground for its importance lies in the controversial proposition that this legal person is not subjected to State legislative power. That proposition has not enjoyed mainstream support in subsequent judgments, and must be wrong.

The question in *Bogle* was whether Commonwealth Hostels Ltd, a Commonwealth-controlled company carrying on governmental functions, was bound by a temporary measure of the Victorian Executive Government, directed to the post-war readjustment of prices for essential goods and services.[1238] Justice Fullagar said that a State could not enact legislation 'binding upon the Commonwealth' in the same way that it could enact a law 'binding upon a subject

[1236] ibid 259 (Fullagar J).

[1237] ibid 267 (Fullagar J), cf 249 (Dixon CJ), 255 (Webb J), 274 (Kitto J), 284 (Taylor J) agreeing.

[1238] The *Prices Regulation Order* (No 2426) (Vic) was made under the *Prices Regulation Act 1948* (Vic), s 2. The Order declared the provision of board and lodging to be a 'declared service', rendering illegal any price increases over a specified period.

of the State.'[1239] To assert the contrary was to give effect to a 'fundamental misconception'. Justice Fullagar gave two examples showing that the Commonwealth could not be 'bound' by State law. The first example was expressed by declaring it 'unthinkable' that the Victorian Parliament 'could have made a law rendering the Commonwealth liable for torts committed in Victoria.'[1240] This statement embeds two ideas that would be regarded now as having been wrong when uttered. First, the statement assumes[1241] that the Commonwealth was immune from suit in tort, by derivative application of the royal prerogative. That assumption was not tested until it arose, by way of a limitations issue, in *Commonwealth v Mewett*.[1242] It was decided in that case that the *Constitution* denied, and moreover ought to be seen as having always denied, the operation for the benefit of the Commonwealth of the prerogative immunity from suit.[1243] Second, the statement assumes that, in cases where the Commonwealth is rendered liable in tort, the liability must have arisen by virtue of a federal enactment. The modern view is that liability attaches to the Commonwealth under the general law, which may be modified by a State Parliament.[1244]

[1239] *Bogle* (n 2) 259-260 (Fullagar J), cf 249 (Dixon CJ), 255 (Webb J), 274 (Kitto J), 284 (Taylor J) agreeing.

[1240] ibid 260 (Fullagar J).

[1241] The assumption was identified in *Henderson's Case* (n 27) 447 (Dawson, Toohey and Gaudron JJ).

[1242] *Mewett* (n 45).

[1243] ibid 545-546 (Gummow and Kirby JJ) and 492 (Brennan CJ) agreeing, 531 (McHugh J), and 496 (Dawson J) and 513 (Toohey J) in dissent.

[1244] cf ibid 526 (Gaudron J), 531 (McHugh J).

Justice Fullagar's second example was equally problematic. He said that the Parliament of Victoria cannot 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.[1245]

Justice Fullagar was describing the *Prices Regulation Act 1948* (Vic), which would have enabled a State-appointed Commissioner to force the Commonwealth to sell almost any item of its property, to any person, on any terms it prescribed.[1246] Such an Act would have contravened the immunities doctrine in any phase of its existence. On two subsequent occasions, however, Fullagar J expressed the same view in the more modest context of Commonwealth tenancy agreements.[1247] His view was that Commonwealth 'capacity' in respect of its ordinary property rights ought to be immune from State law. In this he seems to have had the support of Walsh J,[1248] who said that a State Parliament 'cannot lawfully dictate to the Commonwealth what it may do or allow to be done upon its property'. These views were almost certainly overstated. They are contradicted by the result in

[1245] *Bogle* (n 2) 260 (Fullagar J).

[1246] The *Prices Regulation Act 1948* (Vic) enabled the Commissioner to fix a maximum price for the supply of declared goods and services, and to prohibit all non-compliant or uncontrolled sale or supply: ss 9, 12 and 14. It prohibited persons from *refusing* to supply declared goods or services on demand and for tender of the stipulated maximum payment, and it prohibited the stock-piling of declared goods 'with intent to corner the market or restrain trade therein': ss 32 and 34. The Act imposed offences for non-compliance with its provisions, and empowered the Commissioner to enter upon and search any premises, to inspect and take samples of any stocks of goods, and to impound, retain and copy any inspected documents: ss 22 and 55, and s 7.

[1247] cf *Asiatic Steam Navigation Co Ltd v The Commonwealth* (n 4), 414 (Fullagar J); and *Commonwealth v Anderson* (n 4) 313 (Fullagar J), saying that State legislation could not affect the Commonwealth's right of action for recovery of premises from an over-holding tenant.

[1248] *Stocks and Holdings* (n 4) 288 (Walsh J).

Henderson's Case,[1249] and are inconsistent with the observations of the plurality in *Jacobsen v Rogers*[1250] concerning the Commonwealth's vulnerability to State-issued search and seizure warrants.[1251]

Justice Fullagar went on to say that the Commonwealth 'may, of course, become affected by State laws.'[1252] Where the Commonwealth makes a contract in Victoria, for example, the 'terms and effect' of that contract 'may have to be sought in the *Goods Act 1928* (Vic).[1253] In support of this statement, his Honour referred to two passages[1254] in which Dixon J had propounded the view that *general* State laws, for example governing the law of contract, could affix legal consequences to the Commonwealth's choice to transact in that jurisdiction.

[1249] cf *Henderson's Case* (n 27) 455-456 (McHugh J), wondering rhetorically whether a State Parliament could regulate a Commonwealth transport system, or the maintenance of Commonwealth vehicles.

[1250] *Jacobsen v Rogers* (n 1119) 591 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ), 607 (McHugh J), indicating but not explaining his disagreement with the proposition that one government might authorise forceful entry to premises and seizure of property belonging to another government.

[1251] The better view on proprietary 'capacity', at least, is that expressed by Menzies J: State legislation binds the Commonwealth in the management of its property, except to the extent it would 'prevent or hinder the performance by the Commonwealth of its constitutional functions whether upon its own land or upon the land of any other person': *Stocks and Holdings* (n 4) 271 (Menzies J).

[1252] ibid 260 (Fullagar J).

[1253] *Bogle* (n 2) 260 (Fullagar J). Division 2 of that Act deals with 'Formation of the Contract'; it provides that the '[c]apacity to buy and sell is regulated by the general law', but makes provision for common implied warranties and conditions: *Goods Act 1928* (Vic) ss 7, 18 and 19; as well as rules to assist in ascertaining parties' intentions: s 23. Division 3 deals with the 'Effects of the Contract', and stipulates, eg, the point at which title to property passes: ss 22 and 24.

[1254] *Bogle* (n 2) 260 (Fullagar J), citing *Farley's Case* (n 311) 308 (Dixon J); *Uther* (n 71) 528 (Dixon J).

Although the dichotomy thus propounded (between laws 'binding' and laws 'affecting') was at one time influential,[1255] it is now openly accepted that the State Parliaments may 'bind' the Commonwealth.[1256] The plurality in *Henderson's Case* said that Fullagar J's comments were *obiter dicta*, contrary to the decision in *Cigamatic*, and otherwise 'insupportable.'[1257] Thus, insofar as Fullagar J asserted that State legislation may not 'bind' the Commonwealth, his Honour was wrong. However, the distinction in the judgment between 'binding' and 'affecting', which purported to be applying the statements of Dixon J described above, and in a judgment in which Dixon CJ concurred, expresses an idea that is not without contemporary relevance. Fundamentally, it reflects a distinction between the powers of the executive to act as agent for the constitutional person, and the powers of the executive falling within its exclusive constitutional domain. As McHugh J explained in *Henderson's Case*, Fullagar J's distinction can be understood as a distinction between 'the aggregate of the legal and personal capacities enjoyed by the Commonwealth and its servants and agents', and 'those extraordinary executive powers and capacities which the Constitution gives to the Commonwealth itself to carry out as a political sovereign in the federation.'[1258]

[1255] cf *Maguire v Simpson* (n 649) 368-369 (Barwick CJ), saying that a State cannot 'legislate directly to bind the Commonwealth in any of its manifestations or emanations.'

[1256] cf *Mining Act Case* (n 62) 409 [31] (Gleeson CJ and Gaudron J), 472 [230] (Hayne J); *Clarke* (n 695) 290 [17] (French CJ).

[1257] ibid 445-446 (Dawson, Toohey and Gaudron JJ).

[1258] *Henderson's Case* (n 27) 456 (McHugh J).

(b) Three Controversial Aspects of Commonwealth v Cigamatic

The decision in *Cigamatic*, which overturned the decision in *Uther* and re- established the Commonwealth's immunity, was regarded at the time as heretical, [1259] and has spawned a large academic exegesis. [1260] This section explores three controversies that emerge from the cases in this period and, in turn, substantiates three propositions concerning the Commonwealth's constitutional personality. First, as a constitutional person the Commonwealth is shown to be susceptible to State law. Second, what Gummow J described as the 'exclusive domain' of the executive power is protected from State law. Third, the idea that the Commonwealth might 'consent' to State law confirms the negative claim of this thesis, that legal personality must be distinguished from government.

(i) The Prerogative

Justice Dixon's dissent in *Uther* acknowledged that the Commonwealth might be bound by '[g]eneral laws made by a State [that] affix legal consequences to given descriptions of transaction'.[1261] He gave the example of section 348 of the *Companies Act 1937* (NSW), which made provision for the form of a company's contracts.[1262] However, his Honour held that a State could not regulate the 'legal situation which the Commonwealth, as a Government, shall occupy with

[1259] WMC Gummow and RP Meagher, 'Sir Owen Dixon's Heresy' (1980) 54 *Australian Law Journal* 25.

[1260] cf Leslie Zines, 'The Nature of the Commonwealth' (1998) 20 *Adelaide Law Review* 83, 89.

[1261] *Uther* (n 71) 528 (Dixon J).

[1262] Section 348(1)(a) of the *Companies Act 1937* (NSW), eg, provided that contracts 'on behalf of a company' 'may be made on behalf of the company in writing under the common seal of the company' where, if made between private persons, it 'would be by law required to be in writing under seal'.

reference to private rights.'[1263] This shows that the boundary between permissible and impermissible interference was dependent upon something deeper merely than the presence of the 'Commonwealth' in the transaction. What was important was the position of the Commonwealth 'as a Government', as distinct from its position as constitutional person.

The burden of Dixon J's language here was to dispense with the taxonomy of the prerogative, an effort that can be seen over several judgments. His Honour was careful to stress that, while the origin of the Commonwealth's priority of payment in a winding-up was in the prerogative, nevertheless it had a 'modern form'.[1264] In *Farley's Case*, he described the Commonwealth's priority as a 'fiscal right', a 'governmental or fiscal right of the Commonwealth', and as a 'right which springs from a prerogative of government'.[1265] This language was noticed by Mr Frank Kitto KC who, appearing for the Commonwealth in *Uther*,[1266] argued that the State Parliaments could not exercise their legislative powers to detract from the 'rights which the Federal Executive obtained on its creation'. Justice Dixon's dissent in *Uther* reinforced this language. He described the priority as the Commonwealth's 'right … as a creditor for public moneys',[1267] and as bearing on the legal rights which the Commonwealth, 'as a government', shall occupy with

[1263] *Uther* (n 71) 528 (Dixon J) (emphasis added).

[1264] *Farley's Case* (n 311) 301 (Dixon J); *Cigamatic* (n 93) 376-377 (Dixon CJ).

[1265] *Farley's Case* (n 311) 301, 302, 304, 312 (Dixon J).

[1266] *Uther* (n 71) 510 (report of argument of Kitto KC).

[1267] ibid 528 (Dixon J).

reference to private rights.[1268] In *Cigamatic*, Dixon CJ described the priority as a 'right at common law of the Crown', as 'one of the fiscal rights of government', a 'fiscal right belonging to the Commonwealth as a government', and a 'federal fiscal right'.[1269]

In his thesis on the prerogative, Dr Evatt classified the priority of payment in a winding-up as an 'immunity or preference' of the King.[1270] This was done 'for practical purposes', and it was based on the 'negative' character of the priority—'negative' in the sense that it did not 'connote isolated and occasional action' but rather connoted permanence and continuity. The priority of payment defers the citizen's otherwise equally ranking debt and, by elevating the Commonwealth's right, it reduces the citizen's right from a *pari passu* distribution. Justice Evatt said in *Farley's Case* that, 'by its very nature, such prerogative right postulates a preference over the subject'.[1271] Justice Starke said the priority was 'a prerogative right because it is a right which belongs to the Crown "over and above all other persons."'[1272] It will also be noticed that Dixon J's usage of the word 'right' was in each case qualified adjectivally, making it clear that was protected was special, or governmental, or was derived from the prerogative. His Honour said later, in *Cigamatic*, that the prerogative was 'one of the fiscal rights

[1268] ibid. See also *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 3, 41 (Dixon CJ).

[1269] *Cigamatic* (n 93) 376-378 (Dixon CJ).

[1270] Evatt (n 121) 31. Prerogatives of the nature of immunities and preferences were contrasted with two other types of prerogative: prerogatives that Evatt called 'executive powers' involved direct action, whereas a third class concerned prerogatives conferring 'ordinary rights of property against the whole world'.

[1271] *Farley's Case* (n 311) 323 (Evatt J).

[1272] *Uther* (n 71) 525 (Starke J).

of government'.[1273] Dr Evatt's thesis concluded, in what remains the only extended treatment of this issue, that the Executive Government of the Commonwealth could exercise the prerogative because of the '*partial* validity of the legal theory of the unity of the Crown'.[1274] The theory was *partially* valid because, although the Commonwealth was a distinct *persona* for practical purposes, it owed its legal existence to, and exercised prerogative powers 'in right of', the Crown.[1275] We do not adhere to that fiction anymore. The modern theory is that something corresponding to the royal prerogative is included in the terms 'maintenance of this Constitution' in section 61 of the *Constitution*.[1276] In this way, the judgments of Dixon J correspond to the search for the exclusive domain of executive power.

Justice Dixon's emphasis in *Uther* was on relations involving 'constitutional function or power'.[1277] The Commonwealth's priority in the winding up was a function of its position as 'creditor for public moneys', and its relation in that respect to 'subjects' who were 'creditors for private moneys'.[1278] The point was elaborated in *Essendon Corporation*,[1279] where a State instrumentality sought to tax Commonwealth property occupied in the 'actual carrying on of measures of defence.' Justice Dixon said that, quite aside from section 114, the *Constitution*

[1273] *Cigamatic* (n 93) 376-377 (Dixon CJ).

[1274] Evatt (n 121) 137 (emphasis added).

[1275] ibid 63-65.

[1276] cf *Henderson's Case* (n 27) 464 (Gummow J); *Pape* (n 674) 83 [214]-[215] (Gummow, Crennan and Bell JJ); *Cadia Holdings Pty Ltd v New South Wales* (n 121) 210 [30] (French CJ).

[1277] A point made with reference to American cases: *Uther* (n 71) 529 (Dixon J).

[1278] ibid 528 (Dixon J).

[1279] *Essendon* (n 1216) 18 (Dixon J) (emphasis added).

'does not permit the State to tax *that kind of action* of the Commonwealth.' This was not a case, as his Honour later said, 'where the Commonwealth comes in to avail itself of privileges, facilities or a course of business established by or under State law to which a charge or even a tax is incident.'[1280] There is an imperfectly articulated distinction in these judgments, between varieties of executive action.

It has been suggested from time to time that the distinction drawn by Dixon J was between prerogative and non-prerogative activities.[1281] That overlooks Dixon J's statement in *Uther*, that the prerogative was 'an added reason, a reason perhaps conclusive in itself, for saying that it is a matter completely outside State power.' [1282] It was the antecedent consideration that was more important to his Honour: the proposition that the States lacked power to 'define or regulate the rights or privileges, duties or disabilities, of the Commonwealth in relation to the subjects of the Crown'.[1283] In *Henderson's Case*, six Justices held that the Commonwealth's immunity extended beyond the prerogative. [1284] The prerogative forms part of the protected zone of executive power, the zone of exclusivity. It is a sufficient but not a necessary condition of the immunity. What was more important, to Dixon CJ at least, was the absence of State legislative

[1280] ibid 24 (Dixon J).

[1281] *Cigamatic* was treated as being limited to prerogative in *Re Commissioner of Water Resources and Leighton Contractors Pty Ltd* [1991] 1 Qd R 549 (QSC); cf Doyle (n 1219) 50-51. It was argued by Keith Mason QC, later President of the Court of Appeal of New South Wales, that the decision should be limited to the prerogative: *Henderson's Case* (n 27) 419; this argument was also made by MH McClelland QC in *Maguire v Simpson* (n 649) 365.

[1282] *Uther* (n 71) 528 (Dixon J).

[1283] ibid.

[1284] *Henderson's Case* (n 27) 424 (Brennan CJ), 441-442 (Dawson, Toohey and Gaudron JJ), 454 (McHugh J), 469-470 (Gummow J). Justice Kirby would have rejected the *Cigamatic* principle entirely, replacing it with an inverse application of the *Melbourne Corporation* principle: ibid 507- 509 (Kirby J).

power to 'define or regulate' particular species of relationships that the Commonwealth had 'in relation to' subjects. These were not legal relationships (of the constitutional person) *with* subjects, but the rights, privileges, duties or disabilities that the government bears *in relation to* subjects.

(ii) Want of Power

Justice Dixon also explained the immunity on the basis of an historical proposition about the absence of any legislative power of State Parliaments capable of applying to the relationship of the Commonwealth with its subjects. What is important for present purposes is to see what his Honour meant by 'Commonwealth'. In *Uther*, his Honour had asked, rhetorically: 'whence did the States obtain the power to regulate the legal relations of this *new polity* with its subjects?'[1285] Rather than involving an implication restraining an acknowledged State legislative power,[1286] his Honour's view was based on an historical conception of what was involved in colonial legislative power.[1287] The 'polity' did not then exist, therefore the State Parliaments could not now legislate for the 'polity'. Plainly, that was a flawed conception: the Commonwealth and State Parliaments now regulate many ideas, industries and objects that were not in existence in 1901 (for example aeroplanes). Nevertheless, the notion is interesting for the distinction that it involved, between government and constitutional person.

[1285] *Uther* (n 71) 530 (Dixon J) (emphasis added).

[1286] cf *Payroll Tax Case* (n 312) 372-373 (Barwick CJ); cf *Henderson's Case* (n 27) 451 (McHugh J), describing the immunity as a 'rule that arises by implication from the nature of a federation.'

[1287] Sawer (n 99) 580.

Barwick CJ's exposition of this issue in the *Payroll Tax Case* rested on the inexactly named[1288] concept of 'discrimination'. Legislation was 'discriminatory' in the relevant sense if it was *directed* to the Commonwealth, or to the performance of Commonwealth functions. This was distinguished from legislation that applied generally, and to which the Commonwealth became bound in the course of its operations. Discriminatory legislation could not be supported by State legislative power, because the State simply had no legislative power with respect to the Commonwealth or its functions.[1289] The Colony of New South Wales had had no legislative power with reference to the Commonwealth prior to Federation, since the Commonwealth did not at that time exist.[1290] No such legislative power could have 'continued' under section 107 of the *Constitution*. Thus, in *Cigamatic* it was said that the Commonwealth's 'federal fiscal right' to priority of payment, as well as any other 'legal rights of the Commonwealth in relation to its subjects', lay outside the boundary of the State's legislative power.[1291]

To understand the immunity in this way was unsatisfactory for a number of reasons.[1292] As a method for construing State legislation it was artificial and outcome-driven. As a reading of State legislative power it was rigid and originalist, in that it paid strict attention to what might have been the ambit of the power at the time of Federation. It ignored the amplitude with which the

[1288] cf *Payroll Tax Case* (n 312) 375 (Barwick CJ).

[1289] The concept is explained in the *Melbourne Corporation Case* (n 12) 61 (Latham CJ).

[1290] *Uther* (n 71) 530 (Dixon J).

[1291] *Cigamatic* (n 93) 378 (Dixon CJ).

[1292] cf Doyle (n 1219) 62-63 for a cogent attack.

State Constitutions confer legislative powers,[1293] each of which is 'continued' by section 106 of the Commonwealth *Constitution*. State legislative power is not limited to the natural or artificial persons existing prior to Federation, nor to the matters interesting to colonial legislatures prior to Federation.[1294] This approach to State legislative powers was inconsistent with what was done in the *Engineers' Case*, and also with what was said: in particular, that the 'principle we apply to the Commonwealth we apply also to the States'.[1295] Its logical flaws were productive of linguistic tensions in relation to the judgment of Fullagar J in *Bogle* and later in the plurality judgments in *Henderson's Case*. It also rested upon the contestable premise that a statute can admit of only one characterisation.[1296]

The rejection of the want of power conception involves the proposition that, at least to some extent, the 'Commonwealth' may fall within the purview of State legislative power. Examples of permissible interference call attention to what, exactly, is understood to be bound: what activities, institutions or persons.

[1293] Three of the State Constitutions confer legislative power upon their respective Parliaments, to legislate 'in all cases whatsoever': eg *Constitution Act 1905* (NSW), s 5. The High Court has said that, subject to territorial limitations (since removed by the *Australia Act 1986* (Cth), s 2(1)), these words confer 'a complete and unrestricted power to make laws with reference to New South Wales.' The same words are used in *Constitution Act 1975* (Vic), s 16; *Constitution of Queensland* (2001), s 8, referring to *Constitution Act 1867* (Qld), s 2. Other State Constitutions preserve the pre-existing power of the colonial Legislative Councils: *Constitution Act 1934* (SA), s 5; *Constitution Act 1889* (WA), s 2; *Constitution Act 1934* (Tas), s 9. There is no reason for thinking that these powers are narrower: see Bradley Selway, *The Constitution of South Australia* (Federation Press 1997) 63 [5.1], describing South Australian legislative power as 'plenary'. The *Australia Act 1986* (Cth), s 2(2) confirms that each State Parliament is capable of exercising 'all the legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State'.

[1294] cf Doyle (n 1219) 62.

[1295] *Engineers' Case* (n 59) 155 (Knox CJ, Isaacs, Rich and Starke JJ); cf Henderson's *Case* (n 27) 504-505 (Kirby J), suggesting that the distinction between binding and affecting the Commonwealth unconsciously revived the principle of 'mutual freedom from interference'.

[1296] cf *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 570 (Taylor J), 573 (Menzies J), 582 (Windeyer J); the point is made in Gummow and Meagher (n 1259) 28- 29 fn 31.

Professor Sawer argued that the Commonwealth may become bound 'just as much' as the other legal persons, natural or artificial, which could be said 'literally or notionally' to be within the territorial limits of a State.[1297] As McHugh JA said, with evident disapproval, in *Australian Postal Commission v Dao*:

> The argument that the States have power to bind the Commonwealth depends ultimately upon the premise that the Commonwealth is no different from any other citizen or legal personality who or which comes within the sphere of operation of State law.[1298]

His Honour refuted this argument on the basis that the 'Commonwealth' is not a legal person just like any other. That was because the Commonwealth is 'a body of limited powers'. His Honour was right, of course, but not for the precise reason that he gave. The Commonwealth (government) is not vulnerable to State law; it is quite unlike a legal person, because it is a 'body of limited powers'. The Commonwealth (government), so conceived, is not a legal person at all. The Commonwealth (constitutional person), on the other hand, *is* susceptible to State law but it is not a 'body of limited powers'. No governmental power is vested in the Commonwealth (constitutional person).

(iii) The 'Consent' of the Commonwealth

The idea that the Commonwealth might 'consent' to becoming bound by State statutes was important to Dixon J's view of the doctrine. It was advanced to justify the illustrations of permissible State interference. The idea of 'consent'

[1297] Sawer (n 99) 585-586; see also Gareth Evans, 'Rethinking Commonwealth Immunity' (1972) 8 *Melbourne Unviersity Law Review* 522, 524.

[1298] *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 (NSWCA) 595D (McHugh JA).

was expressed in *Cigamatic* using the language of election. His Honour said that the Part X of the *Companies Act 1936* (NSW) established a scheme, which the 'Crown in right of the Commonwealth' could either 'stand outside of' or into which it could 'at its election come in voluntarily'.[1299] In the *Melbourne Corporation Case,* Dixon J had said:

> At bottom the principle upon which the States become subject to Commonwealth laws is that when a State avails itself of any part of the established organisation of the Australian community it must take it as its finds it. Except in so far as under its legislative power it may be able to alter the legal system, a State must accept the general legal system as it is established.[1300]

This passage, by its structure and by its use of the indicative mood, treats a personified State as an actor within an established legal system capable of modification by its own legislative power. Although a State's subjugation to Commonwealth law is not *voluntary* in the sense of being invited, nevertheless subjugation is the contingent expression of a direct choice to 'avail itself' of the legal organisation of the community. Justice Dixon regarded the *Melbourne Corporation* principle as unnecessary to the elaboration of the Commonwealth's immunity.[1301] Nevertheless, in the *Essendon Corporation Case*,[1302] Dixon J adverted to the possibility of a case where 'the Commonwealth *comes in to avail itself* of privileges, facilities or a course of business established by or under State law'. One year later, Dixon J said:

[1299] *Cigamatic* (n 93) 378 (Dixon CJ).

[1300] *Melbourne Corporation Case* (n 12) 83 and 84 (Dixon J).

[1301] *Cigamatic* (n 93) 377 (Dixon CJ); *Payroll Tax Case* (n 312) 373 (Barwick CJ), 410 (Walsh J); but see *Henderson's Case* (n 27) 440 (Dawson, Toohey and Gaudron JJ).

[1302] *Essendon* (n 1216) 24 (Dixon J) (emphasis added).

> Just as when the Federal Government desires to use or take advantage of anything the nature or character of which is determined by an exercise of the exclusive power of the State, it must take it as it finds it, so the States, when they avail themselves of services or facilities regulated or determined by Federal law, must accept it as part of the system enjoyed by the whole community.[1303]

The idea of 'consent' is also visible in *Henderson's Case*. Those judgments describe the Commonwealth *choosing* to enter into transactions subject to State law.[1304] The idea is that State law binds the Commonwealth, '*alike with the citizen*',[1305] but only where that is the consequence of a choice the Commonwealth had made. *If* the Commonwealth has entered into a given transaction, only *then* would the State law affecting that transaction become binding upon it.[1306]

A related form of consent-based reasoning depended upon the proposition that 'the Crown in right of the Commonwealth' has not *assented* to a given State statute by which it is purportedly bound. This was the rationale given by Fullagar J for his proposition that a State Parliament may not 'bind' the Commonwealth.[1307] In similar vein was Barwick CJ's view that 'the Crown has not by the *Constitution* submitted itself to the legislatures of the States.'[1308] To bind

[1303] *Bank Nationalisation Case* (n 65) 337 (Dixon J) (emphasis added). This passage was cited in *Clarke* (n 695) 305 [61] (Gummow, Heydon, Kiefel and Bell JJ).

[1304] *Henderson's Case* (n 27) 427 (Brennan CJ), speaking of transactions into which the Commonwealth 'may *choose* to enter', 439 (Dawson, Toohey and Gaudron JJ), speaking of activities in which the Commonwealth 'may *choose* to engage', 455 (McHugh J) saying that, if the 'Commonwealth *chooses* to enter into the relationship without negating the consequences of relevant State law, it necessarily submits to the State law governing the incidents of the relationship.'

[1305] *Farley's Case* (n 311) 308 (Dixon J) (emphasis added).

[1306] cf *Uther* (n 71) 528 (Dixon J); *Bogle* (n 2) 260 (Fullagar J).

[1307] *Bogle* (n 2) 259 (Fullagar J).

[1308] *Payroll Tax Case* (n 312) 373 (Barwick CJ).

the Commonwealth without its 'assent' was said by McHugh JA to 'permit the part to diminish the sovereignty of the whole.'[1309] There are several problems with this form of reasoning. One is its tendency to assimilate the 'Crown in right of the Commonwealth' (ie the constitutional person) with the 'Crown' (ie Sovereign), who, personally or by her representative, is a constituent element of the Parliament.[1310] The constitutional person, of course, is not present in the Parliament. Another problem is that this reasoning is inconsistent with colonial cases permitting the 'Crown in right of' one Colony or State to bind the 'Crown in right of another' Colony or State without the latter's consent.[1311]

The notion of 'consent' seems to impute a personalised intentionality to the Commonwealth (government). This *persona* was described by Dixon J as a 'political unit in the federation',[1312] or as a 'polity'.[1313] The same judgments, it might be noted, usually used the device of the 'Crown in right of the Commonwealth' where rights or duties were involved.[1314] The problem with the consent notion is that the constitutional validity of a State law is made to turn on the *choice* of the persons acting from time to time as the Commonwealth. In other words, immunity from State law is 'waived', as such, after an otherwise invalid State law is enacted. This is logically unsatisfactory. As Kirby J said in a related

[1309] *Australian Postal Commission v Dao* (n 1298) 597 (McHugh JA).

[1310] cf *Henderson's Case* (n 27) 446 (Dawson, Toohey and Gaudron JJ) pointing this out, albeit using Crown-dependent terminology.

[1311] ibid 506 fn 354 and 355 (Kirby J) listing the authorities.

[1312] *Cigamatic* (n 93) 399 (Dixon CJ).

[1313] *Uther* (n 71) 530 (Dixon J).

[1314] *Cigamatic* (n 93) 399 (Dixon CJ) saying that the 'Crown' was the creditor; *Uther* (n 71) 521 (Dixon J) speaking of debts due to the 'King in right of the Commonwealth'.

context, 'there can be no estoppel against the *Constitution*.'[1315] To avoid that outcome, the State statute would have to be construed so as not to 'affect' the Commonwealth in the first place. If that were the case, however, it would undermine the notion of voluntariness. [1316] The constitutional task of determining whether an attempted exercise of legislative power is valid cannot be delegated to the Executive Government of the Commonwealth or any State.[1317]

(c) The Cigamatic *Doctrine in* Henderson's Case

The previous sections have dealt with the various ideas and devices that were substituted, following from the *Engineers' Case*, for the notion of sovereignty that had been deployed prior to that case as the fulcrum of the immunities doctrine. None of these devices was satisfactory, and the ideas were shown to be unconvincing as attempts to explain the operation of the doctrine. Nevertheless, the distinction between the Commonwealth (government) and the Commonwealth (constitutional person) persisted in those cases.

This section explores what is now the leading case on the *Cigamatic* doctrine, the decision of the High Court in *Henderson's Case*.[1318] It is structured to follow the different reasons for the decision in that case, which produced a result characterised afterwards by Gummow J as 'unsettled'.[1319] It shows that, in different ways, and notwithstanding terminological variation, each of the

[1315] *Newcrest* (n 621) 647 (Kirby J).

[1316] Gummow and Meagher (n 1259) 29.

[1317] See *D'Emden v Pedder* (n 436) 117 (Griffith CJ).

[1318] *Henderson's Case* (n 27).

[1319] *SGH* (n 1114) 78 [52] (Gummow J); cf *Mining Act Case* (n 62) 471 [230] (Hayne J).

judgments distinguish the Commonwealth (constitutional person) from the Commonwealth (government) and, in so doing, support the narrow theory of constitutional personality. The judgments do so by the deployment of new devices, designed as substitutes for the 'bind'/'affect' dichotomy, which were intended better to represent the way that the doctrine had operated historically and should continue to operate.

Henderson's Case raised the question whether the *Residential Tenancies Act 1987* (NSW), which was intended to bind to the Commonwealth,[1320] applied to the Defence Housing Authority, a corporation created by the *Defence Housing Authority Act 1987* (Cth).[1321] Dr Henderson had purchased land that was subject to a registered lease to the Defence Housing Authority, and sub-let to the Commonwealth. In turn, the Commonwealth had entered into uniform tenancy agreements with defence personnel occupying the premises. The matter came before the High Court on the Defence Housing Authority's application for prohibition, made on the basis that the Residential Tenancies Tribunal had no jurisdiction to hear or determine Dr Henderson's application for orders that he be allowed to enter and inspect, and be provided with a key.[1322] The application was brought by the Defence Housing Authority and supported by the Commonwealth, which together will be described as the 'Commonwealth Parties'.

[1320] cf *Residential Tenancies Act 1987* (NSW), s 4 using the common formulation to bind 'the Crown' in all its capacities to the fullest extend that the powers of the parliament permitted; cf *Whiteford v Commonwealth* (1995) 38 NSWLR 100 (NSWCA) 107A (Kirby P), saying that the *Residential Tenancies Act* clearly intended 'to bind the Crown in right of the Commonwealth, if it had the power to do so.'

[1321] cf *Defence Housing Authority Act 1987* (Cth), ss 11(1), 5 and 7.

[1322] cf *Residential Tenancies Act 1987* (NSW), ss 24 and 29(5)(c).

The Commonwealth Parties' arguments based upon sections 52(ii)[1323] and 109[1324] of the *Constitution* were rejected by the High Court for reasons that are unnecessary to explore here. The submissions on the *Cigamatic* doctrine rested on the proposition that, because of the 'federal structure of the *Constitution*', State law could not of its 'own force bind the Commonwealth.'[1325] The submission evoked a particular conception of the nature of the Commonwealth; a descriptive account collapsing constitutional person into government, as well as aggregating all of the governed, and which elevated this aggregated Commonwealth into something ungovernable by the States. The 'Commonwealth' was something described as having been created by the people, and 'necessarily' having 'social, political and legal relationships with its subjects', which could not be subjected to State control.[1326] This 'Commonwealth' could not be bound by State law without its consent, which consent was to be communicated either by the 'Crown in right of the Commonwealth' or by Commonwealth legislation. That submission was unanimously rejected. In the process, different attempts were made to articulate why, and in what senses, the 'Commonwealth' may become bound by State laws. No judge relied upon or discussed issues of legal (constitutional) personality. Nevertheless, in different ways, each judgment supports the narrow theory of constitutional personality and, in particular, necessitates the rejection of the theory that the Commonwealth (government) is a constitutional person.

[1323] *Henderson's Case* (n 27) 434-438 (Dawson, Toohey and Gaudron JJ), and 424 (Brennan CJ), 449 (McHugh J) agreeing.

[1324] ibid 432-434 (Dawson, Toohey and Gaudron JJ), 424 (Brennan CJ), 449 and 460(McHugh J) agreeing.

[1325] *Henderson's Case* (n 27) 414 (report of argument of Ellicott QC).

[1326] ibid.

Section (i) below deals with the joint reasons of Dawson, Toohey and Gaudron JJ, with whom Brennan CJ separately agreed. Section (ii) deals with the separate reasons of McHugh J. Section (iii) deals with the reasons of Gummow J. These judgments achieved the same result, on the same criteria, whilst applying tests expressed in different language. Justice Kirby dissented on the ground, not considered here, that the *Defence Housing Act* was inconsistent with the *Residential Tenancies Act* and overrode it to that extent.[1327] His Honour did not need to consider the *Cigamatic* principle. Nevertheless, he disagreed with the principle as it had been formulated in *Bogle* and *Cigamatic*.[1328] Justice Kirby preferred to base the immunity on the *Melbourne Corporation Case*,[1329] so as to prevent a State Parliament from discriminating against the Commonwealth, and from impairing the 'integrity or autonomy of the Government of the Commonwealth.' The merits or otherwise of this suggestion are not further explored in this thesis.

(i) The Joint Reasons

The joint reasons of Dawson, Toohey and Gaudron JJ, with which Brennan CJ generally agreed,[1330] rejected the Commonwealth Parties' submission that the *Cigamatic* doctrine removed the jurisdiction of the Residential Tenancies Tribunal. Their Honours did so on grounds that, although subsequently attracting

[1327] ibid 497-499 (Kirby J).

[1328] ibid 503 (Kirby J).

[1329] ibid 507-508 (Kirby J).

[1330] ibid 424 (Brennan CJ).

the support of Hayne J,[1331] have been regarded as unsatisfactory and difficult to apply.[1332]

The joint reasons began by rejecting the Commonwealth Parties' submission that State laws cannot 'by their own force bind the Crown in right of the Commonwealth.'[1333] The phrase 'Crown in right of the Commonwealth' was said to mean 'the government of the Commonwealth exercising the executive power'. Their Honours then drew three distinctions. First, their Honours distinguished between 'the traditional, or clearly regal, functions of government', on one hand, and 'activities of an entrepreneurial or commercial kind' on the other hand.[1334] This distinction was used ostensibly only for the purpose of an historical comparison: the 'Crown's functions' extended nowadays beyond the former, and into the latter.[1335] However, as will be seen, that distinction was later deployed to a more directly pertinent purpose. Second, with Brennan CJ's agreement,[1336] their Honours distinguished the 'capacities of the Crown' from the 'exercise of the capacities of the Crown'. As will be seen, their Honours' sense of the word 'capacity' differed from that adopted here: consistently with the use of the 'Crown' to mean the Executive, 'capacity' was used by their Honours as a surrogate for executive powers. This was advanced as the critical dichotomy for the operation of the immunity, and is examined below. Third, their Honours

[1331] *Mining Act Case* (n 62) 471-472 [229]-[230] (Hayne J).

[1332] *Henderson's Case* (n 27); Zines (n 1260) 191, saying that the distinction raised at least as many problems as the 'bind/affect' distinction.

[1333] *Henderson's Case* (n 27) 438 (Dawson, Toohey and Gaudron JJ).

[1334] ibid.

[1335] ibid.

[1336] ibid 424 (Brennan CJ).

distinguished between legislation *modifying* 'capacities', and legislation 'merely regulating' the 'activities in which the Crown may choose to engage in the exercise of those capacities.'[1337] The former was impermissible; the latter was permissible.

Their Honours defined 'capacities' to mean the 'rights, powers, privileges and immunities' of which Dixon J had spoken in *West*,[1338] quoting from the judgment of Isaacs J in *Pirrie v McFarlane*.[1339] The plurality in *Henderson's Case* purported to follow these judgments.[1340] However, in each of the passages to which the plurality referred, Dixon J had spoken either of the prerogative, which his Honour preferred to call the 'fiscal and governmental rights of the Commonwealth', or of governmental powers that were '*separate and exclusive*'.[1341] As a representation of Dixon J's judgments, their Honours' definition of 'capacities' was therefore over-inclusive. It was over-inclusive because Dixon J had clearly distinguished 'exclusive' or 'fiscal and governmental' rights, on one hand, from the activities or 'transactions' that were not 'separate and exclusive' in the same sense. Thus, in *Farley's Case*,[1342] Dixon J distinguished between 'governmental rights and powers belonging to the Federal executive *as such*', and other 'Commonwealth

[1337] ibid 439 (Dawson, Toohey and Gaudron JJ).

[1338] *West* (n 525) 682 (Dixon J).

[1339] *Pirrie v McFarlane* (n 1196) 191 (Isaacs J). Chief Justice Brennan adopted the same definition: see *Henderson's Case* (n 27)424.

[1340] cf *Henderson's Case* (n 27) 438-439 and 447 (Dawson, Toohey and Gaudron JJ), saying that the distinction was 'fundamental' to the decision in *Cigamatic*.

[1341] cf *West* (n 525) 682 (Dixon J), quoting *Pirrie v McFarlane* (n 1196) 191 (Isaacs J), describing the 'capacity or functions *expressly conferred*' upon government in the context of a discussion of the use to which '*separate and exclusive government powers*' may validly be put (emphasis added).

[1342] *Farley's Case* (n 311) 308 (Dixon J).

administrative action'. In *Uther*,[1343] his Honour had said that 'given descriptions of transaction' might be validly affected by State law. These remarks were restated in *Cigamatic*.[1344] The judgments in *Henderson's Case* give no clear indication of how the 'capacity'/'exercise of capacity' dichotomy assists to distinguish what Dixon J called a 'transaction' from what his Honour called a 'governmental' and 'fiscal right'.

The dichotomy was buttressed with a conception of 'equality'. It was here that the distinction between 'traditional or regal' activities, and those of a 'commercial or entrepreneurial kind' was called into aid. Relationships of 'equality' existed where the 'capacity of the Crown' was no greater or narrower than that of the subject. Contract was given as an example of this: 'the capacity of the Crown to enter into contracts is no more or less than that of its subjects.'[1345] Later in the judgment, their Honours adverted to the 'practical reality' that the 'Commonwealth executive increasingly engages in transactions *upon the same basis* as ordinary citizens in a State'.[1346] In such cases, laws of general application binding 'the Crown and its subjects alike', did not have an impact on 'any relationship of equality' and would hence be valid. As with earlier phases of the doctrine, the Commonwealth (constitutional person) was understood to be bound by State laws in contexts where it behaved as, or was equal to, a citizen.

[1343] *Uther* (n 71) 528 (Dixon J).

[1344] *Cigamatic* (n 93) 378 (Dixon CJ).

[1345] *Henderson's Case* (n 27) 443 (Dawson, Toohey and Gaudron JJ).

[1346] ibid 447 (Dawson, Toohey and Gaudron JJ) (emphasis added).

The Commonwealth (government), on the other hand, was not bound by State laws.

Chief Justice Brennan agreed that a State law of 'general application', governing 'transactions into which the Crown in right of the Commonwealth may choose to enter,' would bind 'the Crown in right of the Commonwealth'.[1347] The idea of *choice* is a species of the consent-based reasoning that has already been rejected in this chapter. This context affords a further example of the difficulty with such reasoning. The theory would hold that State legislation can regulate the formation of a contract by the Commonwealth (an '*exercise*' of a '*capacity*'), but cannot validly postpone the debts of the Commonwealth in a liquidation (a '*capacity*'). The theory cannot explain, however, why the Commonwealth has not '*exercised*' its capacity when it files a proof of debt in the liquidation. Chief Justice Brennan refined the idea by saying that the executive power exerted in the making of the '*choice* to enter'[1348] into a transaction was not '*affected*' merely because the '*incidents*' of that transaction were prescribed by State law.[1349] The italicised words suggest untenably that the capacity to choose, per se, involves executive power but that the performance of a contractual obligation, or even the '*choice*' to breach it,[1350] also does not. If the choice to breach also involves executive power, as it must, then that choice has been regulated by the

[1347] ibid 427 (Brennan CJ).

[1348] ibid 427 (Brennan CJ).

[1349] ibid 427 (Brennan CJ).

[1350] A point made by McHugh J: ibid 455.

Residential Tenancies Act 1987 (NSW), which compels the Commonwealth to provide a key to its landlord.[1351]

Within this idea of equality there is subsumed a notion that, when acting 'as' a legal person, when contracting or otherwise engaging 'on the same basis' as human beings, the Commonwealth may be bound by State law. The joint judgment went on to say that relationships of 'inequality' existed where the 'Crown alone' had a privilege or immunity, for example the right to priority of payment in a liquidation. A footnote cited judgments, including two judgments of Brennan J, adopting Blackstone's definition of the prerogative.[1352] Justice Brennan, it must be remembered, had distinguished the prerogative powers of the 'Crown' from the 'mere capacities of a kind which may be possessed by persons other than the Crown.'[1353] Their Honours went on to say that State laws affecting relationships of 'inequality' would be invalid because they would 'alter the relationship of the Crown with its subjects.'[1354] That is a notion that might have been better expressed by saying, as Gummow J did, that the Executive Government (the 'Crown') is immune when exercising power within the 'exclusive domain'.[1355]

[1351] cf *Residential Tenancies Act 1987* (NSW), ss 29(1)(a), (c).

[1352] Namely *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32, 48 (Isaacs, Powers and Rich JJ); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 155 (Brennan J); *Davis v Commonwealth* (n 52) 108 (Brennan J).

[1353] *Davis v Commonwealth* (n 52) 108 (Brennan J).

[1354] *Henderson's Case* (n 27) 443 (Dawson, Toohey and Gaudron JJ).

[1355] ibid 473 (Gummow J).

Their Honours went on to reject the distinction, drawn by Fullagar J in *Bogle*,[1356] between laws 'binding' the Commonwealth and laws 'affecting' the Commonwealth.[1357] This distinction was said to be 'insupportable' and 'impossible' to apply,[1358] a conclusion with which Kirby J agreed.[1359] Justice Fullagar's distinction was based upon the view, shared by Barwick CJ,[1360] that the 'Crown in right of the Commonwealth' had not assented to the State statutes, and therefore could not be 'bound' although it might choose to 'become affected'. Their Honours rejected this view on the ground that it cannot be 'a matter of choice for the Commonwealth executive whether or not it is bound by the law of the land.'[1361] If the 'Crown' is to be bound by a State law then, subject to inconsistency with a Commonwealth law, it will be 'bound by the statute *in the same way as the subject is bound*'.[1362] This is the critical idea. The subject is bound by State legislation as a legal person; so too is the Commonwealth (constitutional person). On the other hand, the Commonwealth (government), doing something the subject cannot do (a relationship of inequality), is immune.

(ii) The Reasons of McHugh J

Justice Gummow and McHugh J delivered separate judgments that, although they contain differences in detail, essentially agreed that the Defence Housing

[1356] *Bogle* (n 2) 23 (Fullagar J).

[1357] *Henderson's Case* (n 27)445 (Dawson, Toohey and Gaudron JJ).

[1358] ibid 446 (Dawson, Toohey and Gaudron JJ).

[1359] ibid 444-447 (Dawson, Toohey and Gaudron JJ), 504-505 (Kirby J).

[1360] cf *Payroll Tax Case* (n 312) 373, 379-380 (Barwick CJ).

[1361] *Henderson's Case* (n 27) 447 (Dawson, Toohey and Gaudron JJ).

[1362] ibid 447 (Dawson, Toohey and Gaudron JJ) (emphasis added).

Authority could not avail itself of the immunity because it was not part of the Executive Government of the Commonwealth.[1363] That was because the Defence Housing Authority performed its functions 'in a corporate form established by statute.'[1364] Its rights and liabilities were the immediate product of its statutory functions and powers, and did not depend on 'executive power derived solely and directly from the *Constitution*'.[1365]

Justice McHugh thought it was 'settled doctrine' that the States had 'no constitutional power to bind the Commonwealth'.[1366] The proposition that the States could not 'bind' the Commonwealth was said to follow from the fact that 'no polity within a federation' had the power 'to bind another polity within that federation.'[1367] Much depends here on what is meant by the verb 'to bind' and the noun 'polity'. Immediately, the proposition was qualified. The Commonwealth could become 'affected by' the common law, which the States were capable of altering.[1368] Justice McHugh explained Fullagar J's dichotomy as follows:

> [Justice Fullagar's] statement was not directed to the aggregate of the legal and personal capacities enjoyed by the Commonwealth and its servants and agents. Rather, Fullagar J was directing himself to those extraordinary executive powers and capacities which the Constitution gives to the Commonwealth itself to carry out as a political sovereign in the federation. He

[1363] *Henderson's Case* (n 27) 459-460 (McHugh J), 468-469 (Gummow J); other judges assumed but did not decide that the DHA was entitled to the Commonwealth's immunity: 428 (Brennan CJ), 447 (Dawson, Toohey and Gaudron JJ), and 502 (Kirby J).

[1364] ibid 468 (Gummow J).

[1365] ibid 460 (McHugh J), 469 (Gummow J).

[1366] ibid 451 (McHugh J).

[1367] ibid.

[1368] ibid 453 (McHugh J).

> was saying that the States cannot control or restrain the Commonwealth in the discharge of its powers or capacities arising under the Constitution.'[1369]

The 'Commonwealth' is here understood to have two distinguishable spheres of action: 'legal and personal capacities' and the 'extra-ordinary executive powers and capacities' given to a 'political sovereign in the federation.' In the former sphere, the Commonwealth may 'become affected by State law'. In the latter, it may not. In neither sphere, however, could the Commonwealth be bound directly.

In order to explain how the 'polity' could be 'affected by' but not 'bound by' State laws in the sphere of its 'legal and personal capacities', McHugh J was forced to introduce a spurious temporal dimension. State laws could operate upon Commonwealth 'capacity', defined as the 'legal right or power to do or refrain from doing something,'[1370] provided that it did not 'discriminate'[1371] against the Commonwealth. That, with respect, is a correct statement of principle. However, his Honour went further. State law could not operate upon Commonwealth 'capacity' once that capacity had 'authorised a relationship creating rights and duties'.[1372] So, for example, the 'Commonwealth' could 'become affected by' State law in the formation of a contract. Once contractual rights had accrued, the window would have shut and the Commonwealth would be immune. It is, with respect, difficult to reconcile this notion with the result of *Henderson's Case*, where a leasehold interest (having been formed) was able to be regulated by the

[1369] ibid 456 (McHugh J) (emphasis added).

[1370] ibid 454 (McHugh J).

[1371] ibid 457-458 (McHugh J). This term is explained below.

[1372] ibid 454 (McHugh J).

State *Residential Tenancies Act*. His Honour did not even attempt to compare the execution date of the lease in question, relative to the enactment of the statute.

(iii) The Reasons of Gummow J

Justice Gummow's judgment was uncomplicated by overly inclusive definitions of the 'Crown' or 'capacity'. He said that the *Cigamatic* doctrine protected executive power from State interference analogously to the way that section 109 of the *Constitution* protects legislative power, or to the way that the principle in *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[1373] protects judicial power. The *Cigamatic* principle conferred an immunity from State legislative interference, not upon the Commonwealth, but upon members of the Executive Government of the Commonwealth and any non-human legal persons with a sufficiently close constitutional relationship to the Executive Government of the Commonwealth.[1374] As an example of the latter, His Honour cited the Repatriation Commission, which, although it was a body corporate, had been held in *Kirkland*[1375] to be 'so practically identified with [a department of Government] as to be indistinguishable.' In *Bogle*,[1376] the Repatriation Commission had been distinguished from Commonwealth Hostels Ltd, which had an independent existence and performed with independent discretion what were 'not characteristically functions of Government.' Justice Gummow also referred,

[1373] *Owens [No 2]* (n 1118).

[1374] *Henderson's Case* (n 27) 466 (Gummow J).

[1375] *Repatriation Commission v Kirkland* (1923) 32 CLR 1, 8 (Knox CJ and Starke J), 13 (Higgins J), 20-21 (Rich J).

[1376] *Bogle* (n 2) 281-282 (Taylor J).

in a footnote,[1377] to the Federal Capital Commission. Although it was a body corporate, it was part of the Executive Government of the Commonwealth because it had been given the administration of a department.[1378]

In chapter II it was observed that many bodies, institutions and legal persons fall within the rubric of the Commonwealth (government) but have distinct identities from the Commonwealth (constitutional person). The Defence Housing Authority, like the Commonwealth Trading Bank and Airservices Australia,[1379] is part of the 'Commonwealth' for the purpose of section 75(iii) of the *Constitution*[1380] but is not sufficiently identified with the Executive Government to have the protection of the *Cigamatic* doctrine.[1381] Here is a set of sub- groupings within the Commonwealth (government): a myriad of human beings organised into interlocking groups, some with distinct legal personality, having different constitutional roles, each capable of mutual legal relations including with the Commonwealth (constitutional person).

Justice Gummow held that, in vesting the Defence Housing Authority with its own legal personality, the Parliament 'was not adding to the executive arm of the Commonwealth.'[1382] To the extent that the Authority might be said to exercise 'executive power', that power arose from federal statute and was protected only

[1377] *Henderson's Case* (n 27) 467 fn 204 (Gummow J).

[1378] *Pitcher v Federal Capital Commission* (1928) 41 CLR 385, 389 (Knox CJ and Powers J), 393 (Higgins J), 394-395 (Gavan Duffy and Starke J).

[1379] *Airservices Australia* (n 650) 143 [14] (Gleeson CJ, Gummow and Hayne JJ).

[1380] *Henderson's Case* (n 27) 466 (Gummow J).

[1381] ibid 463 (Gummow J).

[1382] ibid 469 and 468 (Gummow J).

by section 109 of the *Constitution*.[1383] What were sought to be protected from the *Residential Tenancies Act* were the 'rights and immunities' arising under the general law, from the relationship of lessor and lessee that had been created consensually by the lease.[1384] This involved no 'violation' of section 61 of the *Constitution*.[1385]

Justice Gummow then made a number of comments with respect to the content of the *Cigamatic* principle that, it is submitted, illuminate the role of the constitutional person within this framework. The phrase 'become affected by State laws' had been used by Fullagar J both to evoke the different judgments of Dixon J, and in contradistinction to State laws that 'purported to "bind" the Commonwealth.'[1386] The examples of 'permissible affectation' given by Fullagar J and Dixon J were said by Gummow J to be of 'legislation which enacted or qualified in some respect the common law of personal obligations with respect to such matters as the formation, performance and discharge of contracts.'[1387] The 'Commonwealth', as Gummow J said in *Henderson's Case* with reference to the judgment of Latham CJ in *Uther*, [1388] 'lives and moves within the Australian common law'. It is this 'Commonwealth' who is the party to government contracts. It is this 'Commonwealth' that may be bound by State laws. This 'Commonwealth' was distinguished in the *Cigamatic* context from the Executive

[1383] ibid, referring to *Cigamatic* (n 93) 378 (Dixon CJ).

[1384] *Henderson's Case* (n 27)466 (Gummow J).

[1385] ibid 468 (Gummow J).

[1386] ibid 473 (Gummow J).

[1387] ibid 473 (Gummow J).

[1388] *Uther* (n 71) 521 (Latham CJ).

Government, and from those legal persons who, although parts of the 'Commonwealth' for the purposes of section 75(iii) *Constitution*, [1389] were nevertheless insufficiently identified with the Executive Government to merit the protection of the *Cigamatic* doctrine. This, quite separate 'Commonwealth', is the Commonwealth (constitutional person).

(3) Conclusion to Chapter IV

This chapter has explored three different phases in the life of the *Cigamatic* doctrine. During the first phase, the doctrine was premised on the notion that the Commonwealth and States were each sovereign within their own spheres. During the second phase, the doctrine was premised on a number of different theories, foremost of which was the proposition that the States lacked legislative power to 'bind' the Commonwealth without its 'consent'. The third phase has been characterised by disagreement about the merits of a dichotomy between State laws impermissibly affecting a broadly defined notion of 'capacities', and State laws permissibly affecting the 'exercise' of those capacities. The doctrine remains unsettled. Viewed in retrospect, it can be seen as one of the most controversial[1390] problems in the canon of Australian public law. The chapter has explained that the version of the doctrine propounded by Gummow J in *Henderson's Case* is both the most coherent version of the immunity, and

[1389] *Henderson's Case* (n 27) 463 (Gummow J).

[1390] The controversy is illustrated by *Pirrie v McFarlane* (n 1196) 201 (Isaacs J), saying (in dissent) that the result of the case was 'utterly ridiculous', 213 (Higgins J) saying that the minority's view produced a 'grotesque result of the Constitution [which] must startle the unsophisticated.' That the doctrine remains unsettled was remarked upon in *SGH* (n 1114) 78 [52] (Gummow J). See also Anne Twomey, 'Federal Limitations on the Legislative Power of the States and Commonwealth to Bind One Another' (2003) 31 *Federal Law Review* 507.

represents the best articulation of the progression of the cases over time. That aside, the primary focus of the chapter has been to show that, in each phase, and to varying degrees, it has been necessary to distinguish the Commonwealth (government) from the Commonwealth (constitutional person) in order to explain the permissible operation of State laws upon the 'Commonwealth'.

Two commentators have expressed the opinion that the *Cigamatic* doctrine actually operates upon the distinction between government in the broad sense and government as legal person. Professor Moens and Dr Trone, in the seventh edition of *Lumb & Moens' Annotated Constitution of the Commonwealth of Australia*,[1391] argue that the *Cigamatic* doctrine operates upon a distinction between the Commonwealth as 'National Government' and the Commonwealth as 'citizen'. When acting in the performance of functions appropriate to its status as National Government, involving rights and interests peculiar to government or essential to the maintenance of its status, the Commonwealth is immune from State law. Where acting within the territorial borders of a State, involving 'rights and interests which are shared by ordinary members of the community', the Commonwealth operates subject to the laws in force in the State. Professor Howard derived a similar conclusion from the cases: the Commonwealth must be unimpeded in the performance of its constitutional functions, being those functions expressly or by implication mandated by the *Constitution*,[1392] but its constitutional functions are fewer in number than the full range of actions that the Commonwealth is capable of performing. Insofar as the Commonwealth

[1391] Moens and Trone (n 1112) 758.

[1392] Howard (n 1112) 218.

exercises its 'undoubted capacity to do things *beyond* its constitutional functions', then it must operate subject to State law 'in the same way as anyone else.'[1393]

The analysis conducted in this chapter does not rise quite as high as might be suggested by these commentators. The cases show that State laws can sometimes operate permissibly on human beings engaged in conduct to which the constitutional person has no relevance, eg defence force personnel bound by State traffic laws (*Pirrie v McFarlane*). The cases also suggest that at least some varieties of State law will be invalid, notwithstanding that they operate upon the Commonwealth (constitutional person). In *Henderson's Case*, for example, Gummow J said that it would be 'to enter into another dimension to conclude that a State might create a criminal offence committed by the Commonwealth in respect of the conduct by the Commonwealth itself of its Executive Government.'[1394] Thus, the *Cigamatic* doctrine does not itself turn upon the distinction between the Commonwealth (constitutional person) and the Commonwealth (government). Nevertheless, that distinction was shown to be present in some form in each of the versions of the doctrine propounded over time. The distinction is illuminating in this context because it resolves the deeper conceptual problem, of how the 'Commonwealth' might be composed of the States, the government and the people (ie Commonwealth (nation)), or embody the primary federal law-giving and law-applying institutions of the legal system (ie Commonwealth (government)), whilst appearing as a subject of rights and duties within that system. This thesis argues that this problem can only be

[1393] ibid 219 (emphasis added).

[1394] *Henderson's Case* (n 27) 473 and see fn 226 (Gummow J).

resolved by admitting the narrow theory of constitutional personality: the Commonwealth (constitutional person) is distinct from the government and the nation.

CONCLUSION

This thesis advanced the primary claim that the 'Commonwealth' is the name of a legal (constitutional) person created by provisions of the *Constitution* implying its capacity for rights and duties. This legal person was termed the Commonwealth (constitutional person) to facilitate the drawing of distinctions between other meanings of the term 'Commonwealth' in the *Constitution*; for example, to designate the Commonwealth (nation) or the Commonwealth (government). The primary claim was defended and elaborated by correlative negative claims: the Commonwealth (government) is not a legal person, and the Commonwealth (constitutional person) is not the government. The terms 'polity' and 'body politic' were shown to confuse these distinct conceptions of the Commonwealth, and to suppress two theories about constitutional personality: the theory of nation (constitutional person), and the theory of government (constitutional person).

The negative claims advanced in this thesis involved an elaboration of Professor Sawer's observation, that there is 'in fact no juristic entity corresponding to the Commonwealth as a whole, or to a state as a whole.'[1395] Sawer observed that it is not 'natural' in the design of a constitution to 'include legislature, judicature and executive in a single public corporation.' Using language then current, he identified the 'Crown in right of the Commonwealth' as the legal person *representing* the Commonwealth (government). The 'Crown in

[1395] Sawer (n 99) 585; and see Sawer (n 45) 165.

right of the Commonwealth' device has been rejected by the High Court in recent times. This thesis argued that the rejection of that device has not brought about the significant structural adjustments that would have been required to erase the consequences of the historical deficiency, in Anglo-Australian constitutionalism, of any legal conceptualisation of the whole 'state' as a legal person. That deficiency is sometimes lamented in the commentary, though it is not always clear why. Australian law has developed without a 'state' notion, and the courts can can continue to develop the law without such a notion, incrementally, so as to satisfy (to the extent necessary) evolving demands of the system, such as accountability and proportionality.

This thesis identified three theories of constitutional personality underlying the way that the Commonwealth (constitutional person) is discussed in cases and literature on the topic. There are two broad theories: the theory of government (constitutional person), and the theory of nation (constitutional person). The former was shown to conceive of the entire government as the constitutional person, incorporating all of the branches through which government (constitutional person) wields governmental power. The thesis has argued that this theory is untenable. The *Constitution* does not vest constitutional powers in the 'Commonwealth' (government). Instead, those powers are wielded by identified institutions and office-holders, which are treated as having legal personality distinct from the Commonwealth (constitutional person). This gives rise to the necessity for provisions like sections 75(iii) and 114, where the term 'Commonwealth' is understood as an umbrella term enveloping the Commonwealth (constitutional person) *and* other entities (some having distinct

legal personality) but having the requisite degree of association with the Commonwealth (government). This is the subject of the correlative negative claims made in this thesis: the Commonwealth (constitutional person) is not the government, and the Commonwealth (government) is not a legal person.

The theory of nation (constitutional person) was shown to conceive of the constitutional person as an aggregate of the people of Australia, united in the 'body politic' by the *Constitution*. The concept of a nation is fluid, and some allowance must be made for differences in what might be comprehended by such terminology. Nevertheless, this theory must confront the 'indissoluble' nature of the Commonwealth (nation), and explain how a constitutional person that is 'indissoluble', and which cannot 'sensibly'[1396] be considered apart from its members (including the people and the States), can still have legal relations with and against those members, as an irreducible unit within the legal system. The High Court has indicated that there are 'different senses in which a place, or a community, or a body politic, may be said to be, or not to be, "a part of" another place, or community, or body politic.'[1397] However, this expansive theory appears to have a core problem: the very point of artificial legal personality is to render the constitutional person distinct from the personalities of the natural persons by which the nation is 'indissolubly' constituted.[1398] *Ex hypothesi*, the

[1396] *Thomas v Mowbray* (n 509) 362 [142] (Gummow and Crennan JJ).

[1397] *Bennett v Commonwealth* (2007) 231 CLR 91, 108 [36] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[1398] cf *Salomon v Salomon & Co* (n 97) 42 (Lord Herschell); *Chaff and Hay Acquisition Committee Case* (n 26) 385 (Latham CJ); *ABC v Lenah Game Meats Pty Ltd* (n 97) 256 [126] (Gummow and Hayne JJ).

Commonwealth (constitutional person) must be a distinct legal person from the people and the States forming composite parts of the Commonwealth (nation).

This thesis advocated a third theory. In its positive dimension, the narrow theory holds only that the Commonwealth (constitutional person) is a unit of the legal system, separate from but represented by (and affected by the acts of) the Executive Government of the Commonwealth. The Commonwealth (constitutional person) in turn *represents* (but does not incorporate) the people of Australia for certain purposes. The primary characteristic of the 'narrow' theory, which distinguishes it from the two 'broader' theories, is that delineates the Commonwealth (constitutional person) from other concepts connoted by the term 'Commonwealth' (ie government and nation). On this theory, there is no difficulty in explaining how the various parts of 'one indissoluble Federal Commonwealth' might sue that Commonwealth, or each other. Such a theory also avoids the need to explain how an undifferentiated 'Commonwealth' could both control the law of obligations, for example, and resort to and make use of that law in carrying on its own business. The difficulties thrown up by broader theories are thus avoided.

Chapter I argued that the narrow theory was consistent with the development of constitutional personality in English law, and its transplantation to Australia both before and after colonisation. Nothing in the rejection of the 'Crown' necessitated the adoption of a broad theory, and the inconsistent and vague usages that have replaced the 'Crown' in modern idiom have achieved no improvement on their predecessor. Chapter II explored the provisions of the

Constitution implying that the 'Commonwealth' enjoys capacities for mutual legal relations. It established that there are at least four different senses of the word 'Commonwealth' in the *Constitution*: the nation, the geographical area occupied by the nation, the government, and the constitutional person. The adoption of the term 'constitutional person' distinguishes the legal person from the other conceptions of the 'Commonwealth', and facilitates comparison with other categories of non-human legal person. Whilst it was not suggested that the *Constitution* itself compels any particular theory of constitutional personality, certain drafting features were identified as pointing towards the narrow theory.

Chapter III demonstrated that legal personality has never been ascribed to the 'Parliament of the Commonwealth', or to the 'Executive Government of the Commonwealth'. Moreover, the behaviour of these individuals, institutions and entities is incompletely attributed to the Commonwealth (constitutional person) and, in the case of the Parliament, not attributed at all. That is so even where their behaviour is within the power of the Commonwealth (government), and where these individuals would for jurisdictional purposes be seen as 'officers of the Commonwealth'. The rules by which such outcomes are achieved were shown to be inconsistent with the theory of government (constitutional person). The distinction between the Commonwealth (government) and the Commonwealth (constitutional person) was shown in chapter IV to form a continuous thread throughout the cases dealing with the Commonwealth's immunity from State law. The *Cigamatic* doctrine was shown to present a logical paradox for broad theories of constitutional personality: how can the constitutional person be at once a unit of the legal system, whilst at the same

time being able to alter that system (in the case of the government), or being underpinned by that system (in the case of the nation). The narrow theory was suggested as a preferable alternative, which avoided this paradox.

It remains true, if trite, that the government is fundamentally different from other legal persons. Adopting a narrow theory does not dissolve whatever underlying need may be felt to draw that dichotomy in particular decisional, discussional or theoretical contexts. Government is 'more powerful than a corporation'[1399] as Dixon J once said. Government contracts can be used to achieve regulatory ends, as was noted in *Williams (No 1)*.[1400] Nevertheless, so worded, the comparison is inapposite and misleading. It is inapposite because 'government' is not a legal person. It is misleading because the Commonwealth (constitutional person) does not wield governmental power. It may (or may not) be the wealthiest legal person or the largest landowner in the country; it is not for such reasons any more or less a legal person.

[1399] *James v Commonwealth* (n 575) 364 (Dixon J); see also *Dixon v Attorney-General* (1987) 75 ALR 300 (FCA) 305 (Jenkinson J).

[1400] *Williams (No 1)* (n 2) 193 [38] and 213 [77] (French CJ) and 353 [521] (Crennan J). See generally Terence Daintith, 'Regulation by Contract: the New Prerogative' (1979) 32 *Current Legal Problems* 41, and Vincent Jones, *The New Public Contracting* (OUP 2006).

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