Federal Law Review

Penhallurick, Catherine --- "Commonwealth Immunity as a Constitutional Implication" [2001] FedLawRw 8; (2001) 29(2) Federal Law Review 151

Commonwealth Immunity As A Constitutional Implication

Catherine Penhallurick[*]

INTRODUCTION

The existence and potential scope of a Commonwealth constitutional immunity from State law has been a vexed issue ever since the High Court decided its first case on this question in 1904[1] There have been major shifts in the approach of the Court over the last century, and the doctrines expounded by the Court have been subjected to an unusually large volume of academic criticism.[2] The operation of Section 64 of the *Judiciary Act 1903* (Cth),[3] together with the presumption of crown immunity,[4] have in many cases prevented the question of constitutional immunity from arising.[5] There are, however, a range of situations in which the constitutional issue will still arise.[6] More importantly, the Commonwealth immunity from

State law remains a highly relevant topic because of the significance of the constitutional issues that it raises. The debate over the existence and scope of the immunity reflects a broader uncertainty as to the form of federalism created by the Australian Constitution.[7]

In this article, I will argue that the Commonwealth immunity from State law must be recognised as a constitutional implication. Although there has been some acknowledgment that the immunity is an implication, there has been little consideration of the consequences that might follow from this.[8]

My contention is that the recognition that the Commonwealth immunity is a constitutional implication has major consequences. The Commonwealth immunity has developed in isolation from broader principles of constitutional law, but it must now be reconciled with these principles. Specifically, the implication of Commonwealth immunity must be drawn in a way that is consistent with the approach to implications which has been articulated by the Court; that is, any immunity must be limited to what is necessary to preserve the text and structure of the Constitution.

The structure of my argument will be as follows. Part I will outline the development of the Commonwealth immunity doctrine, and show why the doctrine must be recognised as an implication. Part II will outline the approach developed by the Court to the drawing of constitutional implications. Part III will analyse the current doctrine of Commonwealth immunity according to these principles. Part IV I will argue that, given the Commonwealth's ability to protect itself using Section 109, no form of Commonwealth immunity from State law should be implied from the Constitution.

PART I: THE DOCTRINE OF COMMONWEALTH IMMUNITY AND ITS CONSTITUTIONAL BASIS

In 1904 the Commonwealth Deputy Postmaster-General for Tasmania argued before the newly established High Court that he should not have to pay the two pence of stamp duty on his salary as required by the State of Tasmania.[9] In 1997, the Defence Housing Authority sought to convince the Court that it should not be required to submit to New South Wales residential tenancy laws which conferred on their landlord a right to inspect the premises rented by the DHA.[10] In these two cases, amongst others, the High Court has been asked to determine whether the Commonwealth Crown (or Executive), and its agents, possess any immunity from the application of State laws.

The text of the Constitution gives the Court no immediately clear answer to this question. Section 109 states that where there is a conflict between Commonwealth and State legislation, the Commonwealth legislation will prevail, but this provision gives no express guidance as to a conflict between the executive power of the Commonwealth and the legislative power of the States. Section 114, which states that neither government may tax the property of another, provides only a limited form of reciprocal immunity. Nor can the Court receive guidance from the intention of the Constitutional founders,[11] since the Constitutional Conventions contain few references to the question of intergovernmental immunities and it is unclear whether the founders intended that the Commonwealth would be bound by State law.[12]

In this Part, I will show that the Court has developed a doctrine of Commonwealth immunity based on the idea that the States lack the power to make laws that affect the Commonwealth in certain ways. I will then argue that this approach is incorrect because the States do have such power, and that the only basis for Commonwealth immunity is as an implication from the Constitution. Although there may appear to be some circularity in this discussion of whether the immunity derives from a lack of power on the part of the States or from an implication protecting the Commonwealth, as will be seen in Part II, given the Court's cautious approach to the drawing of constitutional implications, this is a crucial issue.

The approach of the Court to Commonwealth immunity

The most recent comprehensive consideration of the issue of Commonwealth immunity from State law by the Court was in the case of *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex Parte Defence Housing Authority*,[13] but in order to understand this decision, it is necessary to examine the earlier cases.

The approach prior to the *Residential Tenancies* decision

In the early years of federation, the High Court applied the American doctrine of the implied immunity of instrumentalities to the Australian Constitution,[14] holding that any attempt on the part of a State to interfere with the exercise of the Commonwealth's executive or legislative authority, however minor, would be found invalid.[15]

In *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* ('*Engineers*'),[16] a majority of the Court rejected this doctrine as based on a 'vague, individual conception of the spirit of the compact.'[17] Analysing the Constitution according to the traditional principles of statutory interpretation left little room for the limitation of power according to notions such as federalism. Although the facts of the case raised the issue of State immunity from the Commonwealth, the majority stated that 'the principle we apply to the Commonwealth we apply also to the States, leaving their respective acts of legislation full operation within their respective areas and subject matters.'[18] In *Pirrie v McFarlane*,[19] a majority of the Court applied the *Engineers* decision in order to find that a Commonwealth soldier was required to hold a state driving licence.[20] As Starke J explained, 'the argument denying the power of the States to affect Commonwealth officers based upon some prohibition expressed or implied in the Constitution can no longer be sustained.'[21]

It was not long, though, before a new doctrine of intergovernmental immunities began to emerge from the judgments of Sir Owen Dixon. Following *obiter dicta* comments in *West v Commissioner of Taxation (NSW)*[22] and *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd*,[23] Dixon J and a majority of the Court held in *Melbourne Corporation v Commonwealth*[24] that the States had a form of immunity from certain Commonwealth laws.[25] The pre-*Engineers* immunity had been reciprocal, but Dixon J indicated in *Melbourne Corporation* that the Commonwealth's immunity from the States would differ in both its origins and in its scope from the immunity possessed by the States.[26]

In the same year as *Melbourne Corporation* was decided, the issue of Commonwealth immunity arose before the Court in *In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation*,[27] in relation to a New South Wales companies law which removed any priority for debts possessed by the Crown in right of the Commonwealth. The Crown's priority in the collection of debts is a prerogative right, and so this case raised the

question of whether, as *Engineers* had hinted, the general principle that the States and Commonwealth could legislate for one another was subject to an exception in relation to prerogative rights.[28] A majority of the Court found that the New South Wales Act could validly abolish or restrict the prerogative right of the Crown in right of the Commonwealth to the payment of debt.[29] In the majority in *Uther*, Latham CJ held that, as the Commonwealth had in Section 109, a means of protecting itself against legislation which impaired or interfered with the performance of Commonwealth legislation, unlike the States, it had no need of judicial protection.[30]

Dixon J dissented in *Uther*, arguing that the State law was invalid in its application to the Commonwealth.[31] In contrast to Latham CJ, his Honour argued that the Commonwealth was entitled to a greater degree of protection than the States. Dixon J's reasoning proceeded in the following steps: The Australian Constitution created a federal system, and 'a federal system is necessarily a dual system'.[32] There is an initial presumption that 'in a dual political system you do not expect to find either government legislating for the other.'[33] The Constitution confers express grants of specific powers and legislative supremacy on the Commonwealth, which displaces this presumption – therefore, the Commonwealth has power to legislate in relation to the States.[34] However, Dixon J argued that the legislative power of the States has no such distinguishing characteristics – it consists only of the residue left after full effect is given to the powers granted to the Commonwealth, and a State law will be subordinate to a Commonwealth law in the case of inconsistency. Therefore the initial presumption, that one government does not legislate for the other, applies to limit State legislative power.[35]

It is particularly significant that Dixon J's reasoning in *Uther* made no reference to implications in favour of the Commonwealth. This was despite the fact that, in *Melbourne Corporation*, his Honour referred to 'the implication protecting the Commonwealth from the operation of State laws',[36] and that the statement that a federal system is 'necessarily' a dual system looks very much like an implication. Rather Dixon J's suggestion appeared to be that the States simply lack power to legislate in relation to the rights or activities of the Commonwealth.[37] His Honour put forward a number of reasons for this lack of power on the part of the States, which will be discussed below.

Sir Owen Dixon's views were confirmed in *Commonwealth v Cigamatic Pty Ltd (In Liquidation)*,[38] a case arising on very similar facts to those in *Uther*, where the now Chief Justice succeeded in overruling the earlier decision.[39] 'It is not a question,' stated Dixon CJ in *Cigamatic*, 'of making some implication in favour of the Commonwealth restraining some acknowledged legislative power of the state.'[40] Indeed, his Honour indicated that to hold that the States did possess such power would be to 'import' and 'imply' a new proposition into the Constitution.[41]

There was a great deal of uncertainty about the scope of the immunity established in *Cigamatic*. In particular, it was unclear whether that decision had to be seen as overruling *Pirrie v McFarlane*. On a strict reading, the only proposition *Cigamatic* stood for was that the States were prevented from interfering with Commonwealth prerogative rights. Dixon CJ's comments, though, in particular his suggestion that the States had no power to 'control legal rights and duties as between the Commonwealth and its people', seemed to suggest a broader immunity.[42] *Obiter dicta* in *Commonwealth v Bogle*[43] (decided after *Uther* but before *Cigamatic*) seemed to provide additional support for the broader interpretation of *Cigamatic*, by suggesting that the immunity would apply in a situation where no Commonwealth prerogative was involved.[44] A majority of the Court in *Bogle* accepted that 'the State

Parliament has no power over the Commonwealth.'[45] The only concession was that the Commonwealth might be 'affected' by State law, though exactly what this meant was not explained in *Bogle* or *Cigamatic* and remained very unclear.[46]

The decision in *Residential Tenancies*[47]

Largely because of the effect of Section 64 of the *Judiciary Act 1903*, it was some time before the High Court was called upon to resolve the uncertainties left in the wake of *Uther*, *Cigamatic* and *Bogle*.[48] When the issue finally arose in 1997, the question before the Court was whether the *Residential Tenancies Act 1987* (NSW) was valid and binding on the Commonwealth Defence Housing Authority.[49] Six of the seven judges agreed that the New South Wales Act was binding on the Commonwealth agency.[50] However, there was a division of views on the scope of the Commonwealth's constitutional immunity.

A majority of the court – comprising Brennan CJ, and, in a joint judgment, Dawson, Toohey and Gaudron JJ – drew a distinction between the 'capacities' of the Commonwealth and the exercise of those capacities, and found that the States could regulate the latter only.[51] This meant that 'the Commonwealth might be regulated by State laws of general application in those activities which it carries on in common with other citizens.'[52] McHugh and Gummow JJ rejected this distinction in favour of a broader immunity principle, but limited its application by finding that the immunity would generally operate only to the benefit of persons or bodies who derived their authority from the executive, as opposed to legislative, power of the Commonwealth.[53] Kirby J rejected the *Cigamatic* principle altogether and argued for a reciprocal immunity based on the *Melbourne Corporation* principle.[54]

The majority made it clear that they saw the doctrine of the immunity of Commonwealth capacities from State law as emerging from the judgments of Sir Owen Dixon in *Uther* and *Cigamatic*. In their joint judgment, Dawson, Toohey and Gaudron JJ repeated the process of reasoning used by Dixon J in *Uther*. The starting point was a presumption of immunity enjoyed by all governments in a federation – although, where Sir Owen Dixon never made the precise scope of this immunity clear, their Honours were careful to emphasise that the initial presumption was not one of general immunity, but an immunity in respect of executive capacities.[55] By adopting this narrower view of the scope of the immunity, the majority ensured that the decisions in *Cigamatic* and *Pirrie v McFarlane* could be reconciled. Dawson, Toohey and Gaudron JJ then echoed Sir Owen Dixon's reasoning as to how this basic principle had a different application in respect of the States and the Commonwealth.[56]

In particular, Dawson, Toohey and Gaudron JJ clearly accepted Sir Owen Dixon's view that the Commonwealth immunity derived from a lack of power on the part of the States rather than from an implication. Their Honours stated that:

No implication limiting an otherwise given power is needed; the character of the Commonwealth as a body politic ... by its very nature places those capacities outside the legislative power of ... a State, without specific powers in that respect.[57]

Their Honours considered that:

[T]he fundamental point made in *Cigamatic* is that ... the priority of the Crown in right of the Commonwealth in the payment of debts is not something over which the States have legislative power.[58]

Why the Commonwealth Immunity is based on an implication rather than a lack of power

The discussion above has demonstrated that the predominant interpretation of a Commonwealth immunity from State law is one based on a lack of power on the part of the States to regulate the Commonwealth in certain ways. This was the basis of Sir Owen Dixon's reasoning in *Uther* and *Cigamatic*, it was the view of a majority of the Court in *Bogle*, and it was accepted by Dawson, Toohey and Gaudron JJ in *Residential Tenancies* to form the *ratio decidendi* of that decision.

Dixon J's first argument, expressed in *Uther*, was that there was no possible source of State power to regulate the Commonwealth. The States could not have possessed such a power before federation since the Commonwealth sprang into existence in 1901. Nor did the Constitution confer such a power. Therefore, Dixon J suggested, such a power did not exist.[59] Meagher and Gummow have already demonstrated the weakness of this argument.[60] The source of State power to regulate the Commonwealth is the plenary power, deriving initially from Imperial legislation and confirmed by Section 107 of the Constitution, to legislate in respect of any subject matter from time to time within that power.[61] State legislative power is clearly not confined to subjects in existence when the colonies attained responsible government**.** If it were, the absurd result would follow that the States would be unable to regulate corporations or persons that came into existence after the nineteenth century.[62]

Dixon J's second claim was that a law adjusting the rights of the Commonwealth could not be for the 'peace, welfare and good government' of a State.[63] Meagher and Gummow have observed that this approach was inconsistent with the dual characterisation principle accepted by the Court in relation to Commonwealth powers.[64] If a Commonwealth law can admit of more than one characterisation, it is difficult to see why the same principle should not apply to a State law. It is true that a State law regulating the Commonwealth *might* be outside the scope of the State's plenary power over its territory. For instance, as Latham CJ suggested, a New South Wales law which purported to regulate the functions of the Governor General in summoning and dissolving the Commonwealth Parliament would not be a law for the 'peace, welfare and good government' of New South Wales.[65]

However, in *Uther* and *Cigamatic*, Sir Owen Dixon was concerned with a New South Wales law regulating the winding up of companies in New South Wales. If such a law affects the Commonwealth, it may be said to be a law about Commonwealth prerogative rights, but it remains a law about New South Wales companies. Thus while the terms of State legislative power might render some State legislation affecting the Commonwealth invalid, it is difficult to accept this argument in relation to the type of law before the court in *Uther* and *Cigamatic*.[66] It should also be noted that the Court has clearly rejected a characterisation approach as the basis for the State immunity from Commonwealth law, as based on artificial reasoning, and that essentially the same criticism applies in the case of Commonwealth immunity.[67]

An additional argument, raised initially by Fullagar J in *Bogle*, was that the States had no power to regulate the Commonwealth because the Commonwealth had not assented to a State law.[68] Doyle and Evans have both pointed to major flaws in this analysis.[69] Most obviously, to suggest that the Crown in right of the Commonwealth cannot be bound by legislation passed by a State legislature, is to ignore the doctrine of the indivisibility of the

Crown, which was central to the reasoning of the *Engineers* decision.[70] It would follow from this doctrine that if the Crown in right of a State has assented to a statute, then the Crown in right of the Commonwealth is also bound.[71] Moreover, as Dawson, Toohey and Gaudron JJ observed in *Residential Tenancies*, the significance given to the notion of Crown assent is inconsistent with the reality of parliamentary sovereignty embodied in the Australian Constitution. The Crown is bound by a statute not because it has assented to it, but because Parliament is supreme.[72] This principle is reinforced by the fact that the Parliament of a State has the power to bind the Crown in right of another State and the Crown in right of the United Kingdom.[73]

It is my contention, therefore, that none of the arguments used in support of the view that the States lack power to bind the Crown in right of the Commonwealth stand up to critical analysis. To the contrary, under Section 107 of the Constitution, the States have retained their plenary power to make laws for their own peace, order and good governance, and, *prima facie*, are capable of binding the Commonwealth. This was recognised in *Uther*, in *Pirrie v McFarlane* and, implicitly, in *Engineers*. Any immunity possessed by the Commonwealth, therefore, must be founded upon an implication from the Constitution.

An analysis of the reasoning of Dixon J in *Uther* shows that the Commonwealth immunity is better understood as an implication, albeit an unacknowledged one. The starting point for his Honour was the idea that a federal system is a dual system, and that in such a system you do not expect to find either government legislating for the other. From this follows a principle of mutual immunity, modified in the case of the Commonwealth by the grant of specific powers, but applicable to the States. Of course, the Constitution does not say that the system it creates is one of 'dual federalism', or that there shall be a mutual immunity beyond Section 114. What Dixon J has done is to form a view as to what the structure of the Constitution requires, and then to *imply* such restrictions on power as are necessary to maintain that structure. The only difference between Sir Owen Dixon's approach and the process undertaken by the early High Court in creating the doctrine of intergovernmental immunities is that Dixon relies on a form of deduction from the Constitution rather than on American precedents in moving from the fact that the Constitution creates a federal system to the contention that governments are not entitled to regulate one another.[74]

Although Dawson, Toohey and Gaudron JJ accepted Sir Owen Dixon's claim that the immunity was based on a lack of power, several of the other judges in *Residential Tenancies* acknowledged that the Commonwealth immunity was based on a negative implication.[75] Kirby J clearly perceived the immunity as being based on an implication, albeit one without legitimate foundations.[76] Although McHugh J accepted most of the reasoning in *Cigamatic*, he realised that the Court was in fact dealing with an implication. McHugh J stated that 'within their respective domains, the polities that make up a federation are regarded as sovereign. Because that is so, it is a necessary implication of the document that creates the federation that no polity in the federation legislate for another.'[77] McHugh J, then, recognised that the *Cigamatic* doctrine is more appropriately viewed as an implication – that the link between a particular view of the federal system and the proposition that governments cannot legislate for one another can only be one of necessary implication.[78]

PART II – IMPLICATIONS IN CONSTITUTIONAL INTEPRETATION

It is a matter of great significance that the current doctrine of Commonwealth immunity is more correctly interpreted as an implied limitation on the power of the States than as the consequence of a lack of State power, for the Court has adopted an entirely different approach to such implied limitations than to questions of a lack of power. Sir Owen Dixon himself had accepted, in *Melbourne Corporation*, that an implied limitation on power must be 'compelling'.[79] In more recent years, the Court has devoted a great deal of attention to the subject of constitutional implications, and has authoritatively determined that such implications are only to be drawn where 'necessary'.

The Court has never analysed the Commonwealth immunity according to these principles. But if, as I have argued, Commonwealth immunity is an implication, then it is necessary to evaluate whether the current doctrine of immunity, or in fact any doctrine of immunity, can be reconciled with the Court's approach to implications. This Part will, first, outline the Court's approach to constitutional implications, and second, consider what is involved in this approach, in order to apply these principles to the question of Commonwealth immunity in Parts III and IV.

The first point to note is that the implication of Commonwealth immunity, identified in Part I, would share the same basic features as the implications the Court has devoted its attention to in the past – it is an implied limitation derived from a structural feature of the Constitution.[80] The immunity has generally been seen as deriving from the federal structure of the Constitution, although there have been suggestions that its origins may lie in the national character of the Commonwealth.[81] Although the Court has generally focused its attention on implications that limit the power of the Commonwealth rather than that of the States, it is clear that the same interpretative principles apply.[82]

The Court's approach to implications

The Court has authoritatively laid down the principles by which implications limiting power are to be drawn. In *Australian Capital Television Pty Ltd v Commonwealth*,[83] Mason CJ stated that 'where the implication is structural...it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.'[84] In this case, the Court established that the provision for representative government in the Constitution required an implication of a freedom of political communication. The historical precedent that the Court relied on in the *Political Broadcasts* case was the implication of State immunity in the cases of *Melbourne Corporation* and *Queensland Electricity Commission v Commonwealth*.[85] In *Lange v Australian Broadcasting Commission*,[86] a unanimous judgment of the Court confirmed that the approach articulated by Mason CJ was the correct one.[87]

The Court in *Lange* also took the opportunity to clarify the precise method by which constitutional implications were to be derived:

[T]he Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it. ... under the Constitution the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?"