THE *MELBOURNE CORPORATION* DOCTRINE — SOME UNRESOLVED QUESTIONS

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I. INTRODUCTION

1 In recent years intergovernmental immunities have had something of a resurgence, both inside and outside the courts. Intergovernmental immunities were raised by both the Commonwealth and the States in *Spence v Queensland*,[2] the challenge to Queensland's ban on electoral donations by property developers. And the Commonwealth relied upon its intergovernmental immunity from State laws in response to attempts by two state executive inquiries to subpoena Commonwealth officers and documents, namely the South Australian Murray-Darling Basin Royal Commission and the NSW Special Commission of Inquiry into the Ruby Princess.

2 In this paper, I will pose and consider (but perhaps not answer) various questions about implied intergovernmental immunities in Australia, with a particular focus on the *Melbourne Corporation* doctrine. Those questions are as follows:

(a) Does the reciprocal *Melbourne Corporation* doctrine protect a State from the laws of another State?

(b) Does the *Melbourne Corporation* doctrine embrace some version of the *Printz* doctrine from the United States — that is, does it prevent the Commonwealth from co-opting State officials to perform Commonwealth functions?

(c) What is the role of State consent in the *Melbourne Corporation* doctrine? That arises both in relation to the *Printz* doctrine and more generally in relation to the operation of the *Melbourne Corporation* doctrine.

(d) Where is the line to be drawn in relation to those officials and entities protected by the *Melbourne Corporation* doctrine and those not so protected?

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[2] (2019) 268 CLR 355; [2019] HCA 15 ('*Spence*').

For example, does the *Melbourne Corporation* doctrine operate to protect State local governments from (some) Commonwealth legislation? What of state instrumentalities?

(e) Finally, how do intergovernmental immunities play out in the context of the exercise of coercive powers by an executive inquiry, such as a Royal Commission?

3 I hope, by these questions, to provoke discussion and, perhaps, greater clarity about the operation of the implied governmental immunities.

II. INTERGOVERNMENTAL IMMUNITIES: A SHORT INTRODUCTION

4 I will assume a high degree of familiarity with the legal concept and underpinnings of implied intergovernmental immunities in the Australian federal system. They have been written about extensively, by judges, practitioners and academics, and I am certain this audience is familiar with the cases and the academic writings. Thus I will not rehearse the early cases upholding a strong intergovernmental immunities doctrine,[3] the 'explosion' of such a doctrine in the *Engineer's Case*,[4] the gradual development by Sir Owen Dixon of modified doctrines of intergovernmental immunities culminating in *Melbourne Corporation* and *Cigamatic*,[5] or the development of those doctrines after 1947 in cases such as *QEC*,[6] *Austin*,[7] *Clarke*[8] and *Henderson*[9] and, most recently, *Spence*[10] (although I will say a few things about *Spence*, as it is one of my favourite cases). It is, nonetheless, important

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3 Eg *D'Emden v Pedder* (1904) 1 CLR 91; [1904] HCA 1.

4 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; [1920] HCA 54.

5 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; [1947] HCA 26 ('*Melbourne Corporation*'); *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372; [1962] HCA 40.

6 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; [1985] HCA 56 ('*QEC*').

7 *Austin v Commonwealth* (2003) 215 CLR 185; [2003] HCA 3 ('*Austin*').

8 *Clarke v Commissioner of Taxation* (2009) 240 CLR 272; [2009] HCA 33 ('*Clarke*').

9 *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex Parte Defence Housing Authority* 190 CLR 410; [1997] HCA 36.

10 *Spence* (2019) 268 CLR 355; [2019] HCA 15.

to provide a snapshot of the current state of the jurisprudence concerning intergovernmental immunities.

5 The *Melbourne Corporation* doctrine, in summary, is that the Commonwealth cannot make laws which destroy, or significantly burden, curtail or weaken either the capacity of the States to carry out their proper legislative, executive and judicial functions or their exercise of those functions.[11] It was recently described by a majority of the High Court, in *Spence*, as follows:

> In a passage in the *Melbourne Corporation Case* … Dixon J said:
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> > "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities."
>
> The doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case* is a structural implication built on that conception. The implication is captured in the proposition articulated by Starke J in that case that "**neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations**'". His Honour explained that **"[i]t is a practical question, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the operations of the other"**. The essentially practical nature of the enquiry involved in determining whether a law of one polity impermissibly interferes with the operations of government of another is borne out by subsequent cases in which Commonwealth legislation has been held to contravene that structural implication.[12]

6 The 'limited State immunity'[13] from Commonwealth laws depends on 'the essential question ... whether the law restricts or burdens one or more of the States in the exercise of their constitutional powers'.[14] In answering that question, no single 'test' has been identified. Nor could such a test be identified. It is not possible to state exhaustively every form of exercise of Commonwealth legislative power that might

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11 *QEC* (1985) 159 CLR 192, 260 (Dawson J); [1985] HCA 56; *Austin* (2003) 215 CLR 185, 217 [24] (Gleeson CJ), 257 [143] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3; *Clarke* (2009) 240 CLR 272, 286 [1] (French CJ); [2009] HCA 33.

12 *Spence* (2019) 268 CLR 355, [99]–[100] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15 (emphasis added) (citations omitted).

13 *Austin* (2003) 215 CLR 185, 259 [146] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3.

14 *Austin* (2003) 215 CLR 185, 258 [143] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3.

be contrary to the principle.[15] And, because the principle is derived from the federal structure, it is impossible to articulate it except in negative terms which are cast at a high level of abstraction.[16]

7 In *Clarke*, French CJ identified a series of factors from the cases that are relevant when assessing the application of the *Melbourne Corporation* principle:[17]

(a) Whether the law in question singles out one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally.

(b) Whether the operation of a law of general application imposes a particular burden or disability on the States.

(c) The effect of the law upon the capacity of the States to exercise their constitutional powers.

(d) The effect of the law upon the exercise of their functions by the States.

(e) The nature of the capacity or functions affected.

(f) The subject matter of the law affecting the State or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application.

8 His Honour noted that no one factor is determinative. However, 'the fact that a law is of general application may make it more difficult to demonstrate, absent operational discrimination in its impact upon the States, that it transgresses the limitation'.[18]

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15 *Austin* (2003) 215 CLR 185, 217 [24] (Gleeson CJ); [2003] HCA 3. See also *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 610 [134] (Hayne, Bell and Keane JJ); [2013] HCA 34.

16 *Austin* (2003) 215 CLR 185, 246 [115], 249 [124] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3.

17 (2009) 240 CLR 272, 299 [34]; [2009] HCA 3.

18 *Clarke* (2009) 240 CLR 272, 299 [34] (French CJ); [2009] HCA 33.

9 Further, as was made clear in *Spence*, the *Melbourne Corporation* doctrine operates in a reciprocal fashion, such that neither the Commonwealth nor the States may curtail the other's capacity to function as governments.[19]

10 One can see in the reasoning in *Spence* consideration of most of the factors identified by French CJ (although of course the final factor — the nature of the head of power — is irrelevant to the reciprocal *Melbourne Corporation* doctrine). Thus the majority in *Spence* had no trouble concluding that the Queensland legislation in issue did not contravene the doctrine. That was because the provisions in question were not directed at the Commonwealth, or persons or bodies uniquely, or even predominantly, involved in the federal electoral process. Nor did the legislation impose some special disability or burden on the Commonwealth, or interfere to limit its capacity to regulate its own elections, which could be said to curtail the Commonwealth's capacity to function.[20]

11 I will now turn to the various questions I wish to interrogate.

III. THE OUTSTANDING QUESTIONS

(1) Does the *Melbourne Corporation* doctrine protect a State from the laws of another State?

12 As noted above, the reciprocal nature of the *Melbourne Corporation* doctrine as between the Commonwealth and the States was settled by *Spence*. However, what is less clear is whether that doctrine has a *horizontal* operation, between the States. That is, can one State legislate in such a way as to impair the capacity of another State or States to function?

13 In my view there are reasonable arguments that there is an implied constitutional limitation on the legislative power of a State to enact a law that would

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19 *Spence* (2019) 268 CLR 355, 418-21 [100]–[108] (Kiefel CJ, Bell, Gageler and Keane JJ), 493-4 [309]–[310] (Edelman J); [2019] HCA 15. Nettle J did not address the issue, and Gordon J expressly left the issue open: at 476 [266].

20 *Spence* (2019) 268 CLR 355, 421 [109] (Kiefel CJ, Bell, Gageler and Keane JJ), 476 [266] (Gordon J), 497-8 [317]-[319] (Edelman J); [2019] HCA 15.

impair the exercise of another State's constitutional capacities.[21] The effect of such a limitation would be to confer on the State, and perhaps on certain of its officers or instrumentalities, an immunity from the reach of a law of that kind.

14 This implied immunity would correspond to the States' implied immunity from Commonwealth law under the *Melbourne Corporation* doctrine. That immunity is not, of course, a complete or blanket immunity of the State and its instrumentalities from the operation of Commonwealth law. Rather, it is a more confined immunity. Likewise, any horizontal *Melbourne Corporation* doctrine would be a confined, not an absolute, immunity.

15 Part of the *Melbourne Corporation* principle is that a Commonwealth law cannot interfere with the 'integrity' or 'autonomy' of the States.[22] It is at least arguable that a similar concept might apply to the constitutional immunity of one State from the laws of another State. On that basis, it may be that a law of one State cannot interfere with the performance of functions by State instrumentalities or officials, at least those engaged at the higher levels of government. There remains, of course, a question about where the line is to be drawn between the higher and lower levels of government. That is addressed in Part III(4) of this paper.

16 The underlying reason for the States' constitutional immunity from Commonwealth laws is that '[t]he foundation of the Constitution is the conception of a central government and a number of State governments separately organized'.[23] It is arguable that that underlying reason requires also that a State government be free from interference in the exercise of its constitutional capacities by another State government. However, because of the presumption against extra-territorial

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21 See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 25–6 [15] (Gleeson CJ); [2002] HCA 27. See also *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 468-9 [179] (Hayne J); [2004] HCA 61 ('*Schultz*'), discussed further below.

22 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 232-3 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); [1995] HCA 71 ('*Re AEU*').

23 See *Melbourne Corporation* (1947) 74 CLR 31, 82 (Dixon J); [1947] HCA 26. See also *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 218 (Mason J).

legislation, it has not to date been necessary for the High Court to rule on whether there is an implied 'State–State' immunity.

17 No doubt the likelihood of a State exercising legislative power in such a manner as to impair the capacity of another State to function is considerably less than the likelihood of the Commonwealth doing so. However, there is some support in the jurisprudence to support a horizontal *Melbourne Corporation* doctrine.

18 In *BHP Billiton Ltd v Schultz*,[24] the question was whether the NSW Dust Diseases Tribunal (established as a court of record) could validly take evidence in South Australia. The appellant submitted that it is a necessary implication of the Constitution that no polity can legislate in a way that weakens the legislative authority of another polity of a federation. It adapted the words of Dixon J in *In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation*: that 'in a [federation] you do not expect to find either [state] government legislating for the other.'[25] It argued that a New South Wales law that weakens the extent to which South Australia can provide for the good government of South Australia impermissibly interferes with South Australia's legislative capacity and competence.

19 Ultimately, it was not necessary for any judge to reach a concluded view on this constitutional question. However, some judges expressed some obiter views.

(a) Hayne J stated that it was an 'open question' whether a State law can validly authorise a State court to conduct its proceedings outside the geographical territory of the State. His Honour pointed out that the latent threat of force underpins the administration of justice.[26] With a footnote to *Melbourne Corporation*, he said this:

> The several integers of the federation, whose 'continued existence as independent entities' is a constitutional premise, are polities each of which has its distinct judicial arm of government. Whether a State

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24 (2004) 221 CLR 400; [2004] HCA 61.

25 *Schultz* (2004) 221 CLR 400, 473 [198] (Callinan J); [2004] HCA 61, quoting *In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529; [1947] HCA 45.

26 *Schultz* (2004) 221 CLR 400, 468 [178]; [2004] HCA 61.

> legislature may validly authorise the exercise of that form of coercive power within the boundaries of another State may require consideration of what implications must be drawn from the Constitution's adopting that structure for the judicial system of Australia.[27]

He emphasised that this was quite distinct from questions of the requirement of a nexus for extra-territorial legislation.

(b) Callinan J, to similar effect, observed that the efficacy of court hearings depends on the court being able to exercise coercive powers, which may require the assistance and support of the executive government.[28] He said this:

> This latter proposition has echoes of the doctrine of this Court, enunciated, in relation to the distribution of State and federal power, in *Melbourne Corporation v The Commonwealth* and more recently in *Austin v The Commonwealth*. Whether that doctrine may be applied to the allocation or appropriation of powers inter se between the States is another question. What would be odd in a federation however, would be the lawful toleration of a legislative and judicial usurpation by, for example, weight of numbers and resources, by one imperialistic State, of the legislative and judicial power of smaller, poorer and less intrusive other States.[29]

(c) In contrast, Gummow J, with whom Gleeson CJ, McHugh and Heydon JJ agreed on this issue,[30] observed that State courts are an essential branch of the State government. After quoting from Starke J in *Melbourne Corporation*, he said this:

> It is far from clear whether, even if such a doctrine does apply between the States, a determination of the President of the Tribunal under s 13(7) of the DDT Act [*Dust Diseases Tribunal Act 1989* (NSW)] that all or part of the hearing of the present proceeding take place in South Australia would curtail, in any substantial manner, the exercise of their powers by the courts of that State. Further, it would be necessary in the situation just postulated to consider the impact upon the exercise of the governmental authority of South Australia of the obligation imposed by s 118 of the *Constitution* to give full faith and credit both to the laws and to the judicial proceedings of the other States, including a proceeding under s 13(7) of the DDT Act.[31]

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27 *Schultz* (2004) 221 CLR 400, 468–9 [179]; [2004] HCA 61 (citations omitted).

28 *Schultz* (2004) 221 CLR 400, 472 [193]; [2004] HCA 61.

29 *Schultz* (2004) 221 CLR 400, 473–4 [200]; [2004] HCA 61 (citations omitted).

30 *Schultz* (2004) 221 CLR 400, 427, [29]; [2004] HCA 61.

31 *Schultz* (2004) 221 CLR 400, 442-3 [91]; [2004] HCA 61.

His Honour went on to observe that it would be a 'large proposition' to say that, as a consequence of the federal structure, a State cannot legislate for the exercise by its courts, beyond the geographical territory of the State, of their adjudicative functions.[32] He noted that there was no suggestion of a conflict between the NSW and South Australian laws in issue; indeed, South Australian law permitted NSW courts to take evidence in South Australia (as a 'foreign authority').[33]

20 Another illustration of a limitation of this kind applying as between the States concerns the compulsory acquisition of property. It is highly doubtful that a State could compulsorily acquire property situated in another State. Thus, in *Newcrest Mining (WA) Ltd v The Commonwealth*, Brennan CJ observed that 'the competent authority of a law area is the authority which alone can enact a law which determines the ownership of property within that area.'[34] After referring to the international legal principle that 'denies jurisdiction in a court to determine a claim of title to the property based on the operation of a statute or executive act of the foreign State on that property outside the territory of the foreign State',[35] he said that, by analogy, 'no legislature in an Australian State has power to enact laws for the compulsory acquisition of property in another State or in a Territory'.[36] McHugh J reached the same conclusion.[37]

21 Issues of this kind have also arisen — but not been tested or resolved — in relation to State Royal Commissions that have sought to require evidence from other States. I deal with these issues in Part III(5), below.

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32 *Schultz* (2004) 221 CLR 400, 443 [93]; [2004] HCA 61.

33 *Schultz* (2004) 221 CLR 400, 441 [84], 443 [92]–[93], referring to sub-ss 67AB(1), (3) of the *Evidence Act 1929* (SA).

34 (1997) 190 CLR 513, 543; [1997] HCA 38 ('*NewCrest*').

35 *NewCrest* (1997) 190 CLR 513, 543; [1997] HCA 38, quoting *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 41 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ); [1988] HCA 25. See also *A-G (New Zealand) v Ortiz* [1984] AC 1, 21 (Lord Denning MR).

36 *NewCrest* (1997) 190 CLR 513, 543; [1997] HCA 38.

37 *NewCrest* (1997) 190 CLR 513, 586; [1997] HCA 38.

(2) The *Printz* doctrine: Can the Commonwealth co-opt State officials?

22 A specific manifestation of the *Melbourne Corporation* doctrine concerns the ability of the Commonwealth to enlist State officials to execute the laws of the Commonwealth. As I discuss below, a doctrine of that kind has been developed in the United States, reflected in *Printz v v United States*.[38] For that reason, I will refer to it as the '*Printz* doctrine'.

23 In *New South Wales v Bardolph*, Dixon J identified a possible implied limitation on the Commonwealth Parliament's legislative power to impose statutory duties on State agencies, to preserve the capacity of the State Parliament to keep the State Executive 'answerable politically to [the State] Parliament for their acts' and thereby to keep vested in the State Parliament 'the power of enforcing the responsibility of the [State] Administration by means of its control over the expenditure of public moneys'.[39]

24 Although arguments have been put to the High Court based on a limitation of this kind, the Court has not yet determined whether such a limitation is implied in the Constitution. Thus, the scope of any such implied limitation is uncertain. However, it is arguable that a limit of this kind exists, to the effect that the Commonwealth Parliament lacks power, without State approval, to impose upon the holder of a State statutory office a *duty*, rather than merely a *power,* of an administrative nature. That formulation is drawn from what was said in *O'Donoghue v Ireland*.[40] In that formulation the term 'duty' is important. It is directed to the conferral of a power that must be exercised — that is, a power or function, the exercise of which is mandatory.

25 In *O'Donoghue*, the appellants relied, in part, upon *Printz* as the basis for extending the *Melbourne Corporation* doctrine. *Printz* concerned a requirement in

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38 521 US 898 (1997) ('*Printz*').

39 (1934) 52 CLR 455, 509.

40 (2008) 234 CLR 599, 626 [57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); [2008] HCA 14 ('*O'Donoghue*').

federal law for State law enforcement officers to conduct background checks of potential gun purchasers, and related tasks. In *Printz*, the US Supreme Court struck down those laws, in part because they transferred to the States the responsibility for administering a law enacted by Congress. One concern in *Printz* was the conscription of State authorities to administer federal law.[41]

26 In *O'Donoghue*, however, the plurality (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) held that it was not necessary to determine whether the *Melbourne Corporation* doctrine should be developed so as to embrace the *Printz* doctrine because the provision of the Commonwealth Act that was in issue in that case, being s 19 of the *Extradition Act 1988* (Cth), did not 'impose a duty of the postulated character'.[42] That was because, although framed in mandatory language, it fell to be read with s 4AAA of the *Crimes Act 1914* (Cth).[43] Section 4AAA set out the rules applicable to the conferral of functions on, *inter alia*, State magistrates. It made clear that the function imposed by s 19 was conferred on a Magistrate in a personal capacity, not as a member of a court, and provided that a magistrate 'need not accept the function' so conferred.[44] Thus the plurality considered that, when s 19 was read with s 4AAA, it did not confer a duty of a kind that would engage the *Printz* doctrine:

> The consequence is that the constitutional inhibition for which the appellants contend, even if otherwise accepted, would not apply. This is the consequence of **the presence of a power and the absence of a duty** imposed by the arrangement made under s 46(1)(a) of the Act with respect to the performance by State magistrates of the functions of a magistrate under that law.[45]

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41 *Printz* 521 US 898, 935 (Scalia J for the Court) (1997) .

42 *O'Donoghue* (2008) 234 CLR 599, 626 [57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); [2008] HCA 14 .

43 *O'Donoghue* (2008) 234 CLR 599, 626 [59] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); [2008] HCA 14.

44 *O'Donoghue* (2008) 234 CLR 599, 627 [63]–[64]; [2008] HCA 14.

45 *O'Donoghue* (2008) 234 CLR 599, 627 [68] (emphasis added); [2008] HCA 14. See also 617 [21]–[22] (Gleeson CJ).

27 Thus it seems that a duty 'of the postulated character' is a duty as described in paragraph 24, above — a power or function conferred by federal law that *must* be exercised. That understanding is supported by the distinction drawn in the plurality's judgment between 'powers and duties'.[46]

28 While the proposition is not without doubt, in my view the *Printz* doctrine, if embraced in Australia, would limit the Commonwealth Parliament's power to impose on State agencies or officials functions that the recipient is compelled to exercise, but will not limit the Commonwealth's power to confer functions (whether powers or duties) that the recipient may choose not to accept. In addition, it seems to me that the *Printz* doctrine might not preclude the Commonwealth from conferring on State agencies or officials discretionary powers that they may choose to exercise, or not exercise, in a particular case.

29 I say 'might not preclude' because this last issue is, I think, unclear. It is at least arguable that the *Printz* doctrine would be predominantly concerned with attempts by the Commonwealth Parliament to *compel* State agencies to take steps to implement federal schemes, not with the Commonwealth Parliament's vesting in State agencies of *non-compellable powers* to execute federal functions. On the other hand, it might be said that the conferral of a discretionary power, that cannot be refused by the recipient, sufficiently burdens the State official by requiring him or her to decide whether to exercise the power or not, such that it could fall foul of the *Printz* doctrine. It is significant, in that regard, that the plurality in *O'Donoghue* placed reliance on s 4AAA of the *Crimes Act*.

30 Returning to the nature of the *Melbourne Corporation* doctrine, it is certainly arguable that a State's capacity to function would be impaired if the Commonwealth Parliament vested power in a State agency and also purported to compel the agency to exercise that power, without the State consenting to that compulsion. That is, there

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46 *O'Donoghue* (2008) 234 CLR 599, 623 [47]–[48]; [2008] HCA 14.

is a logical basis for extending the *Melbourne Corporation* doctrine so as to encompass the *Printz* doctrine.

(3) What is the role of State consent in the *Melbourne Corporation* doctrine?

31 In *O'Donoghue* the plurality referred with approval to the following passage of Willoughby, *The Constitutional Law of the United States*:

> In general, however, the Federal and State Governments act independently of each other, as regards their executive or administrative services, and the principle is well established that **the Federal Government may not impose upon State officials the imperative obligation and burden of executing Federal laws**, nor, a fortiori, may the States obligate Federal officials to execute State laws. However, it is equally, well established that **there is no constitutional objection to the granting by the Federal Government to State officials of authority to execute Federal functions, if they, or rather their respective State governments, are willing** that they should do so.[47]

32 The final sentence, referring to the State government being 'willing' to have State officials execute federal functions, directs attention to the question of State consent to conferral of functions on its executive officials.

33 There are two aspects of the role of consent in the operation of the *Melbourne Corporation* doctrine that I wish to address here. One flows immediately from the discussion of the *Printz* doctrine: can the Commonwealth confer functions — including duties — on the States *with their consent*?[48] And, if so, how should that consent be given? The second concerns the role of consent in relation to matters such as the terms and conditions of employment of State officials: does provision for State consent to such matters render valid Commonwealth legislation that would otherwise contravene the *Melbourne Corporation* doctrine?

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47 *O'Donoghue* (2008) 234 CLR 599, 624 [51]; [2008] HCA 14 (emphasis added) (citations omitted), quoting Westel Woodbury Willoughby, *The Constitutional Law of the United States* (Baker, Voorhis, 2nd ed, 1929) vol 1, 120.

48 I note in passing that it is routine that persons convicted of federal offences and sentenced to a term of imprisonment by a State court are housed in State prisons, thus requiring State officials to perform duties associated with keeping a person in custody. However, s 120 of the Constitution makes express provision in that regard, so this may be put to one side.

34 As to the first issue, it seems clear that, if the *Printz* doctrine is adopted in Australia, it would permit the conferral of Commonwealth functions on State officials if the State has consented to that conferral. However, what is less clear is whether consent could be given by the State executive, or whether it must be given by the Parliament. Whether State consent must be given by the legislature, rather than by the executive, was expressly not decided in *O'Donoghue*.[49]

35 Plainly, requiring legislative consent would be more onerous than permitting executive consent. And certainly the position of South Australia, Victoria and Western Australia in *O'Donoghue* was that legislative consent was not required.[50] As a matter of principle, it seems to me that if the purpose of the *Melbourne Corporation* doctrine is to protect the capacity of the State to function as a government, it ought to be open for the executive to decide whether its capacity is so affected, noting that the executive remains subject to the supervision and control of the Parliament.

36 That proposition was explored, to some extent, in *United Firefighters' Union of Australia v Country Fire Authority*,[51] which dealt with the second issue identified above. In that case the Country Fire Authority ('CFA') challenged the validity of certain clauses in an enterprise agreement between it and the United Firefighters' Union ('UFU') on the basis of the *Melbourne Corporation* doctrine and *Re AEU*. The UFU contended that those cases had no application because the CFA had consented to the inclusion of the clauses in the agreement. The trial judge held that those clauses were invalid. Although he accepted that the clauses may have 'no practical impact' on the State's capacity to govern, he held that the *Melbourne Corporation* doctrine, as expressed in *Re AEU*, applied to the approved enterprise agreement whether or not it was voluntarily entered into by the State party.[52]

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49 (2008) 234 CLR 599, 623 [47] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); [2008] HCA 14. I note that the position of South Australia and Victoria in *O'Donoghue* was that executive consent is sufficient: see 605, 606.

50 (2008) 234 CLR 599, 604, 605, 606.

51 (2015) 228 FCR 497; [2015] FCAFC 1 ('*UFU*').

52 *UFU* (2015) 228 FCR 497, 529 [151]; [2015] FCAFC 1.

37 On appeal, the trial judge's decision was supported by the Attorney-General for Victoria, in part on the basis that 'the constitutional powers and functions of the State, which are protected by the *Melbourne Corporation* principle, could not be displaced by the State entering into contractual arrangements'.[53] A similar point was made by the CFA: that acceptance of the UFU's position would mean that the principle underlying *Melbourne Corporation* could be subverted by a State government of the day, towards the end of its term, directing its departments and agencies to make enterprise agreements under Commonwealth law which contained enforceable terms that had the very effect against which the *Melbourne Corporation* principle was intended to afford the States enduring protection.[54] One can see an echo of the issue discussed above: which branch of government is the appropriate branch of government to give consent to what would otherwise be a breach of the *Melbourne Corporation* doctrine?

38 The trial judge's decision was overturned on appeal by the Full Court. It held that the *Melbourne Corporation* doctrine applies 'where the curtailment or interference with the exercise of a State's constitutional power is significant, which is to be judged qualitatively and, in general, by reference, among other things, to its practical effects.'[55] It accepted the UFU's submission that the primary judge erred in rejecting the argument that the *Melbourne Corporation* doctrine does not apply to invalidate the relevant provisions of the Agreement because the CFA had voluntarily made the Agreement.[56]

39 The Full Court distinguished *Re AEU*. It observed that the plurality in *Re AEU* had emphasised the critical importance of the capacity of a State government *to determine* the number and identity of the persons whom it wishes to employ, etc.[57]

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53 *UFU* (2015) 228 FCR 497, 537 [175(e)(i)]; [2015] FCAFC 1.

54 *UFU* (2015) 228 FCR 497, 536 [174(d)]; [2015] FCAFC 1.

55 *UFU* (2015) 228 FCR 497, 537 [176]; [2015] FCAFC 1.

56 *UFU* (2015) 228 FCR 497, 537 [176]; [2015] FCAFC 1.

57 *UFU* (2015) 228 FCR 497, 540 [189]; [2015] FCAFC 1.

But, it said, the position is different when a State or one of its agencies *voluntarily* enters into an enterprise agreement and, thereby, effectively consents to that agreement being approved by Fair Work Australia ('FWA') in accordance with the relevant provisions of the *Fair Work Act 2009* (Cth) ('*FW Act*').[58] In that context, it can be said the State was permitted to determine the number and identity of the persons it employed. The Full Court said this:

> The relevant provisions of the *FW Act* did not single out any State or its agencies. The relevant question is whether those provisions imposed some special disability or burden on the exercise of the powers and fulfilment of the functions of the State of Victoria or the CFA which curtailed the State's capacity to function as a government. In circumstances where the CFA voluntarily agreed to make the enterprise agreement, we do not consider that the provisions offended the implied limitation. In particular, we do not consider that the statutory regime for the making and approval of an enterprise agreement had the effect on the State's governmental functions of the Commonwealth imposing on the State of Victoria or the CFA a significant 'impairment', 'interference', 'curtailment', 'control' or 'restriction' so as to attract the implied limitation. In our view, the voluntary nature of the agreement is inconsistent with those concepts, which lie at the heart of the doctrine.[59]

40 In relation to the submissions of the Attorney-General and the UFU concerning the State 'contracting out' of the *Melbourne Corporation* doctrine, the Court said this:

> We consider that this argument should also be rejected, primarily because it reverses the relevant question. In our view, the correct question is not simply whether the State of Victoria has voluntarily given the Commonwealth any power. Rather, the correct question is whether the relevant provisions of the *FW Act* which provided for the making of voluntary enterprise agreements and their approval by the FWA validly applied to the States without offending the *Melbourne Corporation* principle. For the reasons we have given, we consider that the statutory scheme of the *FW Act* did not involve a significant impairment of the type which was found to exist in *AEU,* which involved the imposition of a binding award in an arbitrated context and in the context of a different statutory regime. We accept the UFU's submission that holding a State or its agency to its "determination" for the limited period of an enterprise agreement which had been voluntarily made by the parties has a very different quality to the imposition by the Commonwealth of an

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58 *UFU* (2015) 228 FCR 497, 540 [189]; [2015] FCAFC 1.

59 *UFU* (2015) 228 FCR 497, 545 [207]; [2015] FCAFC 1.

> arbitrated outcome on a State or its agencies which have opposed that outcome.[60]

41 The Full Court also made remarks suggesting that if the entry into the agreement had not been voluntary on the part of the CFA, different considerations might arise. They noted that there was no suggestion that the CFA had been compelled to enter into the agreement because of potential industrial action.[61] They then said this:

> There is no question, therefore, before us as to whether the operation of the regime in Pt 3-3 … might, in some cases, mean that an enterprise agreement, whilst voluntary on its face, was nevertheless involuntary for the purposes of *Melbourne Corporation* by reason of the operation of s 415 [which renders the UFU immune from civil suit if it takes protected industrial action].
>
> … Although it is unnecessary to draw any fixed conclusions about these matters, it may be that that an enterprise agreement will be involuntary for the purposes of *Melbourne Corporation* where a state entity has been forced to propose it under s 181 because of its inability at a factual level to endure protected industrial action. In practice, the ability of the Commission to order that protected industrial action be stopped under s 423 (where it is causing significant economic harm) or under s 424 (where it endangers life, the personal safety or health or the welfare of the population or causes significant damage to the Australian economy) may tend to reduce the situations in which the question of voluntariness may arise.[62]

42 The Full Court's decision suggests that the question of consent is important, and that where the State *executive* voluntarily consents to a particular exercise of Commonwealth legislative power, that can preclude the operation of the *Melbourne Corporation* doctrine. In that context, it is not necessary for the State *Parliament* to have given its consent, by a referral of power to the Commonwealth, for example.[63] However, it is interesting to recall that in *O'Donoghue* the plurality, after referring to

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60 *UFU* (2015) 228 FCR 497, 545 [208]; [2015] FCAFC 1.

61 *UFU* (2015) 228 FCR 497, 546 [210]; [2015] FCAFC 1.

62 *UFU* (2015) 228 FCR 497, 546 [210], [212]; [2015] FCAFC 1.

63 I note that Victoria has referred some powers to the Commonwealth in the industrial relations context, but it excluded from that reference certain matters pertaining to public sector employment that track the decision in *Re AEU*: *Fair Work (Commonwelath Powers) Act 2009* (Vic) s 5. The referral legislation was not directly relevant to the consent issue in the *UFU* case because the Full Court concluded that the CFA was a trading corporation and thus the Commonwealth had legislative power in relation to it by reason of the corporations power, rather than by reason of the referral legislation: *UFU* (2015) 228 FCR 497, 526 [140]; [2015] FCAFC 1.

State officials being 'willing' to receive federal functions, qualified that by saying 'or rather, their respective State governments'.[64] That might suggest that it was not sufficient for the CFA — which was a State entity, but was arguably not the 'State government' (depending on what is meant by that term) — to consent to the relevant exercise of Commonwealth legislative power.

(4) What kinds of State officials and entities are protected by the *Melbourne Corporation* doctrine?

43 In *Re AEU*, the plurality held that it is 'critical to a State's capacity to function as a government' that it have the ability, 'not only to determine the number and identity of those whom it wishes to engage at the *higher levels of government*, but also to determine the terms and conditions on which those persons shall be engaged.'[65] One question, however, is: who falls within those 'higher levels of government'? Another question is whether there are other agencies or instrumentalities of government that might be protected by the *Melbourne Corporation* doctrine in a like fashion.

44 As to which individuals would fall within the higher levels of government, some guidance is given in the case law. State Ministers and Members of Parliament fall within this category.[66] Likewise State judges.[67] And the Governor would also fall within this category. In that regard, it is interesting to note the 'gubernatorial tax' example proffered by French CJ in *Clarke*, where it was the intrusion into high constitutional office, rather than the practical effect of such a tax, that would cause such a law to fail.[68]

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64 *O'Donoghue* (2008) 234 CLR 599, 624 [51] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); [2008] HCA 14.

65 *Re AEU* (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); [1995] HCA 71 (emphasis added).

66 *Clarke* (2009) 240 CLR 272, 305 [62] (Gummow, Heydon, Kiefel and Bell JJ); [2009] HCA 33.

67 *Austin* (2003) 215 CLR 185, 219 [28] (Gleeson CJ), 263 [161]–[162] (Gaudron, Gummow and Hayne JJ), 283 [228] (McHugh J); [2003] HCA 3.

68 *Clarke* (2009) 240 CLR 272, 298 [33]; [2009] HCA 33.

45 Some state instrumentalities may also gain some degree of protection from the *Melbourne Corporation* doctrine, at least in so far as they are 'emanations of the Crown' (to use some outdated terminology[69]) or sufficiently subject to State control as to be a part of the State for constitutional purposes. Thus, for example, the CFA, which was a body corporate established by statute, and appointed by the Governor in Council,[70] was impliedly considered to fall within the scope of the *Melbourne Corporation* doctrine by the Full Federal Court in *UFU*[71] (although the Court held that the CFA's consent to the enterprise agreement precluded the application of the *Melbourne Corporation* doctrine, as discussed above).

46 As to local government bodies, they are separate from the executive government of a State.[72] At least in Victoria, they are a 'distinct' tier of government[73] and they are not public entities for the purposes of the *Public Administration Act*.[74] However, local government bodies exercise important governmental powers delegated to them by State legislation, such as the power to make local laws and impose certain taxes, and are regarded as part of 'the State' for constitutional purposes.[75] In that regard, I note that they were regarded as part of 'the State' in the

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69 See, eg, *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90, 149 [163]; [2004] HCA 48, where McHugh ACJ, Gummow, Callinan and Heydon JJ noted that this expression has been much criticised, citing *International Railway Co v Niagara Parks Commission* [1941] AC 328, 342–3 (Luxmoore LJ). See also *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, 54 [162]; [2001] HCA 19, where Kirby and Callinan JJ noted that, as a statutory corporation, the NSW Water Board 'would have been *once* described as an emanation of the Crown' (emphasis added).

70 *Country Fire Authority Act 1958* (Vic) s 6.

71 *UFU* (2015) 228 FCR 497, 540 [189]; [2015] FCAFC 1.

72 See discussion in *Sydney City Council v Reid* (1994) 34 NSWLR 506, 519-20 (Kirby P, with whom Meagher JA and Powell JA agreed).

73 *Constitution Act 1975* (Vic), s 74A.

74 *Public Administration Act 2004* (Vic), ss 4(1) (definition of 'exempt body') and 5(1)(e).

75 See *Re Lambie* (2018) 263 CLR 601, 621 [41]; [2018] HCA 6, where Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ held that 'there is no doubt that the council in a municipal area is a corporation on which is conferred governmental functions sufficient to characterise it as the "State" for the purposes of s 75(iv), s 114 and similar references in the Constitution'. In the context of s 114 of the Constitution, a tax imposed by a local council is a tax by 'a State': see *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 231–2 (Griffith CJ, Barton J agreeing at 233, O'Connor J agreeing at 238); [1904] HCA 50 ('*Municipal Council*'); *City of Essendon v Criterion Theatres Ltd* (1947) 74 CLR 1, 13 (Latham CJ), 17 (Dixon J), 27 (McTiernan

Melbourne Corporation case itself, which concerned the application of a Commonwealth law to a local government council. Thus it may be arguable that the *Melbourne Corporation* doctrine could prevent the exercise of Commonwealth legislative power in such a way as to impair the integrity or autonomy of local councils.

(5) Intergovernmental immunities and executive inquiries

47 The ability of one polity to inquire into the activities of another polity, and in particular use its coercive powers against the other polity or its officers, provides an interesting and current case study of the scope and operation of intergovernmental immunities. Twice recently the Commonwealth has asserted an intergovernmental immunity in the context of the purported exercise of coercive powers by a State commission of inquiry. The first was the South Australian Murray-Darling Basin Royal Commission ('MDB Royal Commission'), constituted by Bret Walker SC. The second was the Special Commission of Inquiry into the Ruby Princess in New South Wales ('Ruby Princess Inquiry'), also constituted by Bret Walker SC.

The MDB Royal Commission

48 South Australia established the MDB Royal Commission to examine the administration of the water resources of the Murray-Darling Basin. The Basin extends across several States and is regulated by the Murray-Darling Basin Authority ('MDBA'), an entity established under the *Water Act 2007* (Cth).[76] It fell

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J); [1947] HCA 15; *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 76–7 [47] (Gummow J); [2002] HCA 18. *Municipal Council* is authority for the proposition that a corporation exercising governmental functions is 'a State' for the purposes of s 114: *Deputy Commissioner of Taxation (Cth) v State Bank (NSW)* (1992) 174 CLR 219, 233 (the Court); [1992] HCA 6.

Further, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106,; [1992] HCA 45, McHugh J held at 244 that the *Melbourne Corporation* principle prevents a Commonwealth law from regulating a local government election, because 'local government authorities are authorities of the States to which the States have delegated the authority to govern in respect of particular areas of the States'.

[76] That Act was enacted, at least in part, under s 51(xxxvii) of the Constitution, ie the reference power: see ss 9, 9A. New South Wales, Victoria, Queensland and South Australia each referred powers to the Commonwealth to support the enactment of the *Water Act*.

within the Commission's terms of reference to consider matters geographically external to South Australia, and matters concerning officials of other States and the Commonwealth. The Commission was established under the common law power of the executive to inquire, but had coercive powers conferred on it by the *Royal Commissions Act 1917* (SA).[77]

49 It seems relatively clear that, notwithstanding the broad terms of reference, the subject matter had a nexus with South Australia such that it did not fall foul of the rules concerning extraterritoriality, given the effects of 'upstream' activity, and the decisions of the MDBA, on the Murray River in South Australia. In its Report the Commission had this to say about that issue:

> It was never a kind of institutional impertinence, as some came close to insinuating, for the South Australian Government to commission an executive inquiry into the matters required by this Royal Commission's Terms of Reference. The political science of the Federation justifies unilateral executive action to that end, and there is no sound constitutional reason to erect obstacles in its way. Intergovernmental agreement does not come at the price of stultifying the inherent function (and power) of State Parliaments and executives (such as through a Royal Commission) to scrutinize the efficacy of the policy that has been implemented by intergovernmental agreement. That would be a perverse consequence of the co-operative federalism that most observers regard as a good thing.[78]

50 More generally, the courts have not taken any narrow view of the power of the executive government of a State to inquire into matters that occur outside the State. In *Boath v Wyvill*,[79] a person was appointed as a Royal Commissioner under both Commonwealth and Western Australian law to inquire into Aboriginal and Torres Strait Islander deaths in custody. The State commission expressly authorised the Commissioner to inquire into deaths in custody in Western Australia, South

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77 See s 10, which includes powers to enter premises, summons persons to give evidence, require the production of documents, inspect documents and examine witnesses on oath; and s 11, which includes a power to commit a person to prison for failing to attend in obedience to a summons or refusing to answer questions or produce documents.

78 *Royal Commission into Murray-Darling Basin* (Report, 29 January 2019) 39 ('MDB Royal Commission Report').

79 (1989) 85 ALR 621 ('*Boath*').

Australia and the Northern Territory.[80] The Full Court of the Federal Court upheld the validity of the State commission.

(a) The Court quoted with approval the remarks of Brennan J in the *BLF Case*, where his Honour had observed that, so long as the inquiry was for 'a purpose of government', there is 'no limit as to the subjects into which inquiry might be authorised'.[81]

(b) The Court stated that the purposes of government in pursuit of which the Crown might properly wish to inform itself upon various matters 'may include, in a proper case, events which wholly or partly occurred outside the jurisdiction, thus making it appropriate to conduct inquiries wholly or partly outside the jurisdiction'.[82]

(c) The Court held that the purposes of government of a State permitted inquiry into deaths in custody that occurred outside the State. The social, cultural and legal factors which had a bearing on Aboriginal deaths in custody in other parts of Australia could well throw light on the circumstances which surround Aboriginal deaths in custody in Western Australia. Therefore there was a sufficient connection with Western Australia to inquire into these matters.[83]

(d) However, although there were not any relevant territorial limits on the subject matter of inquiry, the Court observed, by way of *obiter*, that there were territorial limits on the provisions of the State Act that conferred coercive powers upon the Commission. It said that the 'ordinary presumption' (that general words are understood as prima facie operating on conduct within territorial limits[84]) applied to the coercive powers conferred by the State Act. Those powers were thus construed as not having effect 'with reference to matters occurring outside' the State.[85] (I consider this aspect of *Boath* in more

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80 *Boath* (1989) 85 ALR 621, 627 (the Court).

81 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 156; [1982] HCA 31, quoted in *Boath* (1989) 85 ALR 621, 635 (the Court).

82 *Boath* (1989) 85 ALR 621, 635.

83 *Boath* (1989) 85 ALR 621, 638 (the Court).

84 *Boath* (1989) 85 ALR 621, 636.

85 *Boath* (1989) 85 ALR 621 at 637–8.

detail below when considering the question of the MDB Royal Commission's exercise of coercive powers outside South Australia.)

51 Accordingly, following *Boath*, the power of a Royal Commission extends to inquiries into matters outside the jurisdiction so long as the inquiry is for a purpose of government.

52 The further, and more significant, question, however, is the extent to which a State Royal Commission may use its compulsive powers (necessarily conferred by a State statute) against other polities and their officials — in particular the Commonwealth and its officials and instrumentalities. As to that issue, the MDB Royal Commission observed as follows in its report:

> Early queries were also raised about the capacity of a South Australian Royal Commission to compel evidence from out of the State. Some of them, echoed by bush lawyers, seemed to be based on a very bleak and savage notion of the relationship between the polities that are members of the Federation. Of course, given the received understanding of sec 51(xxiv) (and also sec 118) of the Commonwealth *Constitution*, the provisions of Part 4 Div 4 of the *Service and Execution of Process Act 1992* (Cth) leave no doubt that compulsory processes of this Royal Commission could be enforced in other States and Territories of the Commonwealth. This is **no more remarkable than the effective service of court process, such as a subpoena, requiring a resident of Wodonga to attend court in Albury.** Extra-territoriality was never an issue.[86]
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> However, severe issue was taken by the Commonwealth (and the MDBA) with the issue of compulsory process directed to them and their officers, wherever they were. Proceedings were commenced in the High Court of Australia to vindicate this resistance to compelled production or attendance.[87]

53 The Commission went on to offer its tentative views on the Commonwealth's assertion of immunity, as follows:

> First, the constitutional doctrine invoked by the Commonwealth is not, to put it mildly, thoroughly well worked out in the authorities. Second, its general concern with a kind of immunity of one government from compulsory processes of another government seems to stem from a mutual requirement to refrain from depriving each other of their definitional governmental

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86 Except apparently in the mind of the obstreperous Mayor of Renmark, who seemed to regard the Commissioner and staff as foreign intruders anywhere outside South Australia and there bereft of authority. Happily, he was alone in that discourteous error.

87 MDB Royal Commission Report, 39–40 (emphasis added) (footnote in original).

> functionality. Third, that would appear to constrain Commonwealth legislative power as much as it would constrain State legislative power. **Fourth, it does appear somewhat over-pitched to suggest that the MDBA's obligation to produce documents and witnesses would somehow impede the Commonwealth Government as such, let alone destroy it. What will they say if their records and officers are subpoenaed for a nuisance or negligence action in a State Supreme Court?** Fifth, the Commonwealth position does seem to entail the drastic consequence of reading down or even invalidating its own legislation — sec 6 of the *Service and Execution of Process Act 1992* (Cth), which purports to bind the Crown in all its capacities, to provisions including Div 4 of Part 4 that authorized this Commission's summonses to be served on the MDBA in Canberra. That would be a regrettable regression in nation-building. Sixth, all claims by governments to immunities from suit or from obligations to assist by providing information about their activities are appropriately to be approached with some scepticism, given the notion of equality before the law, and the rule of law. Further, there is merit in all governments proceeding with the benefit of relevant information. Seventh, the operation of secs 127 and 128 of the *Service and Execution Process Act 1992* (Cth), dealing with matters of State and public interest immunity respectively, do somewhat show that the Commonwealth Parliament in 1992 contemplated such weighty governmental matters being the object of, say, a State Royal Commission's compulsory process — and regarded that as appropriately safeguarded by rights of intervention and argument. Presumably and regrettably for co-operative federalism, those provisions too would go overboard had the Commonwealth succeeded in its arguments.[88]

54 I pause to note that, unlike the analogy highlighted in each quote above, a Royal Commission is not a court. That may make some significant difference to the operation of any intergovernmental immunities. One might think that the process of coercive *executive inquiry* by one polity into the actions of the officials of another polity is quite different from the exercise of *judicial power* by a court, with all the safeguards that attend the exercise of judicial power. One might also observe that the 'autochthonous expedient'[89] in Ch III of the Constitution suggests a recognition that the Commonwealth may be subject to the exercise of judicial power by State courts. It may also be relevant that the Commonwealth has voluntarily placed itself broadly in the same position as an ordinary person in judicial proceedings, through s 64 of the *Judiciary Act 1903* (Cth).

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88 MDB Royal Commission Report, 40–1 (emphasis added).

89 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); [1956] HCA 10.

55 I also note that, notwithstanding the reference to the *Service and Execution of Process Act 1992* (Cth) ('SEPA') in the MDB Royal Commission's Report, it does not appear (as far as I could ascertain) that the Commission complied with s 76 or s 127 of SEPA in relation to the service of the summonses issued to the Commonwealth and its officers. I found no record of any grant of leave from a Court under s 76 for the service of the summonses out of South Australia, nor any indication that notice was served on the Commonwealth Attorney-General pursuant to s 127.[90]

56 Although the High Court proceedings instituted by the Commonwealth were settled, the Commonwealth and New South Wales each filed submissions in the proceeding setting out their position on the intergovernmental immunity issue.[91] The Commonwealth relied upon *Cigamatic* and *Henderson*, rather than the reciprocal *Melbourne Corporation* doctrine (I note that these events occurred prior to the decision in *Spence*). It contended that the subjection of it to the compulsory processes of a State Royal Commission would restrict two of its capacities:

(a) its power under s 61 of the Constitution to execute and maintain the laws of the Commonwealth; and

(b) its prerogative against being compelled to submit to discovery.[92]

57 As to the former, the Commonwealth observed that the power being asserted was to compel the Commonwealth Executive to face coercive questioning about the manner in which it formulated and administered Commonwealth law. But, the

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90 It is, of course, possible that this occurred but cannot be ascertained from the publicly available material.

91 Commonwealth of Australia and Murray-Darling Basin Authority, 'Plaintiffs' Submissions', Submissions in *Commonwealth v Commissioner Bret Walker SC*, C7/2018, 6 August 2018 ('Commonwealth Submissions'); Attorney General (NSW), 'Annotated Submissions of the Attorney General for New South Wales, Intervening', Submissions in *Commonwealth v Commissioner Bret Walker SC*, C7/2018, 17 August 2018 ('NSW Submissions').

92 Commonwealth Submissions, [52]–[62]. The Commonwealth also argued, first, that the *Royal Commissions Act 1917* (SA) did not bind the Crown (pursuant to the *Bropho* presumption) and, second, that s 11(1) of the *Royal Commissions Act*, which provided for punishment for breach of a summons (an exercise of judicial power) by a body that was not a court, could not apply to any of the persons specified in ss 75(iii) or 75(iv) of the Constitution, based on *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15. It appears that South Australia conceded this point in its Defence: see Commonwealth Submissions, [49].

Commonwealth said, the Commonwealth Executive is responsible to the Commonwealth Parliament, not to the 'sectional oversight' of a State.[93]

58 As to the latter, the Commonwealth drew upon a Canadian case, *Attorney General of Quebec v Attorney General of Canada*.[94] That case concerned an attempt by the Quebec legislature to empower a commissioner appointed under a Quebec statute to compel federal officials and departments to give evidence about the practices of the Canadian Mounted Police. The Supreme Court of Canada held that 'provincial legislation cannot be effective by itself to confer such jurisdiction as against the Crown in the right of Canada'.[95] The Supreme Court held that:

(a) as a matter of intergovernmental immunity, a provincial legislature could not authorise a coercive investigation into the administration of a federal agency;[96] and

(b) provincial legislation could not take away or abridge any privilege of the Crown in right of Canada.[97]

59 Based on that case, the Commonwealth contended that, even if the *Royal Commissions Act 1917* (SA) purported to bind the Commonwealth Executive (which the Commonwealth denied), it could not validly do so because that would abrogate an aspect of the Commonwealth prerogative, contrary to the immunity identified in *Cigamatic* and *Henderson*.[98]

60 In contrast, NSW disputed the necessity of any intergovernmental immunity, based on the presence and effect of s 109 of the Constitution.[99] That section was said

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93 Commonwealth Submissions, [56]–[57].

94 [1979] 1 SCR 218.

95 [1979] 1 SCR 218, 244 (Pigeon J for the Court).

96 [1979] 1 SCR 218, 242–3 (Pigeon J for the Court).

97 [1979] 1 SCR 218, 245 (Pigeon J for the Court).

98 Commonwealth Submissions, [59].

99 Similar arguments were put by some States in *Spence* in relation to the existence of the reverse *Melbourne Corporation* doctrine: see, eg *Spence* (2019) 268 CLR 355, 419 [102] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15. Those submissions gained no traction in that case, and one might expect they would gain little traction in the *Cigamatic* context.

to mean that, in so far as the maintenance and execution of Commonwealth laws is concerned, a State law that interfered with that function of the Commonwealth executive would simply be inconsistent with the relevant Commonwealth law.[100] In so far as the Commonwealth's prerogative against discovery was concerned, NSW submitted that that prerogative was limited to judicial proceedings and did not apply to a Royal Commission.[101]

61 As the MDB Royal Commission flagged in its Report, the question of a State entity compelling evidence from outside the State is dealt with by SEPA.[102] As noted above, the Commission was authorised by s 10 of the *Royal Commissions Act 1917* (SA) to issue a summons to a person to produce documents or give evidence. As a consequence, the MDB Royal Commission was a 'tribunal' within the meaning of SEPA.[103] Part 4 of SEPA deals with the service of process of tribunals. Division 4 of pt 4 deals with the service of subpoenas[104] issued by a tribunal in connection with the performance of investigative functions.

62 Pursuant to s 76 of SEPA, a subpoena issued by a State Royal Commission may be served in another State, but only with the leave of the Supreme Court of the

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100 NSW Submissions, [78].

101 NSW Submissions, [81]–[83].

102 I note that the validity of the predecessor legislation to SEPA, the *Service and Execution of Process Act 1901* (Cth), had been upheld in *Aston v Irvine* (1955) 92 CLR 353; [1955] HCA 53.

103 'Tribunal' is defined in s 3 of SEPA to mean:

> (a) a person appointed by the Governor of a State, or by or under a law of a State; or
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> (b) a body established by or under a law of a State;
>
> and authorised by or under a law of the State to take evidence on oath or affirmation, but does not include:
>
> (c) a court; or
>
> (d) a person exercising a power conferred on the person as a judge, magistrate, coroner or officer of a court.
>
> Note: Section 81A alters the meaning of this term for the purposes of Part 5.

104 'Subpoena' is defined in s 47 of SEPA to mean a process that requires a person to give oral evidence before, or produce a document or thing to, a tribunal. It thus included a 'summons' issued under the SA *Royal Commissions Act*. That definition applies only to pt 4; a different definition of 'subpoena', in which 'a court, authority or person' is used in place of 'a tribunal', applies to the balance of the Act: see s 3.

issuing State. If the evidence, document or thing dealt with by the subpoena relates to matters of state, the Court must be satisfied that it is in the public interest that the evidence be given or the document or thing be produced. In such a case, s 127 provides that notice must be given to the Commonwealth Attorney-General, the Attorney-General of the State in which the tribunal is established, and the Attorney-General of the State in which the person to whom the subpoena is addressed is located. Each of those polities has a right to intervene in the proceeding. Finally, SEPA operates to the exclusion of the laws of the States concerning service or execution of process of one State in another State, thereby invoking s 109 inconsistency.[105]

63 I note that the Commonwealth Submissions filed in the High Court proceeding did not deal with the effect of SEPA, perhaps because (as noted above), it appears that the MDB Royal Commission had not purported to issue its summonses in accordance with the processes set out therein. It may be that, had the Commission complied with SEPA — a Commonwealth Act — it would have been more difficult for the Commonwealth to complain of constitutional invalidity. But perhaps the Commonwealth would have contended that SEPA does not purport to deal with — let alone to abrogate — the immunity the Commonwealth asserts it has from the coercive processes of a State commission of inquiry.

64 On any view, the existence of SEPA raises interesting issues concerning the operation of the 'traditional' *Melbourne Corporation* doctrine on Commonwealth legislation, in so far as SEPA might purport to authorise, for example, a summons from an entity of one polity to a different polity to produce State documents, although I note that SEPA preserves the ability of a government to claim public interest immunity.[106] More detailed consideration of that issue is beyond the scope of this paper.

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105 SEPA, s 8(4)(a); and see *Dalton v NSW Crime Commission* (2006) 227 CLR 490, 499 [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); [20016] HCA 17.

106 SEPA, s 128.

The Ruby Princess Inquiry

65 The Ruby Princess Inquiry also raised interesting issues concerning the exercise of compulsive processes against other polities. That Inquiry sought to summons a Commonwealth official to give evidence about the grant of pratique (ie permission to disembark or unload a ship or aeroplane) for the Ruby Princess (a matter within Commonwealth control, pursuant to the *Biosecurity Act 2015* (Cth)).[107] Consistently with the Commonwealth's 'longstanding position in relation to compulsory notices issued by State commissions of inquiry purporting to bind Commonwealth officers', the Commonwealth objected to that exercise of power.[108]

(a) The Commonwealth wrote to the Commission requesting that the summons be withdrawn on the basis that the Special Commissioner lacked the power to issue it.

(b) The Commission responded by indicating that the Special Commissioner had declined to withdraw the summons, but provided an unqualified indication that the Special Commissioner did not intend to issue a warrant to require the official's appearance before the Commission. However, the Commission noted that the official remained potentially subject to prosecution (although that matter was out of the Special Commission's hands).

66 In his report the Special Commissioner said as follows:

> The one fly in the ointment so far as assistance to this Commission goes, is the stance of the Commonwealth. I hasten to exclude the lawyers for the Commonwealth, whose written assistance and production of materials are very much appreciated, in the circumstances. Those circumstances are dominated by the assertion on the Commonwealth's part of an immunity from any compulsory process of a State's Special Commission of Inquiry. A Summons to a Commonwealth officer to attend and give evidence about the grant of pratique for the Ruby Princess was met with steps towards proceedings in the High Court of Australia.
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> …

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107 *Special Commission of Inquiry into the Ruby Princess* (Report, 14 August 2020) 28 [1.53] ('Ruby Princess Report').

108 Commonwealth of Australia, Exhibit 119: Voluntary Submission to the Special Commission of Inquiry into the Ruby Princess (16 July 2020) 2 [7].

> As a South Australian Royal Commissioner, I have previously expressed views contrary to the Commonwealth's stated position. I maintain those views. Further, I continue to believe that this difference about something as fundamental as a State's legislative power to bind the Commonwealth to assist in a State inquiry just as every other legal person in Australia would be obliged to do, disfigures the area of co-operative federalism.[109]

67 Again the issue was resolved without the assistance of the Courts. To that extent, it remains a live issue. As the MDB Royal Commission noted, this raises particular issues in the context of co-operative federal arrangements, such as those concerning the Murray-Darling Basin, where the States have referred power to the Commonwealth. They nonetheless retain a keen interest in the manner in which those referred powers are being exercised — not least because that might inform a State Parliament as to whether it is desirable to repeal or amend the referral of power.

68 Finally, it is relevant to note that the issue of the horizontal operation of the *Melbourne Corporation* doctrine can also arise in the context of executive inquiries. In the Ruby Princess Inquiry the Special Commissioner issued a summons to produce to the Victorian Department of Health and Human Services.[110] It appears from the Commission's Report that DHHS produced material in response to that summons.[111] Certainly, no legal proceedings were issued. However, it would appear to be open to a State to make arguments similar to those made by the Commonwealth in circumstances where a State inquiry seeks to compel the production of documents, or the giving of testimony, from another State or its officials.

69 In addition, SEPA might authorise the exercise of such coercive powers by one State against another State or its officials, subject to the judicial supervision for which that Act provides. But it might be that SEPA itself, being an Act of the Commonwealth Parliament, is subject to constitutional limits derived from the

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109 Ruby Princess Report, 28 [1.53], 29 [1.55].

110 Ruby Princess Report, 283.

111 Ruby Princess Report, 201; Victorian Department of Health and Human Services, Exhibit 115: Chronology and supporting material submitted to the Special Commission of Inquiry into the Ruby Princess (19 June 2020).

Melbourne Corporation doctrine that preclude its operation in this context. Again, these are matters that are beyond the scope of this paper. But they point to the fact that, as already discussed, the horizontal *Melbourne Corporation* doctrine remains an untested, but not altogether hypothetical, issue.