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THE NATURE OF THE COMMONWEALTH: A COMMENT

PROFESSOR Zines has helpfully analysed the recent cases that deal with the nature of the Australian federation.

I do not propose to make any detailed comments on the Territories power, other than to make reference to the comments of the justices that sat in *Gould v Brown*.[1] Those comments may give further insights into the relationship of the Territories power to Chapter III. *Gould v Brown* involved the validity of the cross vesting scheme under the *Corporations Law*. It was necessary to consider whether jurisdiction could be conferred on a federal court by a State Parliament, or whether Chapter III was an exclusive code for the conferral of jurisdiction on federal courts. The question whether jurisdiction could be conferred on a federal court pursuant to s122 of the Constitution arose by way of analogy. Chief Justice Brennan, together with Justice Toohey[2] and Justice Kirby,[3] confirmed the "disparate" nature of jurisdiction founded upon the Territories power. Justice Gummow referred to the cases establishing that disparate nature without comment on their correctness or otherwise.[4] Justice McHugh thought the relevant cases were wrongly decided and took an "integrational" approach that Chapter III applied to Territory Courts.[5] Justice Gaudron also took an "integrational" approach, but with the qualification that "there is nothing in the language or structure of Ch III to preclude the conferral of non-judicial powers on Territory courts".[6]

It seems to me a most unhappy circumstance that the Court seems again to be exploring the "integrational" theory at a time after the ACT and the Northern Territory have achieved a measure of self-government, and at least the Northern Territory is seeking full Statehood. Like Professor Zines, it is not at all apparent to me how the "integrational" theory relates to the powers of the Territory governments. I assume that those governments cannot enjoy any greater powers than did the Commonwealth Parliament. If s122 of the Constitution is subject to Chapter III, as a number of judges seem to suggest, then there may be very significant consequences in the Territories. For example, it could be that no parliament would have the power to validate the orders of the Territory courts if those courts do not comply with the requirements of Chapter III. However, there may be indications within

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1 (1998) 151 ALR 395.
2 At 406, 409.
3 At 497-498.
4 At 455.
5 At 443-444.
6 At 423-424.

the judgments in *Gould v Brown* that the Court will not rigidly apply an integrational approach, at least in relation to the judicial power of the Territories.

The issue upon which I primarily wish to comment is the nature of the relationship between the Commonwealth and the States. I agree with Professor Zines' analysis of the *Defence Housing Authority Case*[7] and with his comments on the remaining significance of the *Cigamatic*[8] doctrine. For some time it has seemed to me that some useful insights into the nature of the Australian federation may be gained by looking at circumstances which do not involve any complications relating to competing federal and state legislative power. One example is the relationship between the legislative powers of the different States, rather than between the legislative powers of the Commonwealth and the States. Each of the States has plenary power to legislate for the peace, order and good government of their respective jurisdictions. Under the *Australia Act* 1986 (Cth) each of the State parliaments has express extra-territorial power. Yet the powers of the State parliaments are limited, at least in part as a result of the federal implication within the Commonwealth Constitution. The extent of the limitation has not had to be defined with any precision, primarily because the Australian States have, by and large, appreciated the need for federal comity. Aspects of the limitation may include:

> (1) the requirement that there be a nexus between the State and the extra-territorial persons, things or events upon which the law operates;[9]
>
> (2) the suggestion that a state law is inapplicable to the extent that it is directly inconsistent with the law of another State having a greater nexus to the subject matter;[10]
>
> (3) the suggestion that a State cannot legislate in respect of matters that are "properly" the subject matter of the legislative power of another State. Apparently this would not include exactly the same issues as arise in respect of the exercise of federal legislative power and which were identified in *Melbourne Corporation v Commonwealth.*[11] However, the matters in which a State's legislative powers are limited may include:

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7 *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 146 ALR 495.

8 *Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372.

9 *Union Steamship v King* (1988) 166 CLR 1 at 10, 14; *State Authorities Superannuation Board v Commissioner of Taxation* (1996) 140 ALR 129 at 136.

10 *Breavington v Godleman* (1988) 169 CLR 41 at 128-129; *Port MacDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340 at 374; *Thompson v R* (1989) 169 CLR 1 at 33; *Union Steamship v King* (1988) 166 CLR 1 at 14; *McKain v Miller* (1991) 174 CLR 1 at 45-46; *State Authorities Superannuation Board v Commissioner of Taxation* (1996) 140 ALR 129 at 147-148.

11 (1947) 74 CLR 31 at 79-84. See *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 146 ALR 495 at 497-498, 509-510, 518-521, 564.

(a) the law of real property, the law of trusts and the law of administration of estates in that other State;[12]

(b) the compulsory acquisition of land in another State;[13]

(c) the duties of officers of the other State.[14]

Another circumstance that does not involve any direct considerations of the supremacy of federal legislative power, is the division of prerogative power between the States and the Commonwealth. The federal prerogative forms part of the federal executive power which is vested in the Commonwealth pursuant to s61 of the Constitution. The prerogative in respect of a State is vested in the State Governor by virtue of s7(2) of the *Australia Act* 1986 (Cth). The question of the division of these prerogative powers was discussed by Professor Zines in his commentary to Evatt's book on the prerogative.[15] He concluded that the Commonwealth executive may exercise its prerogative powers in areas where the Commonwealth has exclusive legislative power, or in areas where the Commonwealth Parliament has exercised concurrent legislative power. It was not necessary for Professor Zines to deal with the question of the division of the prerogative between States. I have suggested elsewhere[16] that:

• *prerogative powers* (eg the parens patriae powers) of the States are generally based upon their territories, but are not necessarily limited to those territories, so long as they are "in respect" of them;[17]

• each of the States and the Commonwealth share the *prerogative immunities* (eg immunities in litigation); and

• a State holds the *proprietary prerogatives* (eg bona vacantia) that are related to its territory[18] (as does the Commonwealth in respect of a Commonwealth place) or, where the prerogative arises out of an activity (eg prerogative copyright), that are related to its activity.[19]

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12 *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338 at 342-343; *Gosper v Sawyer* (1985) 160 CLR 548 at 560-561.

13 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 58, 91-92.

14 *Commonwealth v New South Wales* (1923) 33 CLR 1 at 54; *Re Cram; Ex parte NSW Colliery Proprietors Association* (1987) 163 CLR 117 at 127-128; *Mercantile Mutual Life Insurance Co Ltd v ASC* (1993) 112 ALR 463 at 492; *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 146 ALR 495 at 518.

15 Evatt, *The Royal Prerogative* (Law Book Co, Sydney 1987) C10-C17.

16 Selway, *Constitution of South Australia* (Federation Press, Sydney 1997) pp88-90.

17 See eg *Boath v Wyvill* (1989) 85 ALR 621 at 635-636, 638.

18 *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 322.

19 See eg *Attorney-General (NSW) v Butterworths & Co (Aust) Ltd* (1938) 38 SR (NSW) 195.

These examples seem to me to highlight that the federation established by the Constitution is as it was described by the majority in the *Engineers' Case*.[20] Within the Australian federation the powers of government are exercised by different governments in different localities, or in respect of different purposes in the same localities.[21] There is a sharing of power in order to achieve the common goal of the good government of the federal nation.

This is a different sort of federation to that created by the United States Constitution where each element of the federation remains sovereign.[22] This difference in the nature of the respective federations does have legal consequences. For example, in the United States the rules prohibiting double jeopardy do not apply outside of the particular jurisdiction where the defendant was acquitted.[23] In contrast, in Australia an acquittal on the merits in respect of an offence against State or Commonwealth law will bar a subsequent prosecution in another Australian jurisdiction in respect of that offence.[24]

The reasoning in *Cigamatic* essentially was based upon the assertion of a separate and superior sovereignty of the Commonwealth executive.[25] That reasoning was inconsistent with the framework of "shared" sovereignty. However, the reasoning of the majority in the *Defence Housing Authority Case* is based upon the necessary implication that

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20 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129.

21 At 152.

22 In some recent cases some judges have discussed the Australian federation in terms of the sovereignty of the individual elements of that federation, see eg McHugh J in *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 146 ALR 495 at 518 and Brennan CJ (perhaps) and by McHugh J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 91-92. This is to be contrasted with the "classic" position that, in Australia, domestic sovereignty is shared between the States and the Commonwealth: see eg *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 638 per Dawson J, and *Bradken Consolidated Ltd v BHP* (1979) 145 CLR 107 at 135 per Mason and Jacobs JJ. On the other hand, the Court has recently embraced the concept of the unity of the Australian common law (as to which, see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 111-115, 137-139). Although the unity of the common law is specifically derived from Chapter III, it is nevertheless an aspect of this shared sovereignty. It is not the only element of it. The differences between the Australian and the US Constitutions in relation to the "sovereignty" of the individual polities within the federation is explained by the majority in the *Engineers' Case* (1920) 28 CLR 129 at 146, 152-153 and by Barwick CJ in *Worthing v Rowell & Muston Pty Ltd* (1970) 123 CLR 89 at 98-100.

23 *Bartkus v Illinois* 359 US 121 at 131, 134, 137 (1958); *Ponzi v Fessendon* 258 US 254 at 259, 260-262 (1922); *State of Arizona v Poland* 645 P 2d 784 (1982).

24 *Maple v Kerrison* (1978) 18 SASR 513 at 520. However, an acquittal on the basis that the first court did not have jurisdiction will not found a subsequent plea of autrefois acquit in another jurisdiction: see *R v Hildebrandt* (1963) 8 WN (NSW) 143 (special leave refused: *Hildebrandt v R* (1964-65) 38 ALJR 43).

25 See, for example, the analysis by Doyle, "1947 Revisited, The Immunity of the Commonwealth from State Law" in Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, Sydney 1994) p47ff.

s51(xxxix), combined with s61 of the Constitution, is an exclusive Commonwealth power.[26] This reasoning is consistent with the "shared sovereignty" framework. The majority necessarily rejected the reasoning that supported *Cigamatic,* although, as Professor Zines has pointed out, they were remarkably coy about saying so.

Having founded the Commonwealth immunity upon the exclusivity of Commonwealth legislative power in respect of the Commonwealth executive, the Court then had to determine what fell within the exclusive power, and what did not. This resulted in the distinction between the capacities of the Crown, on the one hand, and the exercise of those capacities on the other, to which Professor Zines has drawn attention. Like him I have difficulty with that distinction.

Whether or not the result in the *Defence Housing Authority Case* is correct, it seems to me that the reasoning of the majority is consistent with a proper understanding of the nature of Australian federalism. The majority have not based their decision on the "superior sovereignty" reasoning that was initially used to support *Cigamatic.* Instead, the reasoning in *Defence Housing Authority* is consistent with the view that the Australian federation involves a sharing of powers and responsibilities to achieve the common goal of the good government of the Australian nation. Given that the question of Commonwealth immunity from State statutes will only rarely arise in practice,[27] it is this reasoning, rather than the result of that case, which is likely to be most significant in the long term.

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26 (1997) 146 ALR 495 at 497 per Brennan CJ, 520 per McHugh J, 528 per Gummow J. The reasoning of Dawson, Toohey & Gaudron JJ, the other three justices forming the majority, is not so clearly based upon the Commonwealth's exclusive legislative power in respect of the Commonwealth executive, although it is not inconsistent with that view: see at 507-510. By way of comparison, in *Gould v Brown* (1998) 151 ALR 395 it would seem that all members of the Court were agreed that the Commonwealth Parliament has exclusive power to create federal courts (see eg Brennan CJ and Toohey J at 402-403), but the Court split 3:3 on the question whether the Commonwealth has exclusive power in respect of the conferral of jurisdiction on federal courts.

27 The Commonwealth Parliament has, in effect, voluntarily subjected itself to State laws pursuant to s64 of the *Judiciary Act* 1903: see *Commonwealth v Evans Deakin* (1986) 161 CLR 254. Circumstances where s64 might not apply include where the proceedings are before a tribunal, rather than a court: *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 146 ALR 495 at 525, 536, 565-567.