AUSTRALIAN INTER-STATE COMMON LAW

By IAN RENARD*

> No doubt when a jurisdiction is conferred like that given by sec. 75(iii) and (iv) the source whence the substantive law is to be derived for determining the duties of the governments presents difficulties . . .[1]

The Argument

By section 75(iii) and (iv) of the Commonwealth Constitution, the High Court is granted original jurisdiction to hear "matters" between the various Australian governments. As yet, most inter-governmental cases heard by the High Court have been disposed of by interpretation and application of the Constitution, but it is clear that the High Court must have recourse to legal sources outside the Constitution. A study of the cases so far heard by the High Court, the types of disputes that might arise, application of the common law in other areas of law and experience in other federations reveals that the common law is applicable to Australian inter-governmental cases. Not only this, but there exists a body of "inter-state common law" specifically referable to inter-governmental disputes. Strands of this inter-state common law are to be found in the law covering rights of governments and their Attorneys-General to sue other governments on behalf of their residents, inter-governmental agreements, nuisance and inter-State water disputes.

Jurisdiction

On January 1, 1901, the six Australian colonies united to form the Commonwealth of Australia. This federation was brought about by the passage of an Imperial Act, the Commonwealth of Australia Constitution Act 1900,[2] and this statute laid down the distribution of legislative power between the Commonwealth Parliament and the six State legislatures. At the same time, it acknowledged that disputes would arise between the seven governments, and it conferred original jurisdiction upon the High Court of Australia to determine such "matters". It is the purpose of this paper to ascertain the sources of law which the High Court may utilize in exercising this jurisdiction—and, in particular, to determine whether there exists a body of common law specifically referable to inter-governmental disputes in Australia.

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[1] *Werrin v. Commonwealth* (1938) 59 C.L.R. 150, 167 *per* Dixon J.

[2] 63 & 64 Vict., c. 12.

Jurisdiction is conferred on the High Court over inter-governmental disputes by section 75 of the Commonwealth Constitution, the relevant parts of which read:

> In all matters—
> (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
> (iv) Between States . . .
> the High Court shall have original jurisdiction.

In addition to this, section 76(iv) provides that Parliament may confer original jurisdiction on the High Court "in any matter . . . relating to the same subject-matter claimed under the laws of different States". It is not clear how this would cover any matter not already included under section 75,[3] but the question is of little importance as Parliament has never attempted to confer jurisdiction under this sub-section.

Before an issue may be deemed justiciable under section 75, two obstacles must first be overcome. The first is that the plaintiff must have *locus standi* to sue the defendant government. It was at one time thought that section 75 not only authorized the High Court to hear inter-governmental disputes but also created causes of action against the various governments. In *Commonwealth v. New South Wales,*[4] where the Commonwealth was suing New South Wales for £1,000 damages arising from a collision between two boats, New South Wales sought an order setting aside the writ on the grounds that she had not consented to being sued. The Court held that consent was not required, and the majority[5] based this directly on section 75, rather than on the Judiciary Act 1903 (Cth) or New South Wales legislation. This view has been virtually overruled in subsequent cases,[6] and it now seems clear that a Government may only be sued on matters covered by section 75 if a Commonwealth Act so provides. This view is supported by section 78 of the Constitution which provides that:

> The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

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[3] Professor Cowen has stated that s. 76 (iv) is redundant; Z. Cowen, *Federal Jurisdiction in Australia* (1959) 23.

[4] (1923) 32 C.L.R. 200.

[5] Isaacs, Rich and Starke JJ.

[6] *Werrin v. Commonwealth* (1938) 59 C.L.R. 150, 161 *per* Rich J., 168 *per* Dixon J.; *Parker v. Commonwealth* (1965) 112 C.L.R. 295; G. Sawer, "Judicial Power under the Constitution" in R. Else-Mitchell (ed.), *Essays on the Australian Constitution* (2 ed., 1961); but note that a view similar to that of the majority as regards s. 75 (v) has been consistently maintained by the High Court: *Television Corporation Ltd. v. Commonwealth* (1963) 109 C.L.R. 59, 74.

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Parliament has in fact exercised this power in the Judiciary Act 1903-1969 (Cth). Part IX confers the right upon governments and individuals to sue the Commonwealth or any of the States (except where an individual wishes to sue the government of the State in which he resides), but any government may still exempt itself from liability in a particular case by passing a valid Act to that effect.[7]

The second requirement to be met before the High Court will hear a suit against a government is that the issue must be a "matter". The High Court has placed several limitations on the meaning of "matter" (for example, it is not simply equivalent to "proceedings"[8] and there must be a *lis*[9]) but the most important qualification is that the dispute must be capable of judicial, as distinct from political, settlement. This limitation arises from the fact that the High Court exercises the "judicial power of the Commonwealth"[10] which presupposes that the Court will determine cases according to principles of law. This distinguishes the High Court's jurisdiction from that of the United States Supreme Court which may settle "controversies" between States.[11] Further, the High Court has stated that a case between governments will only be capable of judicial determination where the dispute is equivalent to a suit that might arise between individuals or "subject and subject".[12] This gloss would seem to have been inserted to ensure that the Court would only apply laws to which both governments were clearly subject,[13] but, as Harrison Moore has suggested,[14] it seems to be inaccurate. It is well accepted that one State (or its Attorney-General) may sue another State or the Commonwealth for usurpation of legislative power if, say, the defendant State purported to pass an Act which was beyond its constitutional power to pass; yet this is not a right which an individual could claim. Any individual whose interests are sufficiently affected may challenge the validity of an Act, but only a government can challenge an Act on the basis of infringement of legislative power.[15]

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[7] *Werrin v. Commonwealth* (1938) 59 C.L.R. 150; *Commonwealth v. Anderson* (1960) 105 C.L.R. 303.

[8] *Collins v. Charles Marshall Pty. Ltd.* (1955) 92 C.L.R. 529.

[9] *In re Judiciary Act (1903-1920) and Navigation Act (1912-1920)* (1921) 29 C.L.R. 257.

[10] Constitution s. 71.

[11] United States Constitution Art. III, s. 2.1; see the distinction between U.S. and Australian Constitutions discussed by O'Connor J. in *South Australia v. Victoria* (1911) 12 C.L.R. 667, 708.

[12] *Id.*, 667, 675, 715; *Commonwealth v. New South Wales* (1923) 32 C.L.R. 200, 207.

[13] *South Australia v. Victoria* (1911) 12 C.L.R. 667, 715 *per* Isaacs J.

[14] W. Harrison Moore, "The Federations and Suits between Governments" (1935) 17 *Journal of Comparative Legislation and International Law* 163, 172.

[15] *Attorney-General for New South Wales v. Brewery Employees Union* (Union Label Case) (1908) 6 C.L.R. 469.

As will be discussed further below, the *rights* of governments in a suit before the High Court are "as nearly as possible" the same as in a suit between subject and subject,[16] and the better view would seem to be that questions of equivalence of a particular suit to a case that might arise between individuals are only relevant in determining what rights will usually be recognized for and against governments, and do not concern the jurisdiction of the court. It should also be noted that while inter-governmental agreements may be outside the jurisdiction of the court owing to their reliance on political considerations,[17] the High Court's jurisdiction is not ousted simply because the *ramifications* of a decision will be political in effect. In *South Australia v. Victoria,*[18] South Australia sought to have its boundary with Victoria altered in its favour and, if South Australia's claim had been successful, Victoria would have lost control over a considerable tract of land. Despite the possible political consequences, the Court decided that it had jurisdiction to hear the suit.

Choice of Law

Once it is established that the High Court has jurisdiction, the next problem is to ascertain which law it should apply in resolving a dispute. There are four obvious sources—Imperial Acts, Commonwealth Acts, State Acts and the common law. The High Court is guided in this regard by the Judiciary Act 1903-1969 and it is quickly evident from this Act that all four sources are in fact relevant.

(1) Imperial Legislation

By far the most important source is Imperial legislation. The Australian colonies and later, the Australian Commonwealth, were set up under and by the authority of the Parliament at Westminster, and the relationships between the seven Australian governments are primarily determined by Imperial Acts—in particular the Commonwealth Constitution, the State Constitutions, the Statute of Westminster, 1931 (U.K.)[19] and the Colonial Laws Validity Act, 1865 (U.K.).[20] Of the two inter-state[21] and twenty State-Commonwealth[22] cases so far heard

[16] Judiciary Act 1903-1969, s. 64.

[17] *John Cooke & Co. v. Commonwealth* (1922) 31 C.L.R. 394 (H.Ct) (1924) 34 C.L.R. 269 (P.C.).

[18] (1911) 12 C.L.R. 667 (H.Ct); (1914) 18 C.L.R. 115 (P.C.).

[19] 22 Geo. 5, c. 4.

[20] 28 & 29 Vict., c. 63.

[21] *South Australia v. Victoria* (1911) 12 C.L.R. 667; *Tasmania v. Victoria* (1935) 52 C.L.R. 157.

[22] *Commonwealth v. New South Wales* (1906) 3 C.L.R. 807, (1918) 25 C.L.R. 325, (1923) 32 C.L.R. 200, (1923) 33 C.L.R. 1; *New South Wales v. Commonwealth* (1908) 6 C.L.R. 214, (1908) 7 C.L.R. 179, (1915) 20 C.L.R. 54, (1926) 38

by the High Court, all but two[23] were determined by the application of an Imperial Statute.[24]

(2) Commonwealth Laws

For those matters not capable of being settled by application of Imperial legislation, the applicable law is determined by sections 79 and 80 of the Judiciary Act 1903-1969. These provide as follows:

> 79. The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.
> 80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the Statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

Section 80A then extends the effect of these two sections to Territories as well as States.

It is evident from these sections that the second applicable source of law is provided by "the laws of the Commonwealth". This phrase was once thought to include only those laws which were passed under powers that could be exercised over the whole Commonwealth, as distinct from laws relating to Commonwealth territories only.[25] This distinction, however, would now appear to have been discarded.[26] Commonwealth statutes will be relevant in three distinct situations in settling inter-governmental disputes. First, a Commonwealth Act may create a right against the Commonwealth which might be claimed by a State. Second, a dispute between States may involve a problem covered

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C.L.R. 74, (1929) 42 C.L.R. 69, (1932) 46 C.L.R. 155, 235, 246; *Victoria v. Commonwealth* (1926) 38 C.L.R. 399, (1937) 58 C.L.R. 618, (1957) 99 C.L.R. 575; *South Australia v. Commonwealth* (1926) 38 C.L.R. 408, (1942) 65 C.L.R. 373, (1962) 108 C.L.R. 130; *Commonwealth v. Queensland* (1920) 29 C.L.R. 1; *Tasmania v. Commonwealth* (1904) 1 C.L.R. 329.

[23] *New South Wales v. Commonwealth* (Garden Island Case) (1926) 38 C.L.R. 74; *South Australia v. Commonwealth* (Rail Standardisation Agreement Case) (1962) 108 C.L.R. 130.

[24] Commonwealth Constitution (except for *South Australia v. Victoria* (1911) 12 C.L.R. 667, (1914) 18 C.L.R. 115).

[25] *R. v. Bernasconi* (1915) 19 C.L.R. 629.

[26] *Lamshed v. Lake* (1958) 99 C.L.R. 132, 141, *per* Dixon C.J.; *Spratt v. Hermes* (1965) 114 C.L.R. 226.

by a Commonwealth Act. Third, a suit may concern events that wholly took place within a Commonwealth territory, in which case the relevant Commonwealth law would be applicable. A fourth possibility is that sections 79 and 80 may be excluded by other sections of the Judiciary Act. In the recent decision of *Suehle v. Commonwealth*[27]—an action in tort against the Commonwealth—Windeyer J. held that section 56 of the Judiciary Act, which provides that the Commonwealth may be sued in tort, was a "law of the Commonwealth" sufficient to exclude the operation of sections 79 and 80. To date, no inter-governmental suit has been determined by the application of a Commonwealth Act.

(3) State Laws

If neither Imperial nor Commonwealth statutes bear on an inter-governmental case, the combined effect of sections 79 and 80 is that it must be determined by common law as modified by the statutes of the State in which the court is sitting. These two sections are not free from doubt. It is not clear what changes in the common law amount to modifications,[28] which State statutes are not included (and despite the apparent all-embracing form of section 79, it is clear that not all State statutes are "picked-up")[29] or on what criteria the common law is deemed to be "applicable" under section 80. Further, there are grave doubts about the validity of both sections.[30]

Though a court will *prima facie* only be implementing the statutes of the State in which it is sitting, statutes of other States will nonetheless be relevant in some cases. It is now settled that sections 79 and 80 include the common law conflict of laws rules,[31] so, in a contract case, if the proper law of the contract is held to be that of another State, that State's statutes may well be decisive.

A difficulty would appear to arise where a court finds itself bound, by conflict of laws rules, to apply the law of another State, but where the law of the forum holds that particular law to be contrary to its public policy. In a normal conflicts case, the court would refuse to

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[27] (1967) 116 C.L.R. 353.

[28] *Parker v. Commonwealth* (1965) 112 C.L.R. 295.

[29] *Commissioner of Stamp Duties v. Owens* (1953) 88 C.L.R. 168.

[30] P. D. Phillips, "Choice of Law in Federal Jurisdictions", (1961) 3 M.U.L.R. 170, 348; R. W. Harding, "Common Law, Federal and Constitutional Aspects of Choice of Law in Tort" (1965) 7 West. Aust. L. Rev. 196.

[31] *Musgrave v. Commonwealth* (1936) 57 C.L.R. 514, 532 *per* Latham C.J. (and probably Evatt and McTiernan JJ.); *Deputy Commissioner of Taxation v. Brown* (1958) 100 C.L.R. 32, 39 *per* Dixon C.J.; *Pedersen v. Young* (1964) 110 C.L.R. 162; *Parker v. Commonwealth* (1965) 112 C.L.R. 295, 306 *per* Windeyer J.; *contra R. v. Oregan; Ex parte Oregan* (1957) 97 C.L.R. 323; P. D. Phillips, *op. cit.*

follow the foreign law, and application of this rule in inter-governmental cases in Australia might allow any government to unilaterally exempt itself from liability to any other government in the federation, at least if sued in a court sitting within its territory.

But this loophole is effectively closed by the Constitution. It is provided in section 118 that:

> Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

The precise meaning of this section has for a long time been keenly debated. Much of the debate has concerned the problem of whether the section is purely "evidentiary" or "substantive", with the bulk of authority opting for the latter.[32] Two recent High Court decisions, however, have clarified the position and shown that the two suggested alternatives are not exhaustive. In *Anderson v. Eric Anderson*[33] and *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson and Others,*[34] the High Court rejected the notion that section 118 had the effect of rendering the legislation of one State automatically enforceable in every other State. Both cases involved the problem of whether the law of New South Wales or the Australian Capital Territory should apply, and the approach of the Court to this question was, in both cases, identical. Normal conflict of laws rules were utilized and, having ascertained which law applied, the Court stated that section 118 did not have the effect of still rendering enforceable a statute which formed part of the non-applicable law. To give section 118 such an effect, commented the Court, would be to grant to the Acts of one State an extraterritorial effect which they could not constitutionally have:

> "There is no failure to give full faith and credit to the Ordinances of the Australian Capital Territory by deciding that they do not apply to the trial of an action in a court of the State of New South Wales for a cause of action given by the laws of that State."[35]
>
> "[I]t is one thing to give faith and credit to the New South Wales *Stamp Duties Act* as achieving all that it purports to achieve as an alteration of the law of New South Wales, and quite another

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[32] *Jones v. Jones* (1928) 40 C.L.R. 315 *per* Higgins J.; *Harris v. Harris* [1947] V.L.R. 44; E. I. Sykes, "Full Faith and Credit—Further Reflections" (1954) 6 *Res Judicatae* 353; Z. Cowen, "Full Faith and Credit—The Australian Experience" in R. Else-Mitchell (ed.), *Essays on the Australian Constitution* (2 ed., 1961) 326; P. D. Phillips, *op. cit.;* R. W. Harding, *op. cit.*

[33] (1965) 114 C.L.R. 20.

[34] (1968) 43 A.L.J.R. 42.

[35] (1965) 114 C.L.R. 20, 25 *per* Barwick C.J. Similar sentiments were expressed *per* Kitto J. at 31, *per* Taylor J. at 37, *per* Menzies J. at 39 and *per* Windeyer J. at 45.

> thing to treat it as producing an extra-territorial result which on its true construction it does not purport to have and could not constitutionally have, namely to alter the law of the Territory as to Territory administrations."[36]

But while these two decisions appear to put an end to the meaning attributed to section 118 by the "substantive" school,[37] two earlier cases, the authority of which remains unimpaired by these latest High Court decisions, show that section 118 is equally of more than "evidentiary" importance. In *Merwin Pastoral Co. Pty Ltd v. Moolpa Pastoral Co. Pty Ltd,*[38] a judge[39] of the Victorian Supreme Court had refused to enforce a New South Wales Act on the grounds that it was contrary to Victorian public policy, but the High Court reversed the decision, *inter alia,* because such grounds for rejection of an Act were contrary to section 118. Similarly, in *Re E. and B. Chemicals and Wool Treatment Pty Ltd,*[40] Napier J. found that by conflict of laws rules Victorian law applied in the case before him and, by virtue of section 118, he could not refuse to apply the relevant Victorian statute even though it was clearly against the policy of South Australian law.

The true effect of section 118 would thus appear to be that, once conflict of laws rules indicate that the law of a particular State applies, then the common law right of the court to refuse to apply that law on grounds of public policy cannot be exercised.

In inter-governmental cases, State laws will be decisive where no Imperial or Commonwealth legislation is relevant and the facts took place entirely within the territory of one State. It is well settled that, if the Commonwealth takes advantage of a State statute, it is bound by the conditions imposed by that statute.[41] Similarly, if a government undertakes a transaction in one State, it will be bound by the general laws of that State concerning such transactions. As regards the effect of such State laws on the Commonwealth, Dixon J. has stated:

> General laws made by a State may affix legal consequences to given descriptions of transaction and the Commonwealth, if it enters into such a transaction, may be bound by the rule laid down. For instance, if the Commonwealth contracts with a company the form of the contract will be governed by s. 348 of the Companies Act.[42]

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[36] (1968) 43 A.L.J.R. 42, 44 *per curiam.*

[37] Notably the views of Professor Cowen, *op. cit.*

[38] (1933) 48 C.L.R. 565.

[39] Macfarlan J.

[40] [1939] S.A.S.R. 441.

[41] *R. v. Registrar of Titles* (1915) 20 C.L.R. 379; *New South Wales v. Bardolph* [1935] A.L.R. 22 *per* Evatt J.

[42] *Uther v. Federal Commissioner of Taxation* (1947) 74 C.L.R. 508, 528. His Honour was referring to the Companies Act (N.S.W.) 1936.

Similarly, Fullagar J. commented in *Commonwealth v. Bogle*[43] that:

> The Commonwealth may, of course, become affected by State laws. If, for example, it makes a contract in Victoria, the terms and effect of that contract may have to be sought in the Goods Act 1928 (Vict.) . . .[44]

Exactly the same reasoning would presumably apply where the transaction was undertaken by another State rather than the Commonwealth and, with some reservations to be discussed below, where both parties to the transaction are governments. Nor would this be confined to contracts. In *Commonwealth v. New South Wales,*[45] where a Commonwealth boat collided with a New South Wales boat in Sydney Harbour, there can be little doubt that liability would have been determined by the New South Wales law of tort. This seems evident from the judgment of Windeyer J. in *Suehle v. Commonwealth*[46] in which he states that section 56 of the Judiciary Act implies that the relevant law is the law of the State where the alleged tort occurred. Section 57 which, in wording similar to the rights conferred on individuals by section 56 confers rights on States to sue the Commonwealth, would therefore carry a like implication.

Problems of far greater difficulty arise where a dispute does not concern events occurring entirely within the territory of one State—for in such a case, there will be a very real possibility that the laws of more than one State will apparently apply to the case and they may differ. In contract cases, this may well present few problems, for the application of normal conflict of laws rules will usually indicate one "proper law of the contract". Further, inter-governmental agreements are normally authorized or ratified by statute, and the terms of the agreement will be placed in the schedules of the relevant Acts of both parties. However, problems do arise if, where an agreement has been so enacted by the parties, one party repeals its Act unilaterally and claims to have thus ended its liability.[47]

The problem of conflicting laws would seem to be most acute in cases of nuisance, where the actions causing the alleged nuisance occurred in the territory of one State and these actions directly caused damage in the territory of another State. No such case has yet been litigated in Australia, but this problem has arisen in several American inter-governmental suits (pollution of the water of an inter-state

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[43] (1953) 89 C.L.R. 229.
[44] *Id.*, 260.
[45] (1923) 32 C.L.R. 200.
[46] (1967) 116 C.L.R. 353.
[47] Discussed further *infra,* 108-109.

stream,[48] deprivation of natural gas,[49] increasing the flow of an interstate stream causing flooding[50]) and in one celebrated case in international law (emission of fumes[51]). Similar problems arise where one State diverts water from an interstate stream, thus leaving less water for the use of lower riparian States. Such cases have been litigated in the United States,[52] Switzerland,[53] Germany,[54] India[55] and before international tribunals,[56] and it is possible that the current dispute between South Australia and Victoria over the Dartmouth and Chowilla Dams could lead to a similar case being heard before the High Court.[57] In these cases, where the damage has been widespread, the parties to the actions have not been the individuals actually affected but the States, or their Attorneys-General, in the capacity of *parens patriae*.[58] In nearly every instance, the actions of the defendant State have been authorized by that State's legislature, but in no case has the court or tribunal held this to be conclusive.

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[48] *Missouri v. Illinois* (1901) 180 U.S. 208, 45 L.Ed. 497, (1906) 200 U.S. 496, 50 L.Ed. 572; *New York v. New Jersey* (1921) 256 U.S. 296, 65 L.Ed. 937.

[49] *Pennsylvania v. West Virginia* (1922) 262 U.S. 553, 67 L.Ed. 1117.

[50] *North Dakota v. Minnesota* (1923) 263 U.S. 365, 382, 68 L.Ed. 342.

[51] *Trail Smelter Arbitration (U.S.A. v. Canada)* (1938-40) 9 Ann. Dig. 315.

[52] In a long series of decisions, commencing with *Kansas v. Colorado* (1902) 185 U.S. 125, 46 L.Ed. 838, (1907) 206 U.S. 46, 51 L.Ed. 956; the most recent decision is *Arizona v. California* (1963) 373 U.S. 546, 70 L.Ed. 2nd 542. Other cases are reprinted in T. R. Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams* (1956).

[53] *Aargau v. Zurich* (1878) Rec. Off. des Arrets du Tribunal Federal 4, 34-7; partly translated in English in D. Schindler (1921) 15 Am.J.Int.L., 149; F. J. Berber, *Rivers in International Law* (1959) 177-78.

[54] *Wurttemberg and Prussia v. Baden* (1927-28) 4 Ann. Dig. 128.

[55] *Sind v. Punjab* (1942) Report of the Indus (Rau) Commission. This was the decision of an arbitral tribunal by which both provinces agreed to be bound.

[56] *Zarumilla River Arbitral Award (Peru v. Ecuador)* (1945) "Informe del Ministro de Las Relaciones Exteriores A La Nacion", (Quito, 1945); partly translated in English in W. L. Griffin, "The Use of Waters of International Drainage Basins under Customary International Law" (1959) 53 Am.J.Int.L. 50, 80; *Lake Lanoux Arbitration (Spain v. France)* (1957) 24 International Law Reports 101.

[57] The four Governments that are parties to the River Murray Agreement agreed in February 1970 that the next dam to be constructed in the Murray basin should be at Dartmouth in Victoria rather than at Chowilla in South Australia as previously planned. The South Australian Government, however, was later defeated on this issue both on the floor of the House and at the subsequent polls on 30 May, 1970. If the other parties to the River Murray Agreement go ahead with construction of the Dartmouth Dam without South Australia's consent, as Sir Henry Bolte has threatened (Melbourne *Herald* 27/8/1969), South Australia might sue them in the High Court.

[58] *Missouri v. Illinois* (1901) 180 U.S. 208, 241, 45 L.Ed. 497; *Georgia v. Pennsylvania Railroad Co.* (1945) 324 U.S. 439, 89 L.Ed. 1051; *Solothurn v. Aargau* (1900) 26 Rec. Off. des Arrets du Tribunal Federal 1, 444—and it seems the same would apply in Australia: *Attorney-General for New South Wales v. Brewery Employees Union* (1908) 6 C.L.R. 469, 552-53 *per* O'Connor J.

In every instance where both parties to a dispute have been governments and where actions undertaken in the territory of one have caused damage to the territory or inhabitants of the other, it has been held that the legislation of neither State could create or destroy liability. The reason is that the governments have always been treated as equals before the court and accordingly the statutes of one could not be held to bind the other when the facts involved the territory of both. In *Connecticut v. Massachusetts,*[59] a case involving diversion of water from an interstate stream, the United States Supreme Court stated:

> While municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in *Kansas v. Colorado,*[60] such disputes are to be settled on the basis of equality of right.[61]

In *Hinderlider v. La Plata,*[62] the Supreme Court held:

> Whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive.[63]

Similarly, in *Aargau v. Zurich,*[64] the Swiss Federal Court stated:

> In so far as the public watercourses are concerned which flow across several cantons, none of them, in virtue of the principle of the equality of the cantons before the law, has the right to take on its territory measures which would prejudice the other cantons, such as diversions from similar installations, which would paralyse the other cantons in the exercise of the jurisdiction inherent in their sovereignty over the waters or which would result in a violation of their territory.[65]

It is submitted that in a similar dispute between States or the Commonwealth before the High Court, legislation of neither party (unless expressly made paramount by the Commonwealth Constitution) would be held to be conclusive. The United States Supreme Court and Swiss Federal Court both felt this followed simply from the very nature of a federation rather than from any particular constitutional provision. In Australia, the governments are also treated as equals by the High Court. In *Farley's Case,*[66] Dixon J. discussed the competing claims of

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[59] (1930) 282 U.S. 660; 75 L.Ed. 602.
[60] (1907) 206 U.S. 46, 51 L.Ed. 956.
[61] (1930) 282 U.S. 660, 670, 75 L.Ed. 602, 607.
[62] (1938) 304 U.S. 92, 82 L.Ed. 1202.
[63] *Id.,* 110 *per* Brandeis J., 82 L.Ed. 1212.
[64] (1878) Rec. Off. des Arrets du Tribunal Federal 4, 34.
[65] *Id.,* translation from F. J. Berber, *op. cit.,* 177-78.
[66] *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd* (1940) 63 C.L.R. 278.

governments to debts in terms of the basic constitutional framework, and his reasoning would appear to be not confined to Crown prerogatives:

> . . . the State's claim to stand on an equality with the Commonwealth in respect of demands upon the same fund is the consequence of the Federal system by which two governments of the Crown are established within the same territory, neither superior to the other.
>
> They are not rights conferred by the Federal Constitution, but they do depend on the existence of the State as a separate government. . . . [The Constitution] does mean to establish two governments, State and Federal, side by side, neither subordinate to the other . . .[T]o destroy the equality does spell an interference with an existing governmental right of the State flowing from the constitutional relations of the two polities.[67]

When it is considered that the Constitution makes express provision, in section 75, for the settlement of inter-governmental disputes by the High Court, and it is accepted—as it surely must be—that the seven governments must be treated as equals before the Court, then the conclusion seems inescapable that no government, simply by the authority of its own legislative power, may use its territory quite regardless of the damage that this use may incur on the territory of another State. The only writer on Australian constitutional law who appears to have reached this conclusion—Harrison Moore—summarises the position well:

> In the relations of governments such a field exists where if there were no law between them, and the omnipotence of each legislature was the postulate of decision, there might be a contradiction of legal voices in a tribunal before which neither legislature can claim a supremacy over the law of the other, where therefore their equality demands some limit of their constitutional authority.[68]

One is reminded of the nineteenth century justification of restrictions on individual freedom; the very notion of "freedom" impliedly connotes some restrictions, for no man may be so "free" that he may prevent others from exercising similar rights of freedom. The same would clearly seem to apply to "equal" governments operating within the one federation.

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[67] *Id.*, 312-13.

[68] W. Harrison Moore, "The Federations and Suits between Governments" (1935) 17 *Journal of Comparative Legislation and International Law* 163, 200 (third series).

(4) Common Law

But what is the position if no legislation—Imperial, Commonwealth, or State—is conclusive? As noted above, section 80 of the Judiciary Act 1903-1969 requires the High Court to apply "the common law of England". There is one dictum, however, that would seem to imply that common law rules cannot apply to inter-governmental disputes. In *South Australia v. Victoria,*[69] Isaacs J. stated that in inter-governmental disputes, the High Court

> . . . must of necessity have jurisdiction. As a competent forum for inter-State controversies its status is complete; and the *lex fori* must be either direct Imperial legislation or Colonial legislation authorized by some Imperial enactment. If on examination of the case it be found that the claim is not supported by any law binding the defendants, but is dependent on political considerations merely, the Court must say so . . . the Court has always jurisdiction to determine in the first place whether the standard is political or legal.[70]

Isaacs J. was concerned to show that an inter-State case must be determined by rules of law, binding on both parties, and he would seem to be suggesting that those rules of law may only be provided by Imperial or Colonial legislation. He also makes it clear, however, that his main concern was to ensure that the standard by which governments are judged before the Court is legal, not political. If a rule of common law existed, it would, to the extent that neither legislature had modified it, be binding on both parties, and would provide a legal standard. Use of the term *lex fori* would also seem to indicate that common law as well as legislation would apply.

On the other hand, there have been numerous cases in which common law principles have been applied against a government, both in tort[71] and in contract.[72] In both Australia and Canada, common law principles have been used in cases where both parties were governments.[73] There would appear to be no reason why section 80 should not have the effect of applying common law rules to Australian inter-governmental suits in certain cases. Further, the same would seem to

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[69] (1911) 12 C.L.R. 667.

[70] *Id.*, 721.

[71] E.g. *Parker v. Commonwealth* (1965) 112 C.L.R. 295; *Suehle v. Commonwealth* (1967) 116 C.L.R. 353.

[72] E.g. *Welden v. Smith* (1924) 34 C.L.R. 29 (P.C.).

[73] *South Australia v. Commonwealth* (1962) 108 C.L.R. 130; *Dominion of Canada v. Province of Ontario* [1910] A.C. 637, 646.

be true even if section 80 is invalid, for the common law provides the source of law for all Australian courts where legislation is insufficient.[74]

But what is the nature of the common law principles that are applicable to inter-governmental disputes? Are they simply the same principles that would be applied in cases between individuals, or is there a further body of common law applicable specifically to inter-governmental cases? If such an "inter-State common law" or "federal common law" exists, it will certainly not be equivalent to the "federal common law" that was, for a time, thought to exist in the United States of America.[75] The common law is uniform throughout Australia, except as modified by the various legislatures. All Australian governments were formed by the authority of the Imperial Parliament and their courts were charged with the duty of administering English common law principles. The appellate jurisdiction of the High Court has ensured that these principles are interpreted uniformly throughout the Commonwealth.[76] Thus it has been stated that there is an "Australian common law".[77] No such claim could be made in the United States, however, as every State was theoretically quite independent before confederation, and not all have retained the common law, either in full or in part.

Section 64 of the Judiciary Act provides that:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

This section makes it quite clear that, in most circumstances, governments will be subject to the same rules of common law as individuals —but the phrase "as nearly as possible" also infers that there are situations where this is not the case, presumably because of the very nature of governments. If this is so, then there must be a special body of common law specifically concerned with inter-governmental relationships—an "inter-State common law". To ascertain whether

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[74] Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 A.L.J. 240; D. Kerr, *The Law of the Australian Constitution* (1925), 27-30.

[75] *Swift v. Tyson* (1842) 16 Peters 1, 10 L.Ed. 865; overruled by *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, 82 L.Ed. 1188.

[76] See Z. Cowen, "Diversity Jurisdiction: The Australian Experience" (1955) 7 *Res Judicatae* 1, 29-30; D. Derham, discussion (1957) 31 A.L.J. 247.

[77] *The King v. Kidman* (1915) 20 C.L.R. 425, 436-37 *per* Griffith C.J.

there is an inter-State common law in Australia and, if so, what is its content, it is necessary to examine each of the categories of possible inter-governmental suits which might be brought before the High Court.

Challenges to Constitutional Validity

The most common category of inter-governmental cases are those in which one party challenges the constitutional validity of an Act of the other. At first, it was thought by some that a State (or its Attorney-General) could only challenge the validity of another government's legislation if a "material interest" of the plaintiff government was damaged or threatened.[78] However, the High Court quickly came to recognize any government challenging legislation of another as a competent plaintiff if that State's residents were affected. There can be no doubt that the former view was the more consistent with English authority, but the latter view was better suited to a federal system. That this diversion from English precedent was deliberate and caused directly by the federal system was made clear by O'Connor J.:

> In a unitary form of government, as there is only one community and one public which the Attorney-General represents, the question which has now been raised cannot arise. It is impossible, therefore, that there can be any decision in England or in any of the Australian Colonies before Federation exactly in point. But it seems to me that in the working out of the federal system established by the Australian Constitution an extension of the principle is essential. The Constitution recognizes that in respect of the exercise of State powers each State is under the Crown an independent and autonomous community. Similarly the States must recognize that in respect of the exercise of Commonwealth powers all State boundaries disappear and there is but one community, the people of the Commonwealth. The proper representative in Court of each of these communities is its Attorney-General.[79]

Further, the principle was extended to include not only cases where the illegal actions of the defendant government infringed the legislative domain of the plaintiff State, but also cases where there was no such intrusion, provided the plaintiff State's residents were damaged or threatened with damage.[80] The law applied to determine such cases is entirely provided by the Commonwealth and State Constitutions (and other Imperial Acts if relevant) together with normal rules of statutory interpretation (though constitutional provisions tend to be interpreted

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[78] *Commonwealth v. Queensland* (1920) 29 C.L.R. 1 *per* Higgins J.

[79] *Attorney-General for New South Wales v. Brewery Employees Union* (1908) 6 C.L.R. 469, 552.

[80] *Tasmania v. Victoria* (1935) 52 C.L.R. 157.

less narrowly than other Statutes, and the High Court has developed some rules of interpretation specifically applicable to constitutional matters).[81]

The special rules on questions of *locus standi* in constitutional cases, by themselves, are no more than extensions of standard rules of procedure but if a wider body of special rules applicable to inter-governmental suits were shown to exist, they would doubtless form part of this "inter-State common law".

Prerogative Rights

The second category of cases are those in which conflicting prerogative rights are litigated. Even in a unitary system, the Crown in one capacity may sue the Crown in another,[82] but in a federation, conflicts over the exercise of prerogative become more likely. In Australia, the Crown is advised by seven sets of Ministers and it is clear that the Crown exercises its prerogative rights in Australia on the advice of all seven. Inter-governmental suits in Australia and Canada over the exercise of Crown prerogative have dealt with mines royal,[83] fisheries,[84] escheats and *bona vacantia,*[85] and priority of claim to debts in a distribution.[86] These cases have caused a clear split in judicial opinion concerning the nature of the Crown in Australia,[87] but though many of the cases were novel (in that two governments claimed the right to exercise a particular prerogative power), they were decided according to the general distribution of powers as laid down in the Commonwealth Constitution (or the British North America Act, 1867-1964[88]) rather

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[81] E.g. the "pith and substance test"; *The King v. Barger* (1908) 6 C.L.R. 41, affirmed by the Privy Council in *W. R. Moran Pty Ltd v. Deputy Federal Commissioner of Taxation* (N.S.W.) (1940) 63 C.L.R. 338, 341.

[82] *Attorney-General for Jersey v. Solicitor-General for Jersey* [1893] A.C. 326.

[83] *Commonwealth v. New South Wales* (1923) 33 C.L.R. 1; *Attorney-General for British Columbia v. Attorney-General for Canada* (1889) 14 App.Cas. 295.

[84] *Attorney-General for British Columbia v. Attorney-General for Canada* [1914] A.C. 152; *Attorney-General for Canada v. Attorney-General for Quebec* [1921] 1 A.C. 413.

[85] *Attorney-General for Canada v. Attorney-General for Alberta* [1928] A.C. 475.

[86] *Commonwealth v. Cigamatic Pty Ltd* (1962) 108 C.L.R. 372; *Uther v. Federal Commissioner of Taxation* (1947) 74 C.L.R. 508; *Attorney-General for Canada v. Attorney-General for Quebec* [1932] A.C. 514.

[87] Knox, Isaacs, Rich, Starke, Higgins, Williams and Herron JJ. have stated that the Crown is one and indivisible, merely acting through different agencies in the various Australian States, whereas Griffith, Latham, Dixon and McTiernan JJ. see the Crown as being several juristic persons: W. E. Cuppaidge, "The Divisibility of The Crown" (1954) 27 A.L.J. 594.

[88] 30 & 31 Vict., c. 3.

than by special rules of common law. Some of these prerogative cases were held to turn on basic problems about the nature of federalism and the fundamental relationship between the various governments.[89]

Boundaries

The third class of inter-governmental disputes concerns boundaries. There has only been one such case heard by the High Court to date,[90] but there were several inter-colonial boundary disputes in the eighteenth and nineteenth centuries[91] and there have also been several inter-State boundary disputes litigated before the United States Supreme Court.[92] Until at least the mid-eighteenth century, the Crown had a prerogative right to determine boundary disputes between colonies, even if the parties did not refer the dispute to the Privy Council for settlement.[93] In the nineteenth century, the Privy Council heard three boundary cases[94] but it is not clear whether the Board was acting in its judicial capacity or aiding the Crown in its exercise of prerogative power. In *South Australia v. Victoria*,[95] the Court divided on this question. Isaacs J. thought that the prerogative power to settle boundary disputes ceased, at the latest, when the colonies received legislative institutions,[96] so that the Privy Council decisions must have been an exercise of judicial power. Griffiths C.J., Barton and O'Connor JJ., however, thought that the Board was not acting judicially because (i) lay lords as well as law lords heard the cases, (ii) no formal judgments were delivered, and (iii) in 1894, the British Secretary of State (Lord Ripon) stated in a dispatch to the Governor of South Australia that the Privy Council would only hear a

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[89] See, for example, the passage from the judgment of Dixon J. in *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd* (1940) 63 C.L.R. 278, 312-13 quoted *supra*.

[90] *South Australia v. Victoria* (1911) 12 C.L.R. 667, (1914) 18 C.L.R. 115.

[91] Pennsylvania and Maryland 1683-1709, Connecticut and Rhode Island 1725-26, Virginia and North Carolina 1726-27, Rhode Island and Massachusetts 1734-46, Pennsylvania and Rhode Island (Second Case) 1734-69, New Hampshire and New York 1764, New York and Quebec 1768; see (1911) 12 C.L.R. 667, 702.

[92] *New Jersey v. Delaware* (1934) 291 U.S. 361, 78 L.Ed. 847; *Michigan v. Wisconsin* (1925) 270 U.S. 295, 70 L.Ed. 595; *Oklahoma v. Texas* (1922) 258 U.S. 574, 66 L.Ed. 771; *Nebraska v. Iowa* (1892) 143 U.S. 359, 36 L.Ed. 186 and other cases noted in (1929) 74 L.Ed. 786.

[93] Massachusetts and Connecticut 1754.

[94] *Cape Breton Case* (1846) 5 Moo. P.C.C. 259, *Manitoba and Ontario Boundary Case* 1886, *Pental Island Case* 1872.

[95] (1911) 12 C.L.R. 667.

[96] *Id.*, 720-21, citing *In re Lord Bishop of Natal* (1864) 3 Moo. P.C.C. NS, 115, 148; *Penn v. Lord Baltimore* (1750) 1 Ves. 444. His argument is supported by the judgment of the Privy Council in *Re the Labrador Boundary* (1927) 43 T.L.R. 289 which is clearly an exercise of judicial power.

boundary case if both parties referred the dispute to it and agreed beforehand to abide by the result.[97] The significance of the Ripon dispatch is unclear for, as Isaacs J. pointed out, he may simply have been stating that it would not be politic for the Board to exercise its judicial power and compel self-governing colonies to accept its determination, rather than impliedly confirming that a weakened version of the Royal prerogative still existed. The importance of this point concerns the need for the High Court to exercise "judicial power". As the High Court was entrusted with the power of hearing inter-governmental "matters", its jurisdiction clearly extended to settling boundary questions if the Privy Council's decisions were judicial. The point was not crucial in *South Australia v. Victoria*[98] because the Court found as a matter of statutory interpretation that the colonial governors had an implied power to state where, as a question of fact, the boundary between South Australia and Victoria lay. The Court unanimously agreed, nonetheless, that it had jurisdiction to hear a suit in which one State sought a declaration against another as to the true position of the boundary between them. Because no judgments were given in the three Privy Council cases, it is not easy to ascertain what sources of law the Board utilized; if in fact the decisions were based on legal principles rather than on "general rules of justice and good conscience".[99] If the actual decision in *South Australia v. Victoria* is taken as a guide, it would seem that the only source necessary is the Imperial legislation that created the colonies concerned, the powers of their legislatures and the powers of the Governors.

On the other hand, common law principles may still be required. Higgins J., who dissented in *South Australia v. Victoria,*[100] based his conclusions on the common law. As the other four judges held that the Governors had an implied power to fix the boundary, it was not necessary for them to discuss the principles by which South Australia might have recovered the land it claimed if the marked border had not been the legal border. Higgins J., denying that the Governors held such an implied power, agreed that the suit should be dismissed, but on the ground that the rights of the States must be regulated by normal principles of common law applicable between individuals,[101] and at common law only the proprietor of land may get relief in a boundary dispute. As the King was the proprietor (the State of South Australia being a

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[97] (1911) 12 C.L.R. 667, 705 *per* Griffith C.J., Barton J. concurring, 714 *per* O'Connor J. A similar dispatch had in fact been sent by the British Secretary of State some twenty years earlier regarding the Pental Island dispute between New South Wales and Victoria.

[98] (1911) 12 C.L.R. 667.

[99] *Id.*, 705 *per* Griffith C.J.

[100] *Id.*, 733.

[101] Judiciary Act, s. 64.

mere donee of the power to regulate the sale and disposal of the lands), South Australia could not be granted the declaration she sought.[102] Though the conclusions of Higgins J. would not seem to carry great merit, they do show that Imperial legislation may not be sufficient to settle all inter-State boundary disputes.[103] Whether normal common law rules applicable between subject and subject are adequate must at least be open to doubt—for the technicality on which Higgins J. decided against granting South Australia relief seems quite unnecessary and would not appear to take sufficient cognisance of the special position of State governments in a federation.[104] It would seem that, as regards inter-State boundary disputes, there may be a need for "inter-State common law" principles. If precedents are required, the nineteenth century Privy Council decisions may provide them, but the position will not be clarified until another boundary dispute comes before the High Court.

Inter-Governmental Agreements

The fourth category of inter-governmental suits concerns inter-State or, more usually, Commonwealth-State agreements. The Commonwealth and States all may be sued in contract both by individuals and by other governments[105] and it is clear that normal common law principles apply to contracts made both between an individual and an Australian government,[106] and between two (or more) governments.[107]

The principal problem with inter-governmental agreements is to determine whether or not they are legally binding; that is to say, whether or not they are *contracts*. In many instances they clearly are not.[108] Lack of legal force may be shown in the recitals to the agreement,[109] the general circumstances in which the agreement was made[110] or the degree of certainty of the obligations undertaken by both parties.[111]

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[102] (1911) 12 C.L.R. 667, 744.

[103] In *Re the Labrador Boundary* (1927) 43 T.L.R. 289, the Privy Council used principles of common law (and analogies from international law) in interpreting Imperial legislation.

[104] His conclusion was based on the theory that one State could not represent the Crown in a suit against another State—and this would not seem to be a correct statement of the law, at least as it stands at the present time: W. E. Cuppaidge, *op. cit.*

[105] Judiciary Act, s. 56, Crown Proceedings Act 1958 (Vict.), s. 23 (1) (a) and equivalent Acts of the other States (individuals); Judiciary Act, s. 57 (governments).

[106] *Welden v. Smith* (1924) 34 C.L.R. 29.

[107] *South Australia v. Commonwealth* (1962) 108 C.L.R. 130.

[108] *Ibid.; John Cooke & Co. v. Commonwealth* (1922) 31 C.L.R. 394.

[109] *Ibid.*

[110] E.g. unlikely to be a contract if made as a wartime, emergency measure.

[111] *South Australia v. Commonwealth* (1962) 108 C.L.R. 130.

On the other hand, it is evident that inter-governmental agreements *may* be legally enforceable contracts. In *Magennis v. Commonwealth*,[112] an Act authorizing the making of an agreement between the Commonwealth and New South Wales was ruled invalid because it infringed the requirement in section 51(xxxi) of the Constitution that the Commonwealth may only acquire property on just terms. As regards the agreement, however, the majority commented:

> The present agreement confers on the Commonwealth a number of legal rights which are at least contractual rights with respect to the use and disposal of the land acquired by the State.[113]

In *South Australia v. Commonwealth*,[114] though the court declined to grant South Australia the relief she sought, three judges stated that the whole agreement, or at least certain of its provisions, did give rise to legally enforceable rights[115] and two more affirmed that *some* intergovernmental agreements were enforceable contracts.[116]

In interpreting inter-governmental agreements, the High Court has acknowledged that it must take into account the special characteristics of the parties. It has generally decided such questions according to normal rules of contract—in particular, whether there was a real intention by the parties to enter into legal relations,[117] whether it was only an agreement to make an agreement[118] and whether there was "offer and acceptance"[119]—but the Court has also used as an alternative ground of decision, the political nature of particular agreements. In *John Cooke & Co. v. Commonwealth*,[120] the Court showed that an agreement between the Imperial and Commonwealth Governments was not binding because there was no intention to enter into legal relationships and the Commonwealth was not acting as the agent of the plaintiff, but it deliberately chose to decide the case on broader grounds:

> But putting on one side these objections, the character of the negotiators, the circumstances under which and the purposes for which the wool was required, the steps that might have become necessary in the acquisition of wool, all these factors stamp the nature of the arrangement; they exclude it from the region of

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[112] (1949) 80 C.L.R. 382.
[113] *Id.*, 424 *per* Williams J.
[114] (1962) 108 C.L.R. 130.
[115] *Id.*, 141 *per* Dixon C.J., Kitto J. concurring, 150 *per* Menzies J.
[116] *Id.*, 149 *per* McTiernan J., 154 *per* Windeyer J.; intergovernmental agreements may be enforced as contracts in the United States: *Arkansas v. Texas* (1953) 346 U.S. 368, 98 L.Ed. 80; *Kentucky v. Indiana* (1929) 281 U.S. 163, 74 L.Ed. 784.
[117] *Id.*, *per* McTiernan and Windeyer JJ.
[118] *Id.*, *per* Owen and Taylor JJ.
[119] *John Cooke & Co. v. Commonwealth* (1922) 31 C.L.R. 394, 402.
[120] *Id.*

> contract, and establish it as an arrangement of a political nature forced upon the two Governments by reason of the War and necessary for military purposes.[121]

In *Magennis v. Commonwealth*,[122] the dissenting judgment of Dixon J. (supported by McTiernan J.) was in similar terms:

> If the agreement is examined it will be found that there are not a few clauses which depend on, or provide for, agreed action by State and Commonwealth, and the general tenor of the document suggests rather an arrangement between two governments settling the broad outlines of an administrative and financial scheme than a definitive contract enforceable at law.[123]

This passage was cited with approval by Windeyer, Owen and Taylor JJ. in *South Australia v. Commonwealth*.[124]

Two interpretations could be put to these passages; either that they are a reminder that political decisions are not "matters" and thus go to questions of jurisdiction, or alternatively, that special rules of common law apply to inter-governmental agreements. That the latter is perhaps the correct view is borne out by the judgment of Dixon C.J. in *South Australia v. Commonwealth*.[125] He felt that parts of the agreement were enforceable and parts were not, depending on whether final agreement on all the terms of a particular provision had been clearly concluded between the parties. In applying common law principles to the problem, he noted that by section 64 of the Judiciary Act 1903-1969 the rights of the parties were to be "as nearly as possible . . . as in a suit between subject and subject", but he continued:

> But it is one thing to find legislative authority for applying the law as between subject and subject to a case concerning the rights and obligations of governments; it is another thing to say how and with what effect the principles of that law do apply in substance. For the subject matters of private and public law are necessarily different. What is in question here is an agreement assuming to affect matters which are governmental and by nature are subject to considerations to which private law is not directed. That is particularly true of financial provisions, the fulfilment of which in constitutional theory at least must be subject to parliamentary control.[126]

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[121] *Id.*, 418.
[122] (1949) 80 C.L.R. 382.
[123] *Id.*, 409.
[124] (1962) 108 C.L.R. 130.
[125] *Ibid.*
[126] *Id.*, 140.

An inter-governmental agreement will often, as in both *Magennis v. Commonwealth*[127] and *South Australia v. Commonwealth,* signify a decision by two governments to undertake a scheme jointly, and though the agreement may set out many details of the scheme, there will usually be provision for both governments to make further decisions about the scheme as it progresses. Such an agreement to make a decision at a later time is not legally enforceable—and failure to in fact make that decision does not constitute, as it might in private law, "refusal to carry out the terms of the contract", giving rise to damages or specific performance.[128] It is clear also that no agreement by a member of the Executive may bind the legislature[129] even if he acts under the authority of an Act.[130] This is a distinct change from normal rules of contract. When, in his dissenting judgment in *New South Wales v. Commonwealth* Isaacs J. suggested[131] that because the New South Wales Government accepted land from the Imperial Government on the understanding that the Garden Island area would be perpetually dedicated to naval purposes, it was bound to adhere to this condition, the Privy Council rebuked him because he did not differentiate between rules applying to individuals and those applicable to governments:

> [Isaacs J.] seems to ignore the difference between a self-governing Colony or State and an individual.[132]

Further, the Government may only make binding agreements where a Statute clearly authorizes their formation or they are in pursuance of the "maintenance of the Constitution".[133] Another problem is that, even if a binding contract is made and inserted in the schedules of statutes of both parties, by what law is that contract made binding? Is the existence of both Acts necessary to maintain liability so that, at any time, one party could unilaterally repeal its Act and thus end its liability? It is clear that in Australia, State Parliaments can bind themselves for the future[134] so possibly repeal would not end a State's liability in a case before the High Court. The Court could imply an intention by both parties at the time the contract was made not to terminate the contract unless both Acts were repealed, and the other party's Act would still remain valid and enforceable throughout the

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[127] (1949) 80 C.L.R. 382.

[128] *South Australia v. Commonwealth* (1962) 108 C.L.R. 130, 147 *per* Dixon C.J.

[129] *Rederiaktiebolaget Amphitrite v. The King* [1921] 3 K.B. 500.

[130] *New South Wales v. Commonwealth* (1926) 38 C.L.R. 74.

[131] *Id.,* 108.

[132] (1929) 42 C.L.R. 69, 77.

[133] *Commonwealth v. Colonial Combing, Spinning & Weaving Co.* (1922) 31 C.L.R. 421.

[134] *Clayton v. Heffron* (1960) 105 C.L.R. 214.

Commonwealth by virtue of section 118 of the Constitution. Discussion on this possibility may only be speculative, but it does further demonstrate the special consideration that the High Court must make for the nature of the parties in an inter-governmental agreement.

These considerations, taken *in toto,* indicate that, for inter-governmental agreements, common law principles of contract regulating contracts formed between individuals are inadequate. At the very least, the standard of proof that there was an intention to enter into legal relations or that both parties had capacity to enter into the contract is far higher. Further, certain types of agreement—agreements to make certain decisions in the future and apparently agreements on financial payments in the future[135]—simply cannot be contracts if formed between governments, either because they are "political" or because they would, if binding, infringe "constitutional theory".[136] In contract cases between governments, therefore, special rules of common law would appear to operate.

Tort Claims

The final category of inter-governmental disputes are those in which a claim in tort is made. Unfortunately for this study, the only two inter-governmental tortious cases so far heard by the High Court give very little guide to the common law principles which might be applied. In *Commonwealth v. New South Wales,*[137] a case in negligence, the High Court was concerned merely with questions of jurisdiction and did not ever hear the merits of the dispute. In *South Australia v. Victoria,* where South Australia was in essence suing for trespass, the court settled the question simply with reference to Imperial legislation. All Australian Governments may be sued in tort[138] and as the law of tort is almost entirely common law, there can be no doubt that common law rules apply to inter-governmental suits. As noted earlier, the alleged tort will usually occur within the territory of one State (or Commonwealth territory) and the applicable law will be the common law as modified by the legislature of that State or territory. In actions of negligence there would seem to be no reason why normal common law rules should

[135] *Commonwealth v. Colonial Combing, Spinning & Weaving Co.* (1922) 31 C.L.R. 421 *per* Isaacs and Starke JJ.; *South Australia v. Commonwealth* (1962) 108 C.L.R. 130, 140 *per* Dixon C.J.

[136] Dixon C.J., *id.*

[137] (1923) 32 C.L.R. 200.

[138] Judiciary Act 1903-1969, s. 56 (actions by individuals), s. 57 (actions by governments), Crown Proceedings Act 1958 (Vic.), s. 23 (1) (b) and equivalent statutes of the other States.

not apply, though in actions of trespass that in fact aim to settle boundary disputes, questions of the Court's jurisdiction may arise.[139]

As regards nuisance, as submitted earlier, the legislation of the parties would not seem sufficient to end liability, but normal common law rules have been found to be adequate in the United States in pollution cases, except that the damage incurred or threatened must be substantial before relief is granted,[140] and presumably the same would be true in Australia.

A Topical Instance: Water Law

One area in which common law principles applicable to private persons would not appear to be adequate to regulate inter-governmental suits, is the law governing diversion of water from streams. Common law "riparian rights" allow a riparian owner to use as much water as he wishes for "domestic purposes" (e.g. human consumption, washing, cooking, and feeding stock) but prohibit use of water for other extraordinary purposes if such use causes a "sensible diminution" in the flow of the river.[141] While these rules may sometimes be sufficient to govern disputes between individual land-owners,[142] they are quite inapplicable to governments. They would not allow a government to erect on an interstate river any dam to provide water for irrigation or the generation of hydro-electric power or to enable flood control, because clearly any such dam would cause a "sensible diminution" in the flow; yet it is obvious that any government must provide dams for these purposes. Unlike the other categories of inter-governmental cases, normal common law rules on diversion of water cannot be simply extended or modified to take into account the peculiar characteristics of governments: they are completely inadequate. This creates a novel problem because there are, of course, no precedents in England on inter-governmental water utilization disputes, and there are also no precedents from any other Commonwealth country. The doctrine of "equitable apportionment" applied by the United States Supreme Court is not viewed by that court as being an extension of English common law principles. Legislation will almost certainly not be conclusive. There is no relevant Imperial

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[139] *South Australia v. Victoria* (1911) 12 C.L.R. 667.

[140] *New York v. New Jersey* (1921) 256 U.S. 296, 309, 65 L.Ed. 937, 943; *Missouri v. Illinois* (1906) 200 U.S. 496, 521, 50 L.Ed. 572, 579.

[141] *Embrey v. Owen* (1851) 6 Exch. 353, 155 E.R. 579; *H. Jones & Co. v. Kingborough Corporation* (1950) 82 C.L.R. 282.

[142] In Australia these rules have proved quite inadequate. In Victoria, Queensland, Northern Territory and possibly in New South Wales, the common law rules have been completely displaced by a licensing system (e.g. Water Act 1958 (Vict.)) while in South Australia, Western Australia and Tasmania, common law rules only apply in certain areas. See S. D. Clark and I. A. Renard, "The Riparian Doctrine and Australian Legislation" (1970) 7 M.U.L.R. 475.

Act, the Commonwealth has no power to legislate on water use except for navigation[143] and where diversion in one State causes damage in another, the legislation of neither State will be decisive (that is, assuming there is no existing compact between the parties governing the question, in which case problems of contract law discussed earlier would arise). There are thus clearly two alternatives: either inter-State river disputes are not subject to rules of law, or rules of "inter-State common law" apply.

There are several compelling reasons for holding that inter-governmental disputes over river utilization must be governed by rules of law, despite the lack of judicial precedents. First, the High Court is specifically empowered to resolve "matters" between governments in Australia. The main restriction on "matters" is that they do not cover political issues—yet it is clear from experience in the United States, Switzerland and India that inter-State water disputes are capable of judicial solution, and they are inherently no more "political" than any other problem in tort. If they are "matters", then the very conferring of jurisdiction on the High Court to settle such a "matter" where in most cases no legislation will be relevant would seem to imply that the Court has recourse to a body of law which will be applicable.[144] Such a body of law could only be provided by an "inter-State common law".

Second, there is a strong presumption that relationships between Australian governments will be governed by common law rules. As Sir Owen Dixon has pointed out,[145] the common law was anterior to the formation of any Australian government and, except where modified by Statute, it *prima facie* applies to all relationships capable of legal control. The common law was extended throughout the British Empire and governed governments as well as individual subjects. This is clearly stated by Griffith C.J.:

> If, therefore, any dependency infringes the law of the Empire governing its relations with a neighbouring dependency it is guilty of a wrong towards that other dependency.[146]

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[143] Constitution, s. 98. The defence power was invoked to justify the Snowy Mountains Hydro-Electric Power Act 1949 (Cth) but its validity seems very doubtful. Mere claims that the Act is designed to increase the industrial potential of the Commonwealth and thus increase the ability of the country to defend itself are not enough to bring the Act within the defence power *(Commonwealth v. Australian Commonwealth Shipping Board* (1926) 39 C.L.R. 1).

[144] See *Pedersen v. Young* (1964) 110 C.L.R. 162, 170 *per* Windeyer J.

[145] Sir Owen Dixon, Address to American Bar Association (1943) 17 A.L.J. 138; *id.*, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 A.L.J. 240.

[146] *South Australia v. Victoria* (1911) 12 C.L.R. 667, 676; cited by Knox C.J. in *Commonwealth v. New South Wales* (1923) 32 C.L.R. 200, 205.

Further, if there is a presumption that common law applies between governments of the British Commonwealth, the presumption must be even stronger as regards governments in a federation. "Federalism means legalism"[147] and on several occasions the High Court has based decisions concerning relations between the Commonwealth Government and the States on the basic federal structure.[148] Courts in other federations have also held that the very conception of federalism implies legal rules governing relations between the various governments in the federation.[149]

Finally, the common law is quite capable of extension to meet novel situations. The common law is not a fixed and rigid set of doctrines, but a body of legal principles that are constantly adapting to changing circumstances. As there have been no precedents on inter-governmental water disputes, there has been no need for the judiciary to develop common law principles to meet such situations, but this development—by the usual methods of analogy, justice and common sense—could easily take place if required. The position was well put by Isaacs J. who stated in *Commonwealth v. Colonial Combing, Spinning and Weaving:*

> It is the duty of the Judiciary to recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter.[150]

Such extension of the common law has already been made by the High Court to adapt it to Australian conditions. As noted above, the Court has extended common law principles to allow States to sue other States on the grounds of usurpation of legislative power[151] or illegal damage to their residents.[152] It has also developed rules to cover inter-governmental disputes over the exercise of the royal prerogative. A recent

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[147] A. V. Dicey, *"Introduction to the Study of the Law of the Constitution"* (9 ed. 1948) 175.

[148] *Essendon Corporation v. Criterion Theatres* (1947) 74 C.L.R. 1, 14 *per* Latham C.J., 22 *per* Dixon J.

[149] "The community embracing the German States is closer than the international community of nations, and the duty of reciprocal consideration of interests is, therefore, more intensive than in the relations of other States": *Wurttemberg and Prussia v. Baden* (1927-28) 4 Ann. Dig. 128, 130-31; *Solothurn v. Aargau* (1900) 26 Rec. Off. des Arrets du Tribunal Federal 1, 444; *Kansas v. Colorado* (1907) 206 U.S. 46, 51 L.Ed. 956.

[150] (1922) 31 C.L.R. 421, 438-39.

[151] *Attorney-General for New South Wales v. Brewery Employees Union* (1908) 6 C.L.R. 469.

[152] *Tasmania v. Victoria* (1935) 52 C.L.R. 157.

example of a deliberate break from English precedent due to the different nature of the Australian political system was the conclusion of Menzies J. in *Commonwealth v. Anderson*[153] that in Australia the Crown may sue for ejectment, English cases to the contrary notwithstanding:

> I am satisfied that it can have no application to the Australian federation where the Crown is present in various rights; where the Crown in one right may claim from the Crown in another right; where the Commonwealth may be registered by a State as the proprietor of land; . . . and where there are statutes which authorize the Commonwealth and States to take proceedings for possession of land.[154]

It would seem, therefore, that inter-State water disputes are governed by special common law principles. The High Court, in ascertaining their content, may have recourse to analogous principles of nuisance, implications from the Commonwealth and State constitutions and perhaps the principle of *sic utere tuo ut alienum non laedas.* Cases decided in other federations and principles of international law could also be referred to for, while in no way binding, they are frequently based on general principles of law which are known to the common law.[155]

Conclusion

The evidence adduced from High Court decisions, the nature of the Australian federal system and the adaptability and universality of the common law indicates that there exists in Australia an "inter-State common law" though perhaps not so named as yet. The real test of the existence of this law is provided by the possibility of an inter-State river dispute for in such an event the High Court would be faced with the clear necessity of either applying rules of "inter-State common law" or declaring that there was a lacuna in the law making it impossible for the Court to resolve the dispute. In view of the fact that the High Court is expressly empowered to settle inter-governmental disputes, that in other fields of legislative power inter-governmental relations are covered by law in the Australian federation, and that the High Court has previously expressed its willingness to ensure that the common law adapts to changing conditions and does not become a "clog" on the federal system, it appears evident that the High Court could not hand down a *non liquet* decision in any future inter-State water case.

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153 (1960) 105 C.L.R. 303.

154 *Id.*, 318.

155 "The general principles of law recognised by civilized nations" in fact form one of the sources of international law: Statute of the International Court of Justice, Art. 38 (1) (c).

"Inter-State common law", strands of which are revealed in the law governing the right of one government to challenge the constitutional validity of legislation of another, inter-governmental agreements, nuisance and inter-State water disputes is an essential source of law for the High Court. Only by the existence of such a body of law may the High Court fully carry out its constitutional duties conferred upon it by section 75 of the Constitution.