Governmental and Intergovernmental Immunity in Australia and Canada by COLIN H. H. MCNAIRN. (Australian National University Press, 1977), pp. i-xiv, 1-205. Cloth, recommended retail price $16.95 (ISBN: 0 7081 1577 2).

McNairn teaches constitutional law at the University of Toronto. He spent a study leave at the University of Melbourne in 1973-1974, and this book is the result. It has been published simultaneously by A.N.U. and University of Toronto Presses. It is admirably printed and organised, and a credit to author and publishers; the style is clear and forthright, the statutory and case material in the two countries has been exhaustively explored and analysed with acuity and originality, and it is required reading for constitutional lawyers, practitioners and judges in both jurisdictions.

The author considers first the application of the traditional doctrine that statutes are presumed in certain circumstances not to bind the Crown, meaning in substance the central government of the governmental unit—Dominion and Provinces, Commonwealth and States. This part of the book is particularly comprehensive and persuasive.

He then proceeds to consider the various other grounds on which governmental immunity has been based by the courts of the two countries—express constitutional provisions, implications from federalism and characterisation doctrines. He then deals with the application of all the immunity doctrines in the fields of torts, contracts, crime, the Crown as creditor and the Crown as taxpayer.

The most original feature of the book is an attempt to combine aspects of the Crown immunity doctrine with the federal and competence-distribution doctrines. The author contends that immunity whether "Crown" or intergovernmental should attach only to governmental activity which is undertaken by virtue of the prerogative. I think he would probably like intergovernmental immunity to be available symmetrically to centre and region governments alike, though he has to confess that the steady march of authority has been towards protecting the centre against the regions but not the regions against the centre. He favours this solution because he thinks prerogative protection would be institutionally sufficient, and would tend to decline as prerogative merges in statutory powers not within the proposed protection.

His preference is for a minimum application of immunities, mainly on rule-of-law grounds, but he does not launch root-and-branch criticisms against immunity doctrines, collectively or individually.

The main objection to his general thesis is the obvious one which he himself brings out quite clearly: a restriction of immunity to prerogative matters is not part of the *ratio* of any of the leading cases, Australian or Canadian, and indeed was expressly rejected in the leading Canadian case, *Gauthier* v. *R.*[1] I would add two further objections. A doctrine hinged to the position of the Crown now smells too much of the disap-

[1] (1918) 40 D.L.R. 353.

pearing past, and it is spectacularly irrelevant to the only intellectually satisfying ground on which to base governmental immunity from statutes at all in the modern age, namely the occasional common sense, varying from statute to statute, in not applying a particular requirement to a governmental activity whether it be technically under the "Crown" or not.

There was always a good deal more justification for the general "implied immunity of instrumentalities" doctrine developed from federal premises by the first Australian High Court than there was for its "implied prohibitions" or "reserve powers of States" doctrine, and very much more justification than there was or is for the doctrine of the Australian *Cigamatic* case.[2] The justification depended, however, on the maintenance of a substantially coordinate style of federalism. McNairn assumes without question that the Courts must continue to work on that assumption. It is to be regretted that he did not extend his inquiry to the home of federal implications, the U.S.A., and by investigating the history of such doctrines there perhaps approach a more critical view of federal implications generally.

His book brings out a feature of the Canadian situation which other Canadian books tend to conceal, namely the extent to which federal implications have become a settled feature of the thinking of the Canadian Supreme Court, notwithstanding the flavour of disapproval for such doctrines which runs through Privy Council decisions.

GEOFFREY SAWER*

[2] (1962) 108 C.L.R. 372.

* B.A., LL.M. (Melb.); Emeritus Professor of Law, Australian National University.