"THE COMMONWEALTH OF AUSTRALIA"— CONSTITUTIONAL IMPLICATIONS

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In this article Dr Lumb refers to the choice of the phrase "Commonwealth of Australia" to designate the new federal body politic established on the Australian continent and surrounding islands by the Constitution Act. He then attempts to show how the term "Commonwealth" appearing alone or in association with other words is used in different ways. He identifies an "instrumental" usage pursuant to which the term is understood as applying to the federal instruments of government, and an "organic" usage under which the term is used to refer to the Australian body politic or community. This ambiguous usage has had a considerable impact on judicial interpretation of the "federal balance" as is to be seen from the Australian Assistance Plan Case. *The specific problems of the Territories as "parts of the Commonwealth" are examined in the context of the relationship between relevant sections of Chapter VI and earlier Chapters of the Constitution and some opinions are expressed on the sources of constitutional power relating to the Territories.*

I INTRODUCTION

Section 3 of the Commonwealth of Australia Constitution Act empowered the Queen with the advice of the Privy Council to declare by proclamation that

> on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. . . .

The early commentators on this section, Quick and Garran[1] and Harrison Moore,[2] have pointed to certain features of this section which reflect the fundamental basis of the Constitution contained in section 9 of the Act and which have affected the course of judicial interpretation. Those features are the populist or democratic basis of the Constitution and the federalist concept. Accompanying these features is a third concept—the monarchical principle—which, although not explicitly affirmed in section 3, is referred to in the Preamble to the Act in the following form:

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[1] *The Annotated Constitution of the Australian Commonwealth* (1901) 328 ff.

[2] *The Constitution of the Commonwealth of Australia* (2nd ed. 1910) 65 ff.

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established. . . .[3]

These elements, which characterised the new body politic established by the Act, which was an exercise of Imperial parliamentary sovereignty, were brought together in a state of potential tension. The new body consisted not merely of the people of the colonies but of those people organised as colonial bodies politic with existing political institutions and with ties to the Crown and British judicial institutions.[4] The overlay of the royal prerogative also provided the basis for the exercise of legal power which might impinge on the other elements. The effect of the Constitution Act was that the pre-existing colonies were *federated*, these bodies politic being given the designation of "States".[5]

The actual name chosen for the new federal body politic—the Commonwealth of Australia—was suggested by Sir Henry Parkes[6] and chosen over other suggestions such as "Federated Australia", "The Australian Dominion", the "Federated States of Australia" and "United Australia". Moore[7] comments that the term was subject to some criticism but was more acceptable than the other names. For example, the word "Dominion" was not acceptable although it later received recognition as an appropriate term to describe the self-governing colonies which, pursuant to the growth of convention and formal recognition in the Statute of Westminster, were invested with legal independence. However, in the 1890s different attitudes were taken: one class could see in it a menace to democratic institutions, another would find in the creation of a "distinct Dominion" a suggestion of "dismemberment of the Empire". The title "Commonwealth of Australia" was not regarded by the majority of delegates as indicating a leaning towards republicanism[8] or separation although it appears that Parkes was influenced in his selection by admiration for the statesmen

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[3] It is not proposed to examine the changes which have occurred affecting the Crown since 1900 except to make the following observations. The major part of Ireland is no longer under the Crown. In the light of the Abdication discussions in 1936, a change in succession would require the assent of the Member countries of the Commonwealth. It would also appear that a separate royal style and title may be adopted in relation to Her Majesty the Queen as Queen of the Commonwealth of Australia and as Queen of the constituent States of the Commonwealth of Australia. The Judiciary Act 1903 avoids difficult problems of Crown duality by using the terms "State" and "Commonwealth" although these are abbreviated expressions for the "Crown in right of a State" and "Crown in right of the Commonwealth".

[4] *E.g.* the Judicial Committee of the Privy Council.

[5] Clause 6.

[6] Moore, *The Constitution of the Commonwealth of Australia* (2nd ed. 1910) 66.

[7] *Id.* 65-66.

[8] But see the view expressed by Sir John Downer: *National Australasian Convention Debates* (1891) 551-552.

of the "Commonwealth period" in England (Cromwell's Protectorate).[9] But as pointed out in the Convention Debates, the name had an older lineage as synonymous with a community under monarchical rule.[10] In the nineteenth century it also came to be associated with a federal system of government and it was used in this manner in Bryce's "American Commonwealth".[11] Quick and Garran adopt a similar interpretation when they state that the term means "the union of the people and of the colonies of Australia".[12]

We may sum up by saying that the establishment of the Commonwealth of Australia brought into existence a new political entity, the central elements of which are a population, a territory (the Australian continent and surrounding islands) and a federal system. It also led to the creation of new federal institutions to administer power (legislative, executive and judicial) throughout the area of the federated States (and any Territories which might be established). Added to this are the components which go to make up the Imperial connection including the recognition of the Crown in the sovereignty of the United Kingdom.[13]

The Constitution Act itself, however, could not be said to have established an ultimate rule of recognition or basic norm locating legal supremacy within Australia in 1901, although the potential existed in section 128 (embodying the populist and federalist elements) to restructure the foundations of the system. But with the conventional development of the doctrine of autonomy and equality between the member States of the (British) Commonwealth, which was recognised in the Statute of Westminster, that potentiality has now become an actuality: section 128 may without any consequential sanction of the United Kingdom Parliament be exercised to modify the basic elements of the system.[14]

II MEANINGS OF THE WORD "COMMONWEALTH"

The commentators refer to at least two separate meanings of the phrase "Commonwealth of Australia". The first meaning refers to the body politic (people, territory, federated States, Territories) established by the Act, the second as describing the central organs of government (legislative, executive and judicial) through which authority is exercised over that body politic.[15] Quick and Garran state that the latter meaning is the secondary meaning.[16]

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[9] Moore, *op. cit.* 66.

[10] *National Australasian Convention Debates* (1891) 553. See also *Debates of the Australasian Federal Convention* (1897) 618.

[11] Moore, *op. cit.* 66. See also Quick and Garran, *op. cit.* 311-312.

[12] Quick and Garran, *op. cit.* 312.

[13] *Id.* 328.

[14] See Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 F.L. Rev. 148, 153 ff.

[15] Quick and Garran, *op. cit.* 366 ff; Moore, *op. cit.* 72-73.

[16] Quick and Garran, *op. cit.* 368.

References are sometimes made to a third meaning—as referring to the geographic area or territory of the Commonwealth (as in the phrase "parts of the Commonwealth").[17] But on closer study it would appear that the geographical meaning is included within the first meaning: a law operating within a part of the Commonwealth affects not the "bare" territory but also the people of that territory organised as a State or a Federal Territory: in other words the law operates within the "body politic" of the Commonwealth.

Again, the phrase "body politic" is sometimes used to describe the "Commonwealth" in the secondary sense referred to above, namely, as denoting the central organs of government, particularly the Executive Government of the Commonwealth.[18] But it appears more appropriate to use the phrase "body politic" in the more comprehensive sense *viz.*, as designating the political community and not merely the organs of government. For the purposes of this article the phrase "body politic" will be used to denote the Commonwealth as a political community, and the use of the word "Commonwealth" to denote the political community will be referred to as the "institutional" use of the word. Where the word is used to denote the central organs of government, such usage will be described as the "instrumental"[19] use of the word.

Both usages are to be found in the various sections of the Constitution; occasionally, the two usages are to be found in the same section, for example in the first and third paragraphs of section 95 which refer to the collection of custom duties *by the Commonwealth* on goods imported into Western Australia from beyond the *limits of the Commonwealth.* Generally speaking the instrumental usage is to be found in those sections of the Constitution dealing with the organs of authority,[20] while the institutional usage is to be found in those sections having a geographical reference or referring to the area of operation of Commonwealth powers. Thus, a Senator may address his resignation to the Governor-General where the President (of the Senate) is absent *from the Commonwealth,*[21] while section 51 empowers the Parliament to make laws for the peace, order and good government *of the Commonwealth* with respect to designated heads of power: "the Commonwealth" in these contexts means the body politic of the Commonwealth namely, the people of the Commonwealth residing in the component bodies politic *viz.* the States or Territories, together with the institutions of those bodies politic namely, State or Territorial organs of authority (but only to the extent to which a head of power is interpreted to

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[17] Moore, *op. cit.* 73. See also n. 60.

[18] In this respect an alternative term—"political organism" is sometimes used. See *Attorney-General for Victoria (ex rel. Dale)* v. *Commonwealth* (1945) 71 C.L.R. 237, 256 *per* Latham C.J.

[19] The word "organic" might also be used as a synonym.

[20] *E.g.* ss. 1, 61, 71.

[21] S. 19. See also s. 33.

embrace a legislative power over such organs).[22]

This meaning is to be discerned in the majority of the placita of section 51. Thus bounties must be uniform throughout the Commonwealth.[23] The Parliament may make laws for the service and execution of State process throughout the Commonwealth.[24] But what are we to make of section 51(vi)—"(t)he naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth"? It would appear that the Commonwealth in the phrase "laws of the Commonwealth" reflects the instrumental usage—the laws of the Commonwealth Parliament (and not of the State Parliaments). But what of "the Commonwealth" in the earlier part of the placitum? Does it mean the Commonwealth in its instrumental sense, namely, the organs of government? This meaning might be suggested in the light of the insertion of the words "and of the several States" which follow, but common sense would dictate that the word is used in the institutional sense and that the words "of the several States" have been added *ex abundanti cautela* or to affirm the guarantee conferred by section 119.

As to the instrumental usage, it is overshadowed by the institutional usage in the placita of section 51, but it is to be found in some of them, for example, section 51(xxxiii)—"(t)he acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State". The Commonwealth here must mean the Executive Government—the Crown in right of the Commonwealth; a usage which is to be discerned in section 51(xxxix) and also in section 52(ii). The sections of Chapter V comprise mainly the instrumental usage with certain exceptions.[25] In the instrumental sense, the term standing alone is used in the majority of cases to designate the Executive Government.[26] Where it is intended to designate the Commonwealth as *law maker* the words "Parliament" or "Parliament of the Commonwealth" are used.[27] However in certain sections the word designates the Commonwealth both as the Legislature and as the Executive in a subordinate law-making capacity.[28] There are a few instances where the phrase is used ambiguously, for example, the phrase "purposes of the Commonwealth" in section 81, and the interpretation

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[22] This raises issues which have been examined in cases such as the *Engineers Case* (1920) 28 C.L.R. 129; the *State Banking Case* (1947) 74 C.L.R. 31; and the *Payroll Tax Case* (1971) 122 C.L.R. 353. They are beyond the scope of this discussion. It must be noted too, that s. 106 preserves, subject to the Commonwealth Constitution, the State Constitutions.

[23] S. 51(iii).

[24] S. 51(xxiv). See also s. 51(xxv).

[25] *E.g.* ss. 106, 118.

[26] This is its use, for example, in s. 75(iii). See *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, 357-358 *per* Dixon J.

[27] *E.g.* in Ch. I.

[28] *E.g.* ss. 99, 100.

of the phrase has led to major disagreements as to meaning between the justices of the High Court. The cases in which these disagreements have occurred will be examined below.[29]

III THE COMMONWEALTH—"INSTRUMENTAL" USAGE

The major organs of government created by the Constitution are the Commonwealth Parliament (consisting of the Queen, House of Representatives and Senate), the Commonwealth Executive (the Governor-General, the Ministry and personnel and organs comprehended within the term "Crown in right of the Commonwealth") and the High Court (although federal judicial power is also exercisable by other federal courts and State courts to the extent of an investiture under section 77).

There is one distinct difference between the legislative structure and the other structures. There is embodied in the concept of the Parliament a federal representational element reflected in (a) the composition of the Senate as prescribed by section 7 and (b) in the proportionality requirement affecting the composition of the House of Representatives embodied in section 24. As to the latter, *Attorney-General of the Commonwealth (ex rel. McKinlay)* v. *Commonwealth*[30] is authority for the proposition that the second paragraph of section 24 requires that the number of members of the House chosen in the several States shall be in proportion to the respective numbers of their people. It was held in *McKinlay's Case* that sections of the Representation Act 1905 (Cth), which made a new determination of the number of members dependent on population figures contained in a census (which might be held outside the parliamentary triennial period) and any consequential *alteration* of the number of members to take effect upon a redistribution of electoral divisions (which could be postponed), breached the requirements of the section. Consequently a determination was required to be made on the basis of up to date population statistics within the lifetime of the current Parliament. This requirement is now observed in the Representation Act as amended[31] together with consequential amendments to the Commonwealth Electoral Act 1918 affecting the timing of redistributions.[32] The consequence is that each State will be represented in Parliament on the basis of up to date population figures.

The composition of the Senate is however based on the concept of equality of representation (at least of the original States) and therefore the populations of the individual States are irrelevant to the determination of Senate representation. The decision in the *Senate Representation Cases*[33] adds a further dimension in that it recognises representation

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[29] *Infra* p. 295.

[30] (1975) 135 C.L.R. 1.

[31] Act No. 16 of 1977, ss. 4, 5, 6. See also n. 61.

[32] Act No. 14 of 1977, s. 10.

[33] *Western Australia* v. *Commonwealth* (1975) 134 C.L.R. 201; *Queensland* v. *Commonwealth* (1977) 16 A.L.R. 487.

of the Territories in the Senate but differing in numbers and terms from that applying to State Senators.

Some accommodation of the disparate constitutional requirements applying to House and Senate representation is effected by the first paragraph of section 24 which contains the "nexus" principle: the number of members of the House are to be as nearly as possible twice the number of Senators. The weakness of the qualification "as nearly as possible" is to be seen from an examination of *McKellar's Case*:[34] a remainder of less than one-half existing after the formula for determining the number of members of the House from a particular State has been applied will not be sufficient to create an additional member for that State.

The Court in *McKellar's Case* also upheld the validity of sections of the Representation Act which excluded Territory residents from the quota dividend and Territory Senators from the quota divisor. The "people of the Commonwealth" in section 24 of the Constitution and in the Representation Act means the "people of the States" and the term "Senators" in the same context means "Senators for the States". The effect of this reasoning is that although the High Court had in the *Senate Representation Cases* upheld full voting rights for Territory Senators, in *McKellar's Case* it excluded those Senators and the people of the Territory for the purpose of applying the nexus and proportionality elements embodied in section 24 which, it held, were concerned only with State population and State representation.[35] The unique place which section 122 (under which Territory representation was granted) has in the constitutional system will be examined later[36] but one can detect different conceptions of "Commonwealth" in the Court's decisions on these questions.

The significance of section 7 and section 24 relating to the composition of the two Houses in the context of our initial analysis of the two meanings of "Commonwealth" is this: the instrumental elements in the legislative arena reflect the institutional ("body politic") concept. The federal character (the Commonwealth being a union of politically organised States) and the popular character (the Lower House reflecting the population of the States) are recognised in the structuring of the two Houses making up the Commonwealth Parliament.[37]

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[34] *Attorney-General for New South Wales (ex rel. McKellar)* v. *Commonwealth* (1977) 12 A.L.R. 129.

[35] It may be noted however that the Constitution Alteration (Referendums) Act 1977 (Cth) gives electors of the Territories the right to vote at referendums to amend the Constitution under s. 128.

[36] *Infra* p. 298.

[37] But the federal element is not recognised in the structuring of the Executive (although there is a practice of appointing Ministers from all the States) or of the High Court (although a practice has been instituted recently by the Commonwealth Attorney-General under which the States are consulted before an appointment to a High Court vacancy is made).

It would appear therefore that there is some reason for the drafters of the Constitution to have veered away from an exact definition of "Commonwealth" or from a choice of different words to describe the body politic and the instruments of government. Too stark a distinction might have marred the delicate task of drafting a document which in form as well as in substance was to promote federation. It was in Moore's words a "commonwealth of commonwealths, of existing political communities"[38] and therefore the organisation of the central legislature was to take account of the political entities which were being federated.

IV THE COMMONWEALTH AS "BODY POLITIC"

As we have seen the more comprehensive meaning of the "Commonwealth" has reference to the political community. It is in this sense that the term is used in clause 3 of the Covering Clauses. Thus the Commonwealth is a political entity, a body politic, consisting of the territories, populations and governments of the States and (with certain qualifications) the Territories. The powers of the Commonwealth (in the instrumental sense) may be exercised over this community or parts thereof including a region incorporating parts of two or more States, subject to the prohibitions contained in sections 51(ii), 51(iii), and 99.[39]

The clearest use of the word in this sense is to be found in the opening words of section 51, "peace, order, and good government of the Commonwealth", which may be compared with similar wording in the State Constitution Acts. The establishment of the Commonwealth had the effect not only of investing the people (residents) of the States with the status of people of the Commonwealth but also automatically converted the territory of the States into Commonwealth territory (but *not* of course into Commonwealth Territories).[40] Thus the population and territory of the Commonwealth does not exist apart from the population and territory of the States and the population and territory of the Territories.[41]

But the legislative power of the Parliament, unlike that of the State Parliaments, is differentiated according to the topics of legislative power conferred on the Parliament by section 51, section 52 and other sections of the Constitution. Consequently the Commonwealth Parliament may within the area of power conferred on it regulate the activities of residents of a State within the territory of that State (including superadjacent airspace and offshore waters).[42] It may also

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[38] *The Constitution of the Commonwealth of Australia* (2nd ed. 1910) 67-68.

[39] See generally, Rose, "Discrimination, Uniformity, and Preference—Some Aspects of the Express Constitutional Provisions" in Zines (ed.), *Commentaries on the Australian Constitution* (1977) 191.

[40] However the Commonwealth Parliament has, under s. 52(i), exclusive power to make laws for all places acquired by the Commonwealth for public purposes, extending of course to places on or within the territory of a State.

[41] Subject to the qualifications noted above in respect of the operation of s. 24.

[42] Territorial waters are not within the "territory of a State": *New South Wales* v. *Commonwealth* (1975) 135 C.L.R. 337.

under a specific head of power affect the activities of such persons on the high seas or abroad in a foreign country. It has also been established by the *Engineers Case*[43] that the activities of State governments and instrumentalities are subject to regulation under a section 51 head of power, subject to the qualifications expressed in cases such as the *State Banking Case*[44] and the *Payroll Tax Case*,[45] and also to section 106 of the Constitution.

The ambiguity latent in the term "Commonwealth" has lead to differences of judicial opinion in one major area—the interpretation of "purposes of the Commonwealth" in section 81 of the Constitution (the appropriation power). The meaning of this phrase arose for interpretation in two cases spanning a period of 30 years—the *Pharmaceutical Benefits Case*[46] and the *Australian Assistance Plan Case*.[47]

In the *Pharmaceutical Benefits Case* the validity of the Pharmaceutical Benefits Act 1944 (Cth) was challenged. This Act, in addition to regulating certain activities of doctors and chemists as part of a system of providing benefits, also appropriated moneys to pay chemists for medicines supplied. It was held by the Court that the Act was not authorised by section 81.

In discussing the nature of section 81, several members of the Court examined the meaning of the term "purposes of the Commonwealth" as it appeared in that section. In argument for the Commonwealth, senior counsel (Mr Tait Q.C.) had put forward the proposition that, while the Constitution spoke of the Commonwealth sometimes as meaning the Federal body and sometimes in the geographical sense, the significant use of the term was to refer to the "body politic" unless the context pointed to a more limited meaning. Accordingly, the "purposes of the Commonwealth" in section 81 meant the "purposes of the people of Australia".[48] Latham C.J. and McTiernan J. found favour with this submission. Latham C.J. said: "The words 'purposes of the Commonwealth' should not, in my opinion, be construed as meaning for the governmental purposes of the political organism called the Commonwealth". He went on to state that the word "Commonwealth" in section 81 referred to the people who, by covering clause 3, were united in a Federal Constitution under the name of the Commonwealth of Australia.[49]

Likewise, McTiernan J. considered that the word "Commonwealth" in the introductory paragraph of section 51 and in section 81 meant the community. "It is for the purposes of the people united in the Australian

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[43] (1920) 28 C.L.R. 129.
[44] *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31.
[45] *Victoria* v. *Commonwealth* (1971) 122 C.L.R. 353.
[46] *Attorney-General for Victoria (ex rel. Dale)* v. *Commonwealth* (1945) 71 C.L.R. 237.
[47] *Victoria* v. *Commonwealth* (1975) 134 C.L.R. 338.
[48] (1945) 71 C.L.R. 237, 242.
[49] *Id.* 256.

Federal Commonwealth that the power of appropriation is given to the Parliament".[50]

On the other hand, the other judges tended to favour a more restricted interpretation of "purposes of the Commonwealth". In the view of Starke J. "[t]he purposes of the Commonwealth are those of an organized political body, with legislative, executive and judicial functions, whatever is incidental thereto, and the status of the Commonwealth as a Federal Government".[51] This comes close to the instrumental use of the term. Dixon J., too, favoured a restricted although flexible definition. The phrase did not do the work the phrase "general welfare" performed in a corresponding clause in the U.S. Constitution. The power of expenditure necessarily included "whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government".[52] Finally, Williams J. stated that: "The object of the Constitution was to superimpose on the existing body politics consisting of the States a *wider overriding body politic for certain specific purposes.* It was for these particular purposes and these alone that the body politics consisting of the States agreed to create the body politic known as the Commonwealth of Australia. These purposes [section 81 purposes] must all be found within the four corners of the Constitution".[53]

The differences of opinion between the Justices in this case are to be seen also in the *Australian Assistance Plan Case* which involved the validity of a Commonwealth appropriation for regional councils of social development which were constituted to provide a wide range of social services not falling within the four corners of the social services powers.[54] Barwick C.J.[55] and Gibbs J.[56] adopted a limited view while McTiernan J.,[57] Mason J.[58] and Murphy J.[59] adopted a wider view. Gibbs J. expressly stated that the expression "Commonwealth" referred to the body politic rather than to the people forming a particular community.[60] This is a similar view to that of Williams J. in the earlier case and in effect adopts what we have discussed as the "instrumental" meaning of the term "body politic". The ambiguities in this phrase have already been noted. It is the writer's view that the more fundamental sense of the term is that where it is used to refer to the Australian political community or more specifically the community organised on a

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[50] *Id.* 273.
[51] *Id.* 266.
[52] *Id.* 269.
[53] *Id.* 282 (italics added).
[54] Ss. 51(xxiii) and 51(xxxiiiA).
[55] (1975) 134 C.L.R. 338, 359 ff.
[56] *Id.* 370 ff.
[57] *Id.* 366 ff.
[58] *Id.* 391 ff.
[59] *Id.* 417 ff.
[60] *Id.* 374.

federal basis on the Australian continent and surrounding islands. The use of the phrase to refer to the Executive Government or structure or purposes of that Government is in effect a secondary use.

Mention has already been made of the fact that sometimes a third meaning of "Commonwealth" is proposed—the Commonwealth "in the geographical sense".[61] But as has been said, the Commonwealth in a geographical sense cannot exist apart from the body politic which incorporates both people[62] and territory.

If therefore what we have called the instrumental and institutional meanings of the term "Commonwealth" are fully understood, it becomes a question of determining whether the phrase "purposes of the Commonwealth" in section 81 is used in the same sense as in the first paragraph of section 51 (*i.e.* in the institutional sense) or in the instrumental sense (*i.e.* purposes of the Commonwealth as a governmental system). Certainly, the trend in the *Australian Assistance Plan Case* is in favour of the wider meaning but the specific features of the judgments of Mason J. and Jacobs J. must be noted. Jacobs J.[63] adopted a wide view of the incidental power which would stretch the instrumental meaning in such a way as to merge with the institutional. On the other hand, Mason J.,[64] while adopting a wide view of the power to appropriate, adopted a limited view of the expenditure and executive powers thus limiting appropriation to a "bare" operation within the Appropriation Act (No. 1) 1974 (Cth) which did not extend to consequential administration, the latter being judged in the light of the division of powers.

The question therefore is still an open one. Even if one accepts the wide interpretation of the phrase "purposes of the Commonwealth" in section 81, this does not mean that the Commonwealth has power to regulate the subject-matter to which the appropriation relates. In the light of the general principle that executive power follows legislative power, regulation of and execution of functions pertaining to such subject-matter would be dependent on State action.[65]

V THE COMMONWEALTH AND TERRITORIES

A further problem is highlighted when we examine the status of the Territories. Are they part of the body politic of the Commonwealth or outside it, or are they attached to it but in some less direct way than

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[61] *Supra* p. 290. See also (1945) 71 C.L.R. 237, 256 *per* Latham C.J.

[62] But note that while population is taken into account in determining representation under s.24, the right to vote at federal elections and the quotas for electoral divisions relate only to electors. Migrants who are not naturalised and minors are excluded in relation to such quotas.

[63] (1975) 134 C.L.R. 338, 413-415.

[64] *Id.* 401-402.

[65] See Saunders, "The Development of the Commonwealth Spending Power" (1978) 11 Melbourne University Law Review 369, 406-407.

are the States? In this context we can observe a tendency on the part of some Justices of the Court to adopt a definition of the body politic which includes only the federated States. Others, while asserting that there is only one Commonwealth, nevertheless in their approach to certain specific problems arising under the Constitution in relation to the Territories, particularly in the context of judicial power, distinguish a "federal" judicial power from a "territorial" judicial power.

The question may be framed in this way: are the Commonwealth "instrumental" powers—the legislative power (section 1), the executive power (section 6) and the judicial power (section 71) exercisable over the whole area subject to Australian sovereignty, namely the States and Territories, or only over the area of the States? Are there Territorial legislative, executive and judicial powers specifically referable to section 122 which are "disjoined" from the powers conferred in other Parts of the Constitution? Is there a Commonwealth "territorial" power referable to section 122 and in addition a Territorial "territorial" power which is specifically referable to local sources of authority? The answers are by no means clear and we can only attempt to unravel the complexities in this area.[66]

Certainly, the earlier cases speak of a divided Commonwealth—a Commonwealth which is divided into a "Commonwealth proper" and a more comprehensive Commonwealth to which the Territories are annexed. In relation at least to judicial power, a consequential distinction is made between the provisions of Chapter III in their application to the "Commonwealth proper", and section 122 in its application to the Territories. However, in the later cases, there is a judicial reaction against the concept of the "two Commonwealths", although, there is also an acceptance of the earlier doctrine that, at least for some purposes, the judicial power of the Commonwealth under Chapter III has a limited application to the Territories.

In *Buchanan* v. *Commonwealth*[67] the Court held that limitations imposed by section 55 of the Constitution to the effect that a law with respect to taxation should deal with one subject of taxation only did not apply to a legislative enactment for a Territory under section 122. One reason given by Barton A.C.J. may be noted. In holding that section 55 was designed to protect the States House from "tacking", the learned judge observed that section 122: "contains all the necessary power to legislate for a territory, including the imposition or continuance of any kind of taxation. It does not need any assistance from sec. 51 in respect either of taxation, or of anything else. It would suffice for all its purposes if there were no sec. 51 at all. It is more ample than sec. 51

[66] See generally Zines, " 'Laws for the Government of any Territory': Section 122 of the Constitution" (1966) 2 F.L. Rev. 72; Finlay, "The Dual Nature of the Territories Power of the Commonwealth" (1969) 43 A.L.J. 256.

[67] (1913) 16 C.L.R. 315.

for all the purposes of a territory".[68] Barton A.C.J. also stated that section 51(ii) conferred a taxation power on the Commonwealth "whose component parts are the States. Territories, until they became States, are dependencies, and not in this sense component parts of the Commonwealth; . . .".[69]

In the same case, Isaacs J. spoke of the Northern Territory as a territory of the Commonwealth, "not fused with it".[70]

In *R.* v. *Bernasconi*[71] the Court considered the question whether section 80 (the last section in Chapter III), which provides that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury . . .", applied to offences under Ordinances of the Territory of Papua. It held that section 80 did not apply to such offences—the whole subject matter was to be regulated by section 122. Griffith C.J. stated:

> In my judgment, Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories. Sec. 80, therefore, relates only to offences created by the Parliament by Statutes passed in the execution of those functions, which are aptly described as "laws of the Commonwealth".[72]

The learned Chief Justice went on to state that section 122 was not restricted by the provisions of Chapter III of the Constitution, whether the power was exercised directly or through a subordinate legislature.[73] In the same case, Isaacs J. emphasised that section 122 was a full grant of power to legislate for those territories "not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers".[74] It was thus untrammelled by the provisions of Chapter III which dealt with the "judicial power of the Commonwealth proper".[75]

As we have said, the trend in the later cases at least conceptually is contrary to the earlier philosophy of a "divided" Commonwealth. In *Lamshed* v. *Lake*[76] it was held that a law enacted for the Northern Territory under section 122 had an extra-territorial operation (within the boundaries of an adjoining State). In holding that a section 122 law had a full operation throughout the Commonwealth to the extent to which it was characterised as a law "for the government of a Territory",[77] Dixon C.J. examined the nature of the legislative powers

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[68] *Id.* 327.
[69] *Id.* 330.
[70] *Id.* 335.
[71] (1915) 19 C.L.R. 629.
[72] *Id.* 635.
[73] *Ibid.*
[74] (1915) 19 C.L.R. 629, 637.
[75] *Ibid.*
[76] (1958) 99 C.L.R. 132.
[77] On which matter see also *Attorney-General (W.A.); ex rel. Ansett Transport*

of the Commonwealth over the Territories.[78] After citing the *Boilermakers Case*[79] as authority for the proposition that the legislative power in respect of the Territories was a "disparate non-federal matter"[80] he continued: "But the legislative power with reference to the Territory, disparate and non-federal as in the subject matter, nevertheless is vested in the Commonwealth Parliament as the National Parliament of Australia; and the laws it validly makes under the power have the force of law throughout Australia".[81] The effect of the reasoning of the Chief Justice is to emphasise that the Territories power, section 122, may be exercised in such a way as to affect the body politic of the Commonwealth as a whole, not merely the Territory. As a corollary, a number of section 51 powers, for example, naturalisation and defence, could apply beyond the area of the Federated States to the Territories. However, viewing the Constitution as a whole there were some exceptions: most of the provisions of Chapter V on their own terms could not have any relevance to laws made under section 122.[82] Referring specifically to the Northern Territory, Dixon C.J. stated: "The Territory takes its place in the organisation of government in Australia with the six States though the States form part of the 'federal system' and the Territory be governed only by one legislature".[83]

Williams J. thought that the Northern Territory would be subject to federal laws made under section 51 as well as to laws made under section 122 (apart from those section 51 placita which had a geographical limitation). In his view, the geographical area of the Commonwealth comprised the whole of the Australian continent and Tasmania.[84]

In *Spratt* v. *Hermes*[85] the High Court was concerned with the validity of proceedings in an Australian Capital Territory Court of Petty Sessions for an offence under the Post and Telegraph Act 1901 (Cth) which applied throughout the Commonwealth, including the Territories. The Court held that a Territory Court was created under section 122 and that the requirements of section 72 of the Constitution (at that time requiring life tenure for judges of federal courts) did not apply to it. It was also held that a Territory Court could enforce, in relation to matters associated with a Territory, a law referable to section 51 which was also referable to section 122.

The dicta in the case on the meaning of the Commonwealth indicate

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Industries (Operations) Pty Ltd v. *Australian National Airlines Commission* (1976) 138 C.L.R. 492.

[78] (1958) 99 C.L.R. 132, 141 ff.
[79] [1957] A.C. 288.
[80] *Id.* 320; (1958) 99 C.L.R. 132, 142.
[81] (1958) 99 C.L.R. 132, 142.
[82] *Ibid.*
[83] *Id.* 148. However, see *infra* p. 301.
[84] *Id.* 151.
[85] (1965) 114 C.L.R. 226.

that a majority of the Justices favoured the more comprehensive definition of the "Commonwealth": it included the bodies politic of the States *and* Territories. Barwick C.J. saw no reason for "contrasting a Commonwealth which contains or embraces only the constituent elements of a federation with a Commonwealth which includes all the areas over which it can by one power or another legislate".[86] He recognised that some of the powers were "appropriate to the rule of non self-governing possessions whilst others, though federally disposed, [were] truly those of a self-governing people. But this neither means that the Constitution is divisible into two parts without any mutual interaction nor that the power to govern dependent territories is in no respect controlled by any other part of the Constitution".[87] Menzies J. was even more emphatic: "To me, it seems inescapable that territories of the Commonwealth are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of 'the Federal System': see the *Commonwealth of Australia Constitution Act*, s. 5, which refers not only to every State but to 'every part of the Commonwealth' ".[88] Menzies J. specifically stated that a law of the Commonwealth made under section 51 might operate within the Territories "simply because they are parts of the Commonwealth".[89]

Kitto J., on the other hand, saw no difficulty in distinguishing between the Commonwealth as the union of federated States and the more extensive area of States and Territories.[90]

In *Capital T.V. and Appliances Pty Ltd* v. *Falconer*,[91] it was held that the Supreme Court of the Australian Capital Territory was not a federal court within the meaning of Chapter III. Barwick C.J., in a reference to his judgment in *Spratt* v. *Hermes* said that, while expressing a view against the duality of the Commonwealth, he nevertheless thought that the "judicial power" referred to in section 71 was "that part of the totality of judicial power which the Commonwealth may exert which can be called 'federal judicial power' ", which is a power "which is called into exercise by or in connexion with legislation enacted pursuant to s. 51 and s. 52".[92] The result of this is that the jurisdiction of a Territory Court could not be derived from section 51: it had to depend on section 122.

In *Berwick Ltd* v. *Gray*,[93] Mason J.,[94] in a judgment agreed in by

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[86] *Id.* 247.
[87] *Id.* 247-248.
[88] *Id.* 270.
[89] *Ibid.*
[90] *Id.* 250.
[91] (1971) 125 C.L.R. 591.
[92] *Id.* 599.
[93] (1976) 133 C.L.R. 603.
[94] *Id.* 608.

other members of the Court, not only considered that the Commonwealth included internal Territories but also external Territories[95] for the purpose of the operation of section 51(ii), thus supporting the opinions in *Lamshed* v. *Lake* that the Commonwealth referred to in the introductory paragraph of section 51 is *prima facie* the whole body politic including States and Territories.

The Commonwealth, the Territories and Legislative Power

If we pull together the threads from these decisions we may make the following observations. Legislative power conferred by the Constitution, especially by section 51, is a power which may be exercised over the area of the States and Territories. The "peace, order and good government of the Commonwealth" is not restricted to the area of the federated States. Of course certain placita of section 51 and section 52 have an operation only in respect of the area of the federated States.[96] *Legislation* enacted under a section 51 head of power may of course be restricted to a lesser area—the Territories may be *excluded.*

There is a specific source of law-making power with respect to the Territories in section 122. The legislative power conferred on the Parliament by section 122 must be exercised by laws which relate to "the government of the Territory": if they are characterised in this way they may operate outside the area of the Territory to which they primarily relate.[97]

When the Commonwealth Parliament legislates by way of a section 51 law which applies throughout the whole area of the Commonwealth, the legislative force of such an enactment in both the States and Territories is derived from section 51, and it is *not* necessary to rely on section 122. Where, however, the Commonwealth Parliament legislates specifically for a Territory and not for the States, the legislative authority for such a law is derived from section 122.[98]

Some sections of the Constitution, for example, most of those in Part V, do not apply to the Territories and therefore do not qualify

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[95] It must be said that there are some external Territories which, because of their size, population and distance from the Australian Continent, would not be admitted to "the Commonwealth" under s. 121 *i.e.* to the federation of States, nor even be given comprehensive powers of self-government under s. 122. Indeed for *statutory* purposes the external Territories are not taken to be included in a reference to the Commonwealth unless a contrary intention appears: Acts Interpretation Act 1901 (Cth) s. 17.

[96] *E.g.* ss. 51(xxxvii) and 51(xxxviii).

[97] But, of course, with a much more restricted operation compared with that of a law made under a s. 51 head of power.

[98] *Spratt* v. *Hermes* (1965) 114 C.L.R. 226, 270-271 *per* Menzies J.; *Lamshed* v. *Lake* (1958) 99 C.L.R. 132, 143 *per* Dixon C.J.; *contra, Capital T.V. and Appliances Pty Ltd* v. *Falconer* (1971) 125 C.L.R. 591, 600 *per* Barwick C.J. See also Cowen and Zines, *Federal Jurisdiction in Australia* (2nd ed. 1978) 156-158. *Cf.* Comans, "Federal and Territorial Courts" (1971) 4 F.L. Rev. 218, 219.

an exercise of power under section 122.[99]

"Laws of the Commonwealth" may encompass laws passed by the Commonwealth Parliament directly as well as laws made by a "subordinate" law-making body, which usually takes the form of ordinances made by the Governor-General directly or by way of assent on his part to the ordinances of a local body.[1] Where however, as in the case of the Northern Territory,[2] a Territory has been granted powers of self-government, laws passed by a local representative body and assented to by an Administrator under the terms of a self-government Act applying to that Territory are properly described as "laws of the Territory". The provisions of Chapter III pertaining to a "law of the Commonwealth" do not apply to either type of law.[3]

The Commonwealth, the Territories and Judicial Power

The judicial power of the Commonwealth as defined by section 71 extends to persons, acts, matters, things and events associated with a Territory. Consequently sections 75 and 76 are sources of federal jurisdiction in relation to Territory matters.[4] The High Court has original federal jurisdiction under section 75 which involves a matter or party specified in that section, and under section 76 in relation to such matters as are covered by a section 51 law.[5] Federal courts may also be given such jurisdiction under section 77.

By contrast Territory courts are established under section 122 to exercise jurisdiction (invariably) for a particular Territory. Such courts are not federal nor do they exercise federal jurisdiction. They exercise what is appropriately described as territorial jurisdiction. Such courts may be established directly by the Federal Parliament under section 122 or by way of a Territory enactment. They may apply laws made under section 122 as well as laws made under a section 51 head of power.[6]

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[99] *Spratt* v. *Hermes* (1965) 114 C.L.R. 226, 250 *per* Kitto J. But it appears that s. 116 may apply: see *Teori Tau* v. *Commonwealth* (1969) 119 C.L.R. 564, 570 *per* Barwick C.J.; *Lamshed* v. *Lake* (1958) 99 C.L.R. 132, 143 *per* Dixon C.J. See also Rose, "Discrimination, Uniformity, and Preference—Some Aspects of the Express Constitutional Provisions" in Zines (ed.), *Commentaries on the Australian Constitution* (1977) 191, 214. A s. 51 law which is construed as applying to the Territories will be subject to the constitutional guarantees.

[1] *Lamshed* v. *Lake* (1958) 99 C.L.R. 132. *Spratt* v. *Hermes* (1965) 114 C.L.R. 226, 276 *per* Windeyer J.

[2] See Lumb, "The Northern Territory and Statehood" (1978) 52 A.L.J. 554.

[3] *R.* v. *Bernasconi* (1915) 19 C.L.R. 629; *Spratt* v. *Hermes* (1965) 114 C.L.R. 226, 244; *Capital T.V. and Appliances Pty Ltd* v. *Falconer* (1971) 125 C.L.R. 591, 598 *per* Barwick C.J. (Subject to the rejection in the later cases of the decision in *Waters* v. *Commonwealth* (1951) 82 C.L.R. 188 denying original jurisdiction to the High Court under s. 75 in relation to acts or matters associated with a Territory.)

[4] *Spratt* v. *Hermes* (1965) 114 C.L.R. 226. Cowen and Zines, *op. cit.* 159.

[5] *Spratt* v. *Hermes* (1965) 114 C.L.R. 226. *Contra, Capital T.V. and Appliances Pty Ltd* v. *Falconer* (1971) 125 C.L.R. 591, 600 *per* Barwick C.J.

[6] This is one of the effects of covering clause 5. This is not to deny that within the one Act or the one section there may be sections or parts referable to a s. 51 head of power and sections referable specifically to s. 122.

As a corollary to this, it would appear that neither the High Court nor a Federal Court can be given *original* jurisdiction by a law passed under section 122[7] although there are strong opinions to the contrary.[8] However because of the High Court's position in the Australian hierarchy, it may be given *appellate* jurisdiction from a Territory Court under a law which can only derive its force from section 122.[9] It also appears that an intermediate federal court in the Australian hierarchy may be validly invested with a jurisdiction to entertain appeals from judgments of Territory Supreme Courts (see, for example, section 24(1)(b) of the Federal Court of Australia Act 1976).

The Commonwealth, the Territories and Executive Power

The power conferred by section 61 on the Governor-General to execute and maintain the Constitution and the laws of the Commonwealth extends throughout the States and the Territories. In *Johnson* v. *Kent*[10] it was held that under section 61 the Commonwealth had power to exercise a prerogative power in relation to a matter arising within the Australian Capital Territory. Such a power did not by its nature depend on statutory authority (although, of course, it could be abridged by an enactment). Barwick C.J. said:

> Just as the legislative power for the Territory derived from s. 122 is non-federal in the sense I used that description in *Spratt* v. *Hermes*, so it seems to me that the executive power in relation to

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[7] This is the view of three Justices (Knox C.J., Gavan Duffy and Higgins JJ.) out of six in *Porter* v. *R.; ex parte Chin Man Yee* (1926) 37 C.L.R. 432 and also three out of six (Taylor, Windeyer and Owen JJ.) in *Spratt* v. *Hermes* (1965) 114 C.L.R. 226. The writer would also take the view, despite the vigorous denial by Menzies J. in *Capital T.V. and Appliances Pty Ltd* v. *Falconer* (1971) 125 C.L.R. 591, 605-606, that "laws made by the Parliament" under s. 76(ii) do not encompass laws made under s. 122. The laws referred to in s. 76(ii) should be construed as referring to laws made under s. 51. But this view is only a tentative one for it is possible that a s. 122 law operating within the area of the federated States has "federal" implications. See *Attorney-General (W.A.); ex rel. Ansett Transport Industries (Operations) Pty Ltd* v. *Australian National Airlines Commission* (1976) 138 C.L.R. 492, 513-514 *per* Stephen J. See also *Federal Capital Commission* v. *Laristan Building and Investment Co. Pty Ltd* (1929) 42 C.L.R. 582, 585 *per* Dixon J. Cowen and Zines, *op. cit.* 161-162.

[8] Isaacs, Rich and Starke JJ. in *Porter's Case* (1926) 37 C.L.R. 432, 440-443, 448; Barwick C.J., Kitto and Menzies JJ. in *Spratt* v. *Hermes* (1965) 114 C.L.R. 226, 248, 265. See also Cowen and Zines, *op. cit.* 164. It should also be pointed out that s. 40(2)(a) and s. 40(3) of the Judiciary Act 1903 (Cth) appear to be founded on the assumption that original jurisdiction (in terms of the removal of a cause from a Territory court) can be conferred. The validity of these provisions in relation to removal of causes to the High Court from a Territory Supreme Court (irrespective of the matters comprised within the cause) must be in some doubt unless they can be read down so as to encompass only those causes pertaining to matters within the original jurisdiction of the High Court.

[9] *Porter* v. *R.; ex parte Chin Man Yee* (1926) 37 C.L.R. 432. A persuasive reason for distinguishing appellate and original jurisdiction is given by Windeyer J. in *Spratt* v. *Hermes* (1965) 114 C.L.R. 226, 277. A contrary stance is taken by Cowen and Zines, *op. cit.* 164-165.

[10] (1975) 132 C.L.R. 164.

> the Territory is not federally restrained. Consequently, whatever the position in other parts of Australia, the executive, unless its power is relevantly reduced by statute, may in my opinion do in the Territory upon or with respect to land in the Territory anything which remains within the prerogative of the Crown.[11]

There is also a comparable Territorial executive power which may be exercised under a section 122 Commonwealth law or under a Territory law (including an exercise of the prerogative in relation to a Territory where self-government powers extending to this area have been conferred on the Territory Executive).[12]

CONCLUSION

Once the essential features of "the Commonwealth" are understood and the "instrumental" and "body politic" uses are distinguished the operation of authority within the federal system becomes much easier to observe. It is a simple matter then to accept a body politic which comprises both States and Territories although recognising the limited powers of self-government which pertain to the latter entities. At this point, however, one must distinguish between the nature and source of the power which operates within the whole Commonwealth (including States and Territories) and that which pertains to the area of the Territories. In this respect section 122 plays a paramount role in determining the nature of "pure" Territory power while section 51 takes its place as the source of power for the whole Commonwealth.

The institutional distinctions between States and Territories are of course maintained in various parts of the Constitution, particularly Chapter I. The ultimate reconciliation of the status of State and Territory occurs when the processes of section 121 are activated, although considerable powers of self-government may have been granted (as in the case of the Northern Territory) before Statehood. At this point the legal status of the Territory is fundamentally modified: it is admitted into the Commonwealth, that is, to the political entity of the federated States. In this respect the uniqueness of the word "Commonwealth" in section 121 becomes obvious: the distinctions arising from the differing conceptions of "the Commonwealth" are eliminated for the admitted Territory—the new State of the Commonwealth.[13]

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[11] *Id.* 169.

[12] See Northern Territory (Self Government) Act 1978, s. 31 (Cth).

[13] The status of the Australian Capital Territory is also unique. While not subject to the admission procedures of s. 121 it is at the "heart" of the federal system because of its association with the Seat of Government. This entails, *inter alia*, being the locale where the "instrumental" Commonwealth is primarily situated.