COMMONWEALTH LIABILITY TO STATE LAW — THE ENIGMATIC CASE OF *PIRRIE* v *McFARLANE*

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INTRODUCTION

Pirrie v *McFarlane*[1] remains an enigmatic case. Decided a few years after the landmark decision of *Engineers*[2] it reflected an application of the reciprocal nature of the principle applied in that case. The thrust of the decision in *Engineers* was that the Commonwealth Parliament had power under s 51(xxxv) to make laws binding on the States. In the course of judgment the majority judges had also observed as follows:

> The principle we apply to the Commonwealth we apply also to the States, leaving their respective acts of legislation full operation within their respective areas and subject matters, but, in case of conflict, giving to valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of sec. 109.[3]

Coming so soon after *Engineers,* the decision in *Pirrie* v *McFarlane* is clearly consistent with this observation of the majority judges. However, given the subsequent developments in cases such as *Cigamatic*[4] and *Bogle,*[5] the authority of *Pirrie* v *McFarlane* has been questioned.[6]

The reason for a second look at *Pirrie* v *McFarlane* is that in the recent *Report on the Sheraton Hotel Incident*[7] Mr Justice Hope in framing his recommendations said:

> The applicability of State law to members of Commonwealth Defence Forces was definitively determined by the High Court of Australia in 1925 in *Pirrie* v *McFarlane* . . . . I have no doubt that the decision in *Pirrie* v *McFarlane* is equally applicable to ASIS officers and individuals who are contracted to work for ASIS. Accordingly, in the absence of specific statutory exemptions, I find that all persons who either took part in, or authorised, the Exercise, were obliged to comply with Victorian law.[8]

Mr Justice Hope did not entertain any doubts as to the correctness of the decision in *Pirrie* v *McFarlane*. The question that will be considered here is whether that

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[1] (1925) 36 CLR 170.

[2] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[3] *Ibid* 155.

[4] *Commonwealth* v *Cigamatic Pty Ltd* (1962) 108 CLR 372.

[5] *Commonwealth* v *Bogle* (1953) 89 CLR 229.

[6] See for instance *Australian Postal Commission* v *Dao* (1985) 63 ALR 1, 17–18 *per* Kirby P; 34 *per* McHugh JA.

[7] Royal Commission on Australia's Security and Intelligence Agencies: *Report on the Sheraton Hotel Incident* (1984). Mr Justice Hope was requested to inquire into an incident at the Sheraton Hotel, Melbourne, which arose from a training exercise conducted by the Australian Secret Intelligence Service (ASIS). "It was intended to conduct the Exercise without publicity and without involving persons other than those directly taking part. In the event, members of the public did become involved and it was publicly revealed that the trainees had been carrying weapons, had threatened members of the public with them and had forced an entry into a room of the hotel causing damage to the hotel" (p 2).

[8] *Ibid* 57.

decision is still tenable in light of later developments in relation to the intergovernmental immunity doctrine in Australia.

1 *PIRRIE* v *McFARLANE*

The case was concerned with whether the defendant (a member of the RAAF) who "was on duty driving a car belonging to the Air Force under orders from his superior officer, on Air Force business,"[9] was subject to the operation of the Motor Car Act 1915 (Vic). The defendant had been prosecuted under s6 of that Act for driving a motor car upon a public highway without being licensed for that purpose. The prosecution was dismissed by the Police Magistrate,[10] but the High Court, by a 3–2 majority, held that the defendant was, in the absence of a Commonwealth law to the contrary, bound by the State law.[11]

The majority judges took the view that if the prohibition against driving a motor car without being licensed under State law was reasonably capable of interfering with the naval or military defence of the Commonwealth or of the States, the Commonwealth Parliament has ample power by legislation to confer on members of the Defence Force the right to drive a motor car in the performance of their duty without being licensed under State law. Knox CJ elaborated:

> If Parliament choose, it can exempt them from the obligation to obey this provision of the State law; but in my opinion, it has not yet done so. No repugnant or inconsistent Commonwealth legislation stands in the way of the State law on this subject, and such law remains valid and binding in Victoria by virtue of sec.107 of the Constitution.[12]

Higgins J, in agreeing with the Chief Justice, said that if exemption from the operation of the State law was required, Parliament had only to say so by an Act.[13] Similarly, Starke J said "the Commonwealth has ample legislative power to maintain its forces free from any inconvenient legislation of the States".[14]

Rich J agreed with the "powerful"[15] dissenting judgment of Isaacs J. Mr Justice Isaacs held that the State Act did not intend to affect the Crown in right of the Commonwealth. After referring to s52 of the Commonwealth Constitution as vesting exclusive legislative power in the Commonwealth in respect of the Department of Naval and Military Defences, he said that even if the Act was construed as applying to the Crown in right of the Commonwealth it was invalid for two distinct reasons. He elaborated:

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[9] (1925) 36 CLR 170, 173–174.

[10] It was held by the Police Magistrate that if s 6 of the Motor Car Act 1915 (Vic) were held to apply to men "carrying out their duties as servants of the Defence Department it would fetter or interfere with the executive powers of that Department". Thus, in his view, the case was governed by *D'Emden* v *Pedder* (1904) 1 CLR 91. Additionally, he held that the provisions of the Act, on its construction, did not apply to persons in the public service of the Commonwealth.

[11] The majority comprised Knox CJ, Higgins and Starke JJ. Isaacs and Rich JJ dissented.

[12] (1925) 36 CLR 170, 184.

[13] *Ibid* 214.

[14] *Ibid* 229.

[15] A description employed by Kirby P in *Australian Postal Commission* v *Dao* (1985) 63 ALR 1, 17.

> The first is that an enactment expressly or by necessary implication purporting to bind the Crown in the right of the Commonwealth in respect of "primary and inalienable functions of the constitutional government" of the Commonwealth — that is, of the King in right of the Commonwealth . . . — is entirely outside the range of the State Constitution. Those functions were expressly taken from the States and vested *exclusively* in the Commonwealth by the Constitution itself.[16]

The second reason proffered by Isaacs J was the inconsistency arising Commonwealth law (the Air Force Act 1923 (Cth)) which empowered the Commonwealth military authorities to choose their own motor car drivers or motor-cycle drivers for the purpose of public defence.

2 RATIONALISING THE DECISION

A number of commentators have attempted to justify or rationalise the decision in the wake of the *Cigamatic* decision. One suggestion is to regard *Pirrie* v *McFarlane* as falling within the "entering into a transaction" exception and, hence, governed by the "affected by" doctrine.[17] After all, Dixon J in *Uther*[18] had said:

> General laws made by a State may affix legal consequences to given descriptions of transactions and the Commonwealth, if it enters into such a transaction, may be bound by the rule laid down.[19]

This suggestion, made rather faintly by Professor Sawer[20] is highly artificial. To equate the driving of a vehicle on the streets of a legislating State with the specific example given by Fullagar J in *Bogle*[21] of entering into a contract requires a considerable stretching of the imagination. Thus, it is not surprising that such a suggestion has not been regarded as a convincing one.

The other attempt at rationalising the decision is to draw a distinction between the Crown in right of the Commonwealth as a juristic entity and the servants or instrumentalities through whom it acts. Professor Howard, in his analysis of the case, said:

> The decision appears at first sight to be inconsistent with the doctrine of total Commonwealth immunity from State law subsequently developed by the High Court, for, since no question of contract or tort was involved, it is not helped by the 'affected by' doctrine as expressed through the Judiciary Act.[22]

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[16] *(1925) 36 CLR 170, 199.*

[17] *For a discussion of the "affected by" doctrine, see G Donaldson, "Commonwealth Liability of State Law" (1985–86) 16 UWA Law Rev 135.*

[18] *Uther* v *Federal Commissioner of Taxation* (1947) 74 CLR 508.

[19] *Ibid* 528. Dixon and McTiernan JJ dissented in *Uther*. Nevertheless, Dixon, sitting as Chief Justice in *Cigamatic*, saw his dissenting judgment in *Uther* adopted by the majority judges in *Cigamatic*. In *Uther*, Dixon J provided the following example of the application of the "affected by" doctrine. "For instance, if the Commonwealth contracts with a company the form of the contract will be governed by s 348 of the *Companies Act.*" (1947) 74 CLR 508, 528.

[20] *Australian Federalism in the Courts* (1967) 138.

[21] (1953) 89 CLR 229, 260: "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 (Vic). . . ."

[22] *Australian Federal Constitutional Law* (3rd ed 1985), 224.

Professor Howard put forward the following argument to support the decision in *Pirrie* v *McFarlane:*

> It is not in fact inconsistent with the total immunity doctrine because that doctrine applies only where it is the Commonwealth itself as a juristic entity which is impleaded and not where the State law is sought to be enforced against individual persons employed by the Commonwealth.[23]

Again, such a suggestion is fairly unconvincing. To a large extent the Crown in right of the Commonwealth must act through its servants and instrumentalities. As Gareth Evans cogently put it, "[a] State law could hamstring Commonwealth activities equally efficiently (at least until inconsistent legislation is passed) by operating on the Commonwealth's servants or on the Commonwealth itself".[24] Evans provided a clever illustration of his argument as follows:

> Take *Pirrie* v *McFarlane* itself: would a State law purporting to impose a duty on the Commonwealth to ensure that all its military drivers held Victorian licences be any *more* effective than the actual statute applied in that case in reducing the authority of the Commonwealth in its choice of persons to perform federal functions?[25]

It is submitted that the emphasis of many commentators is misplaced. The task should not be that of determining whether *Pirrie* v *McFarlane* is consistent with the immunity doctrine but whether the Commonwealth should have the blanket immunity in the first place. Whilst this may be regarded as heretical to the proponents of the Commonwealth immunity doctrine, it is submitted that it provides a better practical solution to problems arising from the application of State laws to the Crown in right of the Commonwealth or its instrumentalities.

3 *CIGAMATIC* RECONSIDERED

In questioning the existing Commonwealth immunity doctrine one is required to consider afresh the *Cigamatic* decision. In *Cigamatic,* where the High Court had held that the States had no power to abolish the prerogative right of the Commonwealth to priority in the payment of debts of equal degree in the winding up of a company, Dixon CJ said that the fundamental proposition that an exercise of State legislative power could directly derogate from the "rights of the Commonwealth with respect to its people"[26] could not be entertained. Such a proposition "must go deep in the nature and operation of the federal system".[27] Thus, in his view, the States have no "legislative power to control legal rights and duties between the Commonwealth and its people".[28]

It is also clear from Dixon CJ's judgment that he was expounding a principle of broader application, for he said:

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[23] *Ibid.* In the first edition of his book, Professor Howard expressed the opinion that the decision in *Pirrie* v *McFarlane* on the immunity point was wrong, but he had changed his mind by the time the third edition was published.

[24] G Evans, "Rethinking Commonwealth Immunity" (1972) 8 MULR 521, 531.

[25] *Ibid.*

[26] (1962) 108 CLR 372, 377.

[27] *Ibid.*

[28] *Ibid.*

> Believing, as I do, that the doctrine thus involved is a fundamental error in a constitutional principle that spreads far beyond the mere preference of debts owing to the Commonwealth, I do not think we should treat *Uther's Case* as a decisive authority upon that question which we should regard as binding.[29]

Although *Uther* was overruled by a 5–2 majority, it does not necessarily follow that a general Commonwealth immunity had been established by *Cigamatic*. However, the contrary view seems to have been adopted by some commentators. One such commentator wrote as follows:

> The proposition established by the High Court in the *Cigamatic* case . . . goes very far; indeed, it probably overrules that part of the *Engineers'* case . . . which implied that State parliaments have the power to legislate so as to bind the Commonwealth: . . . The proposition established by the *Cigamatic* case was that State parliaments have no power to enact legislation, binding on the Commonwealth, which defines or regulates its rights and duties towards its subjects, or that regulates or controls the governmental rights, including fiscal and prerogative rights of the Commonwealth.
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> The proposition was a general one; it was not a specific exception (limited to the Commonwealth's prerogative rights) to a general rule that State parliaments could legislate so as to bind the Crown. The proposition did not depend on any exercise of Commonwealth legislative power which, by virtue of s109, would invalidate inconsistent State legislation. Such a proposition makes *Pirrie* v *McFarlane* . . . a decision of doubtful authority.[30]

It could be queried whether *Cigamatic* did establish a general proposition. The answer to this query requires a reappraisal of the various judgments in that case.

First of all, it is clear that Dixon CJ was supported by Kitto and Windeyer JJ in respect of a general Commonwealth immunity. The same could not, however, be said of the other judges in the majority: Menzies and Owen JJ. Owen J simply agreed with Menzies J[31] and therefore it is important to determine what proposition Menzies J was supporting. Menzies J referred to the dissenting judgment of Dixon J (as he then was) in *Uther,* and said:

> I have come to the conclusion that the dissenting judgment was correct and the Commonwealth Constitution does not permit a State parliament to deprive the Crown in right of the Commonwealth of its prerogative rights. Insofar as *Uther's Case* decided to the contrary it should . . . be overruled.[32]

From that passage it could be argued that Menzies J was confining his conclusion to "prerogative rights". An attempt to place such a restrictive construction on Menzies J's comments was made by McHugh JA of the Court of Appeal of the Supreme Court of New South Wales in *Australian Postal Commission* v *Dao*.[33] In arriving at the conclusion that there was no majority holding in *Cigamatic* that the Commonwealth is generally immune from State legislation, McHugh JA said:

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[29] *Ibid.* See RP Meagher and WMC Gummow, "Sir Owen Dixon's Heresy" (1980) 54 ALJ 25, especially at 29 where the authors observed: "[in] truth, the *Cigamatic* doctrine, in its various formulations, is but a revival in fresh garb of one aspect of the immunity of instrumentalities doctrine, which in both of its operations was discarded in the *Engineers' Case.*"

[30] PJ Hanks, *Australian Constitutional Law* (3rd ed 1985) 417.

[31] (1962) 108 CLR 372, 390.

[32] *Ibid* 389.

[33] (1985) 63 ALR I.

> Although Menzies J approved the dissenting judgment of Dixon J in *Uther* v *FC of T*, . . . he did so in a context which indicates he was deciding the case on the immunity of the prerogative and not on the general immunity of the Commonwealth.[34]

The restrictive reading of Menzies J's comments by McHugh JA is not beyond challenge. At best, what can be confidently asserted is that there is an ambiguity in Menzies J's stand. The approval of Dixon J's dissent could indicate support for the wider proposition of a general Commonwealth immunity and that the prerogative context was merely a specific application of that wider proposition.

There is a body of judicial dicta which can be garnered to suggest a preference for a general Commonwealth immunity from State laws. It is unnecessary to regurgitate all these dicta as they have been admirably set out in McHugh JA's judgment.[35] The strongest assertions perhaps could be found in *Bogle* wherein Fullagar J, with whose judgment Dixon CJ, Webb, Kitto and Taylor JJ agreed, said:

> The Crown in right of the State has assented to the statute, but the Crown in right of the Commonwealth has not, and the constitutional question, to my mind, is susceptible of only one answer, and that is that the State Parliament has no power over the Commonwealth. The Commonwealth — or the Crown in right of the Commonwealth, or whatever you choose to call it — is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legistlative power of any State Parliament.[36]

McHugh JA's judgment in *Dao* is very significant for, unlike the other members of the Court of Appeal, he proceeded to propound his own stand on the immunity doctrine. McHugh JA took a very vigorous stand in defence of a general Commonwealth immunity. He said "the nature of the Australian Constitution indicates, to my mind, that the States were not intended to have the power to bind the Commonwealth".[37]

McHugh JA elaborated by pointing out that by virtue of covering clause 3 of the Constitution, "the people" of the various States were "united in a Federal Commonwealth under the name of the Commonwealth of Australia". As the sovereignty of the Commonwealth was the result of the compact of the Australian people it was implicit in the very nature of that compact that the people of Australia could only be bound by the legislation of the Parliament "where all the people of Australia are represented". He said:

> Whether or not the immunity of the Commonwealth is a necessary consequence of Australian federalism, it would be incongruous for the Parliament of a State to have power under s107 to diminish the sovereignty of the Commonwealth, the body to which the Constitution transferred what would otherwise be part of the States' own sovereignty. The people of the Commonwealth are not represented in the Parliament of an individual State. In uniting in a Federal Commonwealth, the people of Australia cannot be taken as assenting to a Parliament of part of the people binding the Commonwealth, that is to say, "the people" of the whole of Australia. To permit the

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[34] *Ibid* 30.
[35] *Ibid* 30–31.
[36] (1953) 89 CLR 229, 259
[37] (1985) 63 ALR 1, 32.

> Parliament of a State to legislate for the Commonwealth is in effect to permit the part to diminish the sovereignty of the whole.[38]

However, McHugh JA was prepared to subscribe to the "affected by" doctrine, the application of which depended on the circumstances of each case.[39]

How did McHugh JA deal with *Pirrie* v *McFarlane*? McHugh JA seemed to have adopted the Howard argument. After stating that the case "decided nothing as to the power of the State to bind the Commonwealth",[40] he said:

> It simply held that a Commonwealth servant was bound by the Act. While it is true that it seems to follow as a matter of logic, that, if a Commonwealth servant is bound, the Commonwealth itself should be bound, a case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem to follow logically from it . . . I see no reason why this court should seek to extend the principle enshrined in *Pirrie* v *McFarlane*.[41]

McHugh JA went on to point out that much of the reasoning in *Pirrie* v *McFarlane* was inconsistent with the *State Banking* case[42] and *Cigamatic*. Moreover, *Pirrie* v *McFarlane* was decided at a time when the prevailing test to determine a s109 inconsistency was "the simultaneous obedience" test.[43] Thus, *Pirrie* v *McFarlane* could not support the proposition that a State Act of its own force could bind the Commonwealth.

McHugh JA then concluded with this interesting passage:

> A constitutional doctrine which has the support of Dixon CJ, Fullagar, Webb, Kitto, Taylor, Menzies, Windeyer, Walsh JJ, and Barwick CJ, not to mention the dissenting judgments of Isaacs and Rich JJ in *Pirrie* v *McFarlane*, . . . is not likely to be erroneous. Although the decision in *Cigamatic* appears to have more critics than supporters, it is, in my opinion, the doctrine which best serves the needs of Australian federalism. If it was overturned, the difficulties which would face the Commonwealth Parliament in determining what State statutes should or should not apply to the Commonwealth would be enormous. Even if a list of State statutes which were to apply to the Commonwealth was enacted, it would soon be out of date. State legislation would require continual monitoring. On the other hand, the blanket exclusion of State laws might result in the exclusion of laws which the Commonwealth and its citizens might, in particular situations, find useful and appropriate. The doctrine, expounded by Dixon CJ and Fullagar J, when coupled with ss 56, 64 and 79 of the Judiciary Act, enables the courts to proceed on a case by case basis. This provides for flexibility in the application of State law without any real loss of that certainty which is an essential attribute of the administration of justice. The view of Dixon CJ in *Cigamatic* should be followed by this court unless the High Court decides otherwise.[44]

The first comment which can be made about McHugh JA's remarks relates to the proposition that the accuracy of a constitutional doctrine depends on the strength of judicial approval. If McHugh JA were to cast his eye to the *Engineers* decision itself, he would realize that *Engineers* reversed nearly two decades of judicial pronouncements which supported the notion of implied immunity. Thus,

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[38] *Ibid* 33. See also M J Detmold, *The Australian Commonwealth* (1985) 16–20.
[39] (1985) 63 ALR 1, 33.
[40] *Ibid* 34.
[41] *Ibid.*
[42] *City of Melbourne Corporation* v *Commonwealth* (1947) 74 CLR 31.
[43] *Australian Postal Commission* v *Dao* (1985) 63 ALR 1, 34.
[44] (1985) 63 ALR 1, 34–35.

the High Court has no qualms of reversing established constitutional doctrines, regardless of the number of judicial voices which have supported such doctrines in the past.

The second, and more important, aspect of McHugh JA's comments relates to the functional aspects arising from the absence of a general Commonwealth immunity. The picture painted by McHugh JA of the "enormous" difficulties that would confront the Commonwealth is grossly exaggerated. Such an argument had been put forward by Isaacs J in *Pirrie* v *McFarlane*:

> It is obviously impossible for the Commonwealth Parliament to search out and collect all the various existing State regulations interfering with its departmental operations and severally legislate in some way to the contrary, and then to follow day by day new State regulations by Federal laws specially directed to them and counteracting them.[45]

This point had been anticipated and convincingly countered, prior to the *Dao* case, by Professor Sawer in his succinct article, "State Statutes and the Commonwealth".[46] Professor Sawer argued against the adoption of the Dixon-Fullagar theory, saying that "[it] is unnecessary for the successful management of the federal system and should not be adopted".[47] Professor Sawer noted that the Federal Government has ample power to protect its activities and those of its agencies by suitably framed law. He added:

> With only six States, a high degree of social homogeneity and uniformity of State statute law, and an unenacted law which is in principle and almost entirely in fact uniform for Australia, the federal authority has little to fear from *prima facie* subjection to State law.[48]

Professor Sawer concluded that a doctrine that the Commonwealth is *prima facie* subject to State laws purporting to aply to it or its agents was "simple and elegant" and, indeed, more conducive to the maintenance of the rule of law.[49]

Apart from all the considerations mentioned by Professor Sawer, there is the additional factor that the peace, order and good government of the Commonwealth depends also on the peace, order and good government of component States. How can the peace, order and good government of a State be maintained if a Federal Officer "using the street in pursuance of his duty, may drive on the wrong side, at a speed of 60 miles per hour, and may disregard the policeman directing the traffic"?[50] As Higgins J, in *Pirrie* v *McFarlane*, put it "such a grotesque result of the Constitution must startle the unsophisticated".[51] Such an argument was, brushed aside however, by Isaacs J, who simply said: "possibility of abuse is no argument against the existence of a power".[52] This writer submits that it is not merely a question of abuse of power. The legislation under examination in *Pirrie* v *McFarlane* was designed to serve a purpose: "to preserve the public safety and security." Surely such a purpose also serves the needs of the Commonwealth, in the absence of discrimination against it or its agencies. If the Crown in right of the Commonwealth should regard this not to be the case,

[45] (1925) 36 CLR 170, 211.
[46] (1961) 1 Tas UL Rev 580.
[47] *Ibid* 583.
[48] *Ibid* 589.
[49] *Ibid.*
[50] (1925) 36 CLR 170, 213.
[51] *Ibid.*
[52] *Ibid* 210.

contradictory legislation by the Commonwealth Parliament would, pursuant to s109, erase the problem. This is put in most apt terms by Professor Zines:

> The Constitution is designed for the practical affairs of government and society. The fact is that the Federal Government is a large factor in many areas of economic and social activity. To exclude it automatically from the operation of all State legislation can have a serious impact on the effectiveness of that legislation. It may be that this effect will be more serious in some cases than in others. It may be that there are valid countervailing arguments of public interest, in some cases, which require the Commonwealth not to be bound. But these matters are better determined by the Commonwealth itself. It is more likely to do so if the Commonwealth is treated as bound until, by legislation, it determines otherwise.[53]

4 CONCLUSION

The High Court was presented with the opportunity in *Dao* to restore *Engineers* to allow a simple reciprocal "no immunity" doctrine to apply. The rejection of Dixon's approach would have eliminated the need to reconcile *Cigamatic* with the "affected by" doctrine,[54] and more significantly, no more question marks would dangle over the decision in *Pirrie* v *McFarlane.*

The High Court, in upholding the decision of the Court of Appeal of the Supreme Court of New South Wales in *Dao* by the invocation of s 109 of the Commonwealth Constitution, [55] has allowed a golden opportunity to slip away. In consequence, *Pirrie* v *McFarlane* remains, as stated at the outset, an enigmatic case.[56]

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[53] *The High Court and the Constitution* (2nd ed 1987) 322. See also Ronald Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis" (1969) 7 MULR 15, 45: "This case achieves a satisfactory accommodation of the interests of Commonwealth and States."

[54] There is also the question of how *Cigamatic* can be reconciled with s 64 of the Judiciary Act 1903 (Cth). The omission by the High Court in *Cigamatic* to refer to the Judiciary Act 1903 (Cth) puzzled Jacobs and Mason JJ in *Maguire* v *Simpson* (1977) 139 CLR 362, at 403–404 and 402 respectively. Jacobs J said "I am conscious of the somewhat curious situation that the effect of the Judiciary Act was not discussed in the reasons for judgement of any member of the court in *Cigamatic* . . . .", whilst Mason J observed that "no mention was made of s 64 [in *Cigamatic,*] although there seems to be no reason why it should not have had an application if it extended to substantive rights".

Section 64 provides as follows:

> 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 judgement may be given and costs awarded on either side, as in a suit between subject and subject.

The recent decision of the High Court in *Evans Deakin Industries Ltd* v *Commonwealth* (1986) 60 ALJR 619 reinforcing the view in *Maguire* v *Simpson* that s 64 extends to substantive rights, does not resolve the *Pirrie* v *McFarlane* enigma. Professor Zines has pointed out that it is difficult to see how s 64 can have anything to say regarding the decision in *Pirrie* v *McFarlane* as the case was concerned with a prosecution for a statutory offence and not a "suit" within s 64: L Zines, *The High Court and the Constitution* (2nd ed 1987) 327.

[55] (1987) 61 ALJR 229.

[56] As a postscript to this discussion it is interesting to note that the Commonwealth Parliament has recently legislated to confer express immunity on members of the Defence Force from the application of certain State and Territory laws. Section 27 of the Defence Legislation Amendment Act, 1987 (Cth) inserts the following new s 123 in the Defence Act 1903 (Cth):

> A member of the Defence Force is not bound by any law of a State or Territory:
> (a) that would require the member to have permission (whether in the form of a licence or otherwise) to use or to have in his or her possession, or would require the member to register, a vehicle, vessel, animal, firearm or other thing belonging to the Commonwealth; or
> (b) that would require the member to have permission (whether in the form of a licence or otherwise) to do anything in the course of his or her duties as a member of the Defence Force.