

PRIVATE LAW ACTIONS AGAINST THE GOVERNMENT – (PART 2) TWO UNRESOLVED QUESTIONS ABOUT SECTION 64 OF THE *JUDICIARY ACT*

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I INTRODUCTION

One of the tenets of the Anglo-Australian legal system is that governments are ruled by the law, in the same way that citizens are.¹ Consequently, a government can be sued in ‘private’ law (by which I mean causes of action that can also arise in suits between citizens).² However, governments have traditionally had several privileges and immunities that limited their liability in private law. For example, there was and still is a presumption that legislation does not apply to governments, although the force of that presumption has been diluted somewhat by *Bropho v Western Australia*.³ Moreover, governments have had a common law immunity from suit.⁴ Also, when governments are in court, they have special common law privileges and immunities as litigants, such as immunity from discovery.⁵

* Senior Lawyer, Australian Government Solicitor. The views expressed here are mine and not those of the Commonwealth. I am grateful to Professor Leslie Zines and the anonymous referees for their helpful comments. For Part 1 of this article, see Graeme Hill, ‘Private Law Actions against the Government (Part 1) – Removing the Government’s Immunity from Suit in Federal Cases’ (2006) forthcoming *Melbourne University Law Review*.

1 See, eg, Peter W Hogg and Patrick J Monahan, *Liability of the Crown* (3rd ed, 2000) 1–4.

2 ‘Private’ law actions in this sense (such as actions in contract or negligence) can be contrasted with ‘public’ law actions that can only arise in suits against a government (such as misfeasance in public office or judicial review actions). Of course, this distinction is by no means watertight because ‘private’ law doctrine may contain specific principles that relate only to governments.

3 (1990) 171 CLR 1. Note that this presumption extends to the executive government of any Australian polity: *Jacobsen v Rogers* (1995) 182 CLR 572; *Commonwealth v Western Australia* (1999) 196 CLR 392.

4 Under English common law, government immunity from suit was both a defence to the cause of action (‘the King can do no wrong’), and a bar to the jurisdiction of courts (‘the King cannot be sued in his own courts’). For an overview, see, eg, Hogg and Monahan, above n 1, 4–9.

5 On the procedural immunities of governments generally, see, eg, Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) [23.12]–[23.21] (‘ALRC Report No 92’).

In federal cases, these immunities are subject to section 64 of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*').⁶ Section 64 provides:

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

In equating the rights of the Commonwealth or a State with those of a subject, section 64 can apply State or Territory⁷ legislation to the Commonwealth or a State that would otherwise not apply to governments.⁸ On decided authorities, section 64 operates not only on the procedural rights of the Commonwealth and States, but also their substantive rights.⁹ Indeed, section 64 can effectively supply a plaintiff with a cause of action against the Commonwealth or a State.¹⁰ Moreover, it appears that section 64, by itself, is capable of removing the Commonwealth's and the States' immunity from suit in federal cases.¹¹ Section 64 also removes many of the special privileges and immunities that the Commonwealth or States have as litigants.¹² Section 64 can, therefore, significantly affect the rights of governments in litigation.

This article considers two unresolved questions about section 64 of the *Judiciary Act*.¹³

The first is whether section 64 operates when the Commonwealth or a State is performing a function peculiar to government. Clearly, the whole purpose of section 64 is to remove special privileges and immunities that the Commonwealth and the States would otherwise enjoy. That said, the language of section 64 also seems to contemplate that there might be some situations when it

6 Note that s 64 of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*') only operates in cases attracting federal jurisdiction: see, eg, *Bass v Permanent Trustee Co Pty Ltd* (1999) 198 CLR 334, 349–50 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Bass*').

7 Section 64 of the *Judiciary Act* can operate on Territory legislation: Michael Pryles and Peter Hanks, *Federal Conflict of Laws* (1974) 201. As a practical matter, Territory legislation is only likely to be an issue when it is sought to apply NT legislation to the Commonwealth. Territory legislation is unlikely to be an issue when the State is a party. Legislation enacted by the ACT will only apply to the Commonwealth if that legislation is specified in regulations made under the *Australian Capital Territory (Self-Government) Act 1988* (Cth): *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 27. Section 64 of the *Judiciary Act* would not overcome this requirement: see below n 68.

8 See, eg, *Maguire v Simpson* (1977) 139 CLR 362, where s 64 applied State limitations legislation to a cause of action brought by the Commonwealth, when that legislation did not apply to the Commonwealth as a matter of statutory construction. Note that s 64 will not apply *Commonwealth* legislation to the Commonwealth or States that does not otherwise apply: see below n 67.

9 *Maguire v Simpson* (1977) 139 CLR 362.

10 In relation to the Commonwealth, see *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254. In that case, s 64 applied the *Subcontractors' Charges Act 1974* (Qld) to the Commonwealth, which meant that a building subcontractor could bring proceedings against the Commonwealth under that Act. In relation to the States, see *Commissioner for Railways (Qld) v Peters* (1991) 24 NSWLR 407: see below Part IV(B).

11 See below n 27.

12 See, eg, *Naismith v McGovern* (1953) 90 CLR 336, 342–3, considering the Commonwealth's immunity from discovery. Section 64 would not, however, remove a special privilege or immunity that is conferred by Commonwealth legislation: see below n 67.

13 For a more wide-ranging discussion of s 64 of the *Judiciary Act*, see Susan Kneebone, 'Claims against the Commonwealth and States and their Instrumentalities in Federal Jurisdiction: Section 64 of the *Judiciary Act*' (1996) 24 *Federal Law Review* 93.

would not be appropriate to equate the rights of the Commonwealth or a State with those of a subject. Section 64 only equates the rights of the Commonwealth and the States to those of a subject ‘as nearly as possible’. Moreover, section 64 requires that there be a comparable suit ‘between subject and subject’. I suggest that the constitutional test for when a Commonwealth law infringes on the ‘integrity and autonomy’ of the States provides a useful means for determining which government functions are ‘peculiar’ for these purposes.

The second question is whether section 64 is wholly valid in its application to the States. There is an issue about the extent of the Commonwealth’s power to affect the rights of the States, particularly as section 78 of the *Constitution* only authorises laws that confer ‘rights to proceed’ against a State. I propose an alternative analysis of section 64 of the *Judiciary Act*, relying on sections 51(xxxix) and 77 of the *Constitution*, which explains its application to the States.

II ROLE OF SECTION 64 OF THE *JUDICIARY ACT*

Before considering those unresolved questions, it may be useful to briefly explain the role of section 64 of the *Judiciary Act* in the scheme for suing governments in federal jurisdiction. In general terms, the *Judiciary Act* performs three functions that are relevant to ‘private’ law claims against the Commonwealth or a State.

- First, the Act confers subject matter jurisdiction¹⁴ on courts to determine matters in federal jurisdiction (such as matters to which the Commonwealth is a party, matters arising under the *Constitution* or involving its interpretation, and matters arising under Commonwealth laws).¹⁵
- Second, when the Commonwealth or a State is a defendant, the Act confers a right to proceed (that is, a law removing the Commonwealth’s or the States’ immunity from suit).
- Third, the Act determines the applicable law in federal cases.

The main role played by section 64 is determining the applicable law; although, it may also have a role in conferring a right to proceed. Section 64 operates once a court has subject matter jurisdiction,¹⁶ and, therefore, cannot be relied on as the source of jurisdiction to determine a ‘private’ law claim.

14 Note that ‘jurisdiction’ can mean (1) the subject matter over which the court has authority to decide, (2) the court’s jurisdiction over the person, or (3) the geographical extent of the law: see, eg, *Lipohar v The Queen* (1999) 200 CLR 485, 517 (Gaudron, Gummow and Hayne JJ).

15 See *Constitution* ss 75(iii), 76(i), 76(ii).

16 See, eg, *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136, 156 (McHugh J). This conclusion is mainly significant for ‘double function’ provisions that both confer a right and grant jurisdiction: see below n 162. The main provisions in the *Judiciary Act* conferring federal jurisdiction are ss 30 (High Court), 39 (State courts) and 39B (Federal Court).

A Applicable Law in Federal Cases

In cases against the Commonwealth or a State in federal jurisdiction, the applicable law is determined by a combination of sections 64, 79 and 80 of the *Judiciary Act*. Section 79 provides:

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the *Constitution* or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

Section 80 states:

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the *Constitution* and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the *Constitution* and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

1 Complementary Roles of Sections 64, 79 and 80

Sections 64, 79 and 80 of the *Judiciary Act* perform complementary roles. Section 79 applies the statutory law of the State or Territory where the court is exercising federal jurisdiction, unless the *Constitution* or Commonwealth legislation ‘otherwise provides’. Section 80 applies the common law (unless it is inconsistent with the *Constitution* or Commonwealth legislation) and, on current authorities, also applies statutory modifications of the common law.¹⁷ Significantly, section 79 generally applies State and Territory legislation with its meaning unchanged.¹⁸ (Admittedly, section 79 permits some limited ‘translation’ of State or Territory legislation, in order to make that legislation applicable to the exercise of federal jurisdiction, or in federal courts.)¹⁹ Similarly, section 80 applies common law principles with their meaning unchanged.

By contrast, the whole purpose of section 64 of the *Judiciary Act* is to alter the meaning of State and Territory legislation, and to alter the content of common law principles. As noted, section 64 applies State or Territory legislation to the Commonwealth or a State that would otherwise not apply to them. In doing so,

¹⁷ See *Blunden v Commonwealth* (2003) 218 CLR 330, 339 (Gleeson CJ, Gummow, Hayne and Heydon JJ, with Callinan J agreeing). In my view, however, s 80 does not apply statutory modifications of the common law because it should be interpreted as a conferral of judicial power to apply and develop the common law: Graeme Hill, ‘The Common Law and Federal Jurisdiction – What Exactly Does Section 80 of the *Judiciary Act* Do?’ (2006) 34 *Federal Law Review* 75.

¹⁸ See, eg, *Pedersen v Young* (1964) 110 CLR 162, 165 (Kitto J).

¹⁹ State and Territory legislation cannot apply of its own force to the exercise of federal jurisdiction: see, eg, *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) (*‘Solomons’*). Therefore, this legislation can only apply if picked up by s 79. On the extent to which s 79 can ‘translate’ State or Territory legislation to apply it in federal courts and to federal subject matter, see Graeme Hill and Andrew Beech, ‘“Picking up” State and Territory Laws under s 79 of the *Judiciary Act* – Three Questions’ (2005) 27 *Australian Bar Review* 25, 44–54.

section 64 clearly alters the meaning of that legislation.²⁰ Section 64 also removes common law privileges and immunities that the Commonwealth or States might otherwise have, and to this extent alters the common law.

2 Example – Austral Pacific Group Ltd (in liq) v Airservices Australia²¹

The different roles of sections 64 and 79 of the *Judiciary Act* are illustrated by *Austral Pacific*. The question in that case was whether sections 6 and 7 of the *Law Reform Act 1995* (Qld) (*‘Queensland Reform Act’*) applied to Airservices Australia (*‘Airservices’*) in respect of an injury to one of its employees. Sections 6 and 7 provide for contribution between tortfeasors. There was an initial question of whether these provisions applied to Airservices (that is, *‘the Commonwealth’*) as a matter of statutory construction.²² If they did, these provisions of the *Queensland Reform Act* would be picked up and applied by section 79 of the *Judiciary Act*. If they did not, however, section 79 could not apply these provisions to Airservices because section 79 picks up State laws with their meaning unchanged. If this was the case, sections 6 and 7 of the *Queensland Reform Act* could only be applied to Airservices by section 64 of the *Judiciary Act*.²³

As we will see, although the *Queensland Reform Act* could be applied to Airservices by either sections 64 or 79 of the *Judiciary Act*, Airservices was still not liable to pay amounts under that Act.²⁴

B Right to Proceed in Federal Cases

As noted, another function of the *Judiciary Act* is to confer a right to proceed against the Commonwealth or a State in federal cases (that is, a law removing the Commonwealth’s or States’ immunity from suit). Some provisions of the *Judiciary Act* seem to confer an express, but limited, right to proceed against the Commonwealth and the States in federal cases. Section 56 provides that a person making a claim against the Commonwealth *‘whether in contract or tort’* may bring a suit against the Commonwealth in the courts specified in section 56. Section 58 makes similar provision in relation to the States for federal cases.²⁵

20 For this reason, s 64 is said to apply State or Territory legislation *‘as surrogate Commonwealth law’*: *Maguire v Simpson* (1977) 139 CLR 362, 390 (Murphy J).

21 (2000) 203 CLR 136 (*‘Austral Pacific’*).

22 Airservices is *‘the Commonwealth’* within s 75(iii) of the *Constitution*: *ibid* 143 (Gleeson CJ, Gummow and Hayne JJ), 154–5 (McHugh J). However, it does not necessarily follow that Airservices was entitled to the privileges and immunities of the Crown: *Deputy Federal Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219, 230. Accordingly, it is not clear that Airservices was entitled to the benefit of the presumption that State legislation does not apply to the Commonwealth executive government.

23 *Austral Pacific* (2000) 203 CLR 136, 143 (Gleeson CJ, Gummow and Hayne JJ), 155, 157–8 (McHugh J).

24 See below n 78.

25 Note that s 57 of the *Judiciary Act* deals with suits *‘whether in contract or tort’* in the High Court by a State against the Commonwealth, and s 59 deals with suits in the High Court between States. State courts do not have subject matter jurisdiction over these suits, by reason of ss 38(b) and 38(d) of the *Judiciary Act*.

The majority judgment in *Commonwealth v Evans Deakin Industries Ltd*²⁶ indicates that section 64 of the *Judiciary Act* is also capable of removing the Commonwealth's and the States' immunity from suit.²⁷ This conclusion means that there is a right to proceed against the Commonwealth and the States in all courts exercising federal jurisdiction. Justice Brennan dissented in *Evans Deakin*, holding that section 64 only operates once a person has a right to proceed derived from elsewhere.²⁸ This debate has largely been overtaken by the High Court's later decisions in *Commonwealth v Mewett*²⁹ and *British American Tobacco (Australia) Ltd v Western Australia*.³⁰ Those cases seem to hold that the conferral of federal jurisdiction, by itself, removes the Commonwealth's and the States' immunity from suit.³¹ Accordingly, it is now unnecessary to rely on section 64 as the source of the right to proceed in federal cases.

Having explained in general terms the role of section 64 of the *Judiciary Act*, the remainder of the article considers two questions about the scope of section 64.

III SECTION 64 OF THE *JUDICIARY ACT* AND FUNCTIONS PECULIAR TO GOVERNMENT

The first question is whether there is a possible exception to the equalising effect of section 64 of the *Judiciary Act* when the Commonwealth or a State is performing a 'function peculiar to government'.³²

A The Issue – Is There a Limit on the Equalising Effect of Section 64?

This possible 'peculiar government function' exception to section 64 relies on two features of section 64 – section 64 only equates the rights of the Commonwealth or a State to that of a subject 'as nearly as possible', and requires that there be a comparable suit 'between subject and subject'.

Some judicial statements appear to accept that there are situations when section 64 does not operate. For example, in *South Australia v Commonwealth*,³³

26 (1986) 161 CLR 254 ('*Evans Deakin*').

27 Admittedly, the majority in *Evans Deakin* did not explicitly state that s 64 conferred a right to proceed. Their Honours simply stated that the plaintiff had a cause of action (by reason of s 64) and that the Court had jurisdiction: *ibid* 264 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). However, in *Commonwealth v Mewett* (1997) 191 CLR 471, Dawson J (with McHugh J agreeing on this point) relied on *Evans Deakin* to conclude that s 64 conferred a right to proceed against the Commonwealth: at 502.

28 *Evans Deakin* (1986) 161 CLR 254, 270–3. See also *Commonwealth v Mewett* (1997) 191 CLR 471, 513 (Toohey J); Dennis Rose, 'The Government and Contract' in Paul Finn (ed), *Essays on Contract* (1987) 233, 236–7.

29 (1997) 191 CLR 471.

30 (2003) 217 CLR 30 ('*British American Tobacco*').

31 See generally Mark Leeming, 'The Liabilities of Commonwealth and State Governments under the Constitution' (2006) 27 *Australian Bar Review* 217, 221–7. For a critical analysis of *Commonwealth v Mewett* and *British American Tobacco*, see Graeme Hill, 'Private Law Actions against the Government (Part 1) – Removing the Government's Immunity from Suit in Federal Cases' (2006) forthcoming *Melbourne University Law Review*.

32 See *Evans Deakin* (1986) 161 CLR 254, 264–5 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). See also Kneebone, above n 13, 115–16.

Dixon CJ observed that ‘the subject matters of private and public law are necessarily different’.³⁴ In *Commonwealth v Western Australia*,³⁵ Gummow J stated that section 64 would not apply State mining legislation to land acquired by the Commonwealth for defence purposes because the Commonwealth was performing a function peculiar to government.³⁶

Perhaps the strongest statement of this sort was in *Commonwealth v Lawrence*,³⁷ where Else-Mitchell J stated that ‘the character of the Crown [of] the Commonwealth or State in relation to the subject matter of debt, contract or property, cannot be ignored’.³⁸ His Honour gave four specific examples of situations when section 64 would not equate the rights of the Commonwealth or State to those of a subject.³⁹

- (1) In an action in which the Commonwealth or a State seeks to recover a debt, section 64 would not disregard the priority of Crown debts under the prerogative, nor the immunity from statutes of limitation.
- (2) In an action against the Commonwealth or a State for breach of contract, section 64 would not disregard the need for servants of the Crown to have authority to contract on its behalf.⁴⁰
- (3) In an action in relation to the disposal of lands of the Crown, section 64 would not displace the restraints on disposal of Crown lands.⁴¹

33 (1962) 108 CLR 130.

34 Ibid 140.

35 (1999) 196 CLR 392 (*‘Mining Act Case’*).

36 Ibid 438–9. See further below n 101.

37 [1960] NSW 312. Note that recent cases have criticised the use of ‘the Crown’ in this context: see, eg, *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90, 149–50 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

38 *Commonwealth v Lawrence* [1960] NSW 312, 315.

39 Ibid.

40 Citing *New South Wales v Bardolph* (1934) 52 CLR 455. For a recent discussion of governments’ capacity to contract, see Nicholas Seddon, *Government Contracts: Federal, State and Local* (3rd ed, 2004) ch 2.

41 Citing *A-G (NSW) v Sydney Municipal Council* (1919) 20 SR (NSW) 46; *O’Keefe v Williams* (1910) 11 CLR 171. In *A-G (NSW) v Sydney Municipal Council*, Owen ACJ held that the Crown could only dispose of Crown lands in accordance with statutory provisions, which meant that a Minister could not create interests in land (through estoppel) that were not authorised by law: *A-G (NSW) v Sydney Municipal Council* (1900) 20 SR (NSW) 46, 58. In *O’Keefe v Williams*, Higgins J (dissenting) stated that the Crown was only bound by express covenants, and that it was not permissible to make Crown lands subject to implied covenants (in that case, a covenant of quiet enjoyment): *O’Keefe v Williams* (1910) 11 CLR 171, 219–20. The majority justices held that the grant of Crown land was subject to a covenant of quiet enjoyment, although Griffith CJ left open the possibility that the content of the covenant may not be ‘co-extensive in all respects’ as a like covenant between subject and subject: at 193. For a recent discussion of disposal of Crown lands, see Peter Butt, *Land Law* (4th ed, 2001) 764–6.

- (4) In an action for loss of services brought by the Commonwealth or a State (an action *per quod servitium amisit*), section 64 would not assimilate the Crown to the position of a private employer by treating someone as a ‘servant’ of the Crown who was not in fact a servant.⁴²

At the same time, however, section 64 of the *Judiciary Act* could not be intended to preserve, in every case, the special position of government; otherwise, the section would have no effect.⁴³ In particular, the reference in example (1) from *Commonwealth v Lawrence* to section 64 preserving the government’s immunity from limitation periods is directly contrary to *Maguire v Simpson*.⁴⁴ The challenge then is to discover some basis for distinguishing between those special privileges and immunities of government that are abrogated by section 64 and those that are retained. Professors Sykes and Hanks considered that cases such as *South Australia v Commonwealth* and *Commonwealth v Lawrence* provided ‘no intelligible discriminen’ for determining which special privileges and immunities of government are retained.⁴⁵ Similarly, Professor Zines argues that it is not possible to determine which functions are ‘inalienable’ to government.⁴⁶

B Recent Case Law on Functions Peculiar to Government

The ‘peculiar government function’ argument has been raised, unsuccessfully, in three recent cases. These cases support the statement in *Evans Deakin* that the words ‘as nearly as possible’ in section 64 of the *Judiciary Act* mean as *completely* as possible.⁴⁷ However, these cases also appear to accept that there might be some situations when section 64 does not operate.

1 British American Tobacco – *Recovery of Invalid Taxes*

In the first case of *British American Tobacco*, the question was whether a suit against Western Australia in federal jurisdiction could be subject to the notice requirements in the *Crown Suits Act 1947* (WA) (*‘WA Crown Suits Act’*). The *WA Crown Suits Act* confers a right to proceed against the State,⁴⁸ but requires

42 Citing *Commonwealth v Quince* (1944) 68 CLR 227. An action by an employer for loss of services requires that the injured person be a ‘servant’. Some government officials, such as members of the military and police constables, are not ‘servants’ for these purposes, but others are. Cf *Commonwealth v Quince* (1944) 68 CLR 227; *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237; *Commissioner for Railways (NSW) v Scott* (1959) 102 CLR 392. See generally Rosalie P Balkin and Jim L R Davis, *Law of Torts* (2nd ed, 1996) 593–7.

43 See Leslie Zines, *The High Court and the Constitution*, (4th ed, 1997) 371 referring to *Maguire v Simpson* (1977) 139 CLR 362, 402 (Mason J). Professor Zines considered that *Maguire v Simpson* had ‘clearly rejected’ the general proposition in *Commonwealth v Lawrence* that the character of the Crown cannot be ignored: at 370.

44 (1977) 139 CLR 362.

45 Pryles and Hanks, above n 7, 207.

46 Leslie Zines, ‘The Binding Effect of State Law on the Commonwealth’ in Matthew Groves (ed), *Law and Government in Australia* (2005) 1, 2 fn 6.

47 *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 427 (Kitto J) in *Evans Deakin* (1986) 161 CLR 254, 264 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

48 *Crown Suits Act 1947* (WA) s 5.

that notice of certain matters be given to the State as soon as practicable or within three months after the cause of action accrued.⁴⁹ Western Australia argued that noncompliance with section 6 meant that the plaintiff could not bring proceedings against the State to recover money paid pursuant to a constitutionally invalid tax. In the High Court, the plaintiff responded with the contention that section 6 of the *WA Crown Suits Act* was contrary to section 64 of the *Judiciary Act*.⁵⁰

Relevantly for present purposes, the Attorney-General of New South Wales (intervening) argued that the phrase ‘as nearly as possible’ took account of the peculiar government interest in the protection of public revenue. Accordingly, it was argued, section 64 did not prevent a State from relying on notice requirements in its Crown suits legislation to prevent a person from recovering money paid on account of a constitutionally invalid tax.

That argument was rejected by McHugh, Gummow and Hayne JJ (with whom Callinan J agreed).⁵¹ There is a fundamental constitutional principle that the executive cannot collect taxes without legislative authority.⁵² That legislative authority could not exist if the taxing legislation was contrary to the *Constitution*. Accordingly, the proceedings brought by the plaintiffs in *British American Tobacco* were ‘in furtherance of rather than in opposition to the operation of basic constitutional principle’.⁵³

Even so, the joint judgment in *British American Tobacco* appeared to accept that section 64 of the *Judiciary Act* preserves some of the executive governments’ special privileges and immunities. Specifically, their Honours appeared to accept that section 64 would not affect the so-called ‘*Auckland Harbour Board* principle’,⁵⁴ which holds that ordinary principles of estoppel do not prevent an executive government from recovering moneys that were spent without legislative authority.⁵⁵

2 Taudevin v Egis Consulting Australia Pty Ltd (No 1)⁵⁶ – State Unfair Contracts Legislation and Commonwealth Defence Contractors

In the second case of *Taudevin (No 1)*, Mr Taudevin sought orders under section 106 of the *Industrial Relations Act 1996* (NSW) (‘*NSW Industrial Relations Act*’) varying his contract of employment with Egis Consulting, and

49 *Crown Suits Act 1947* (WA) s 6.

50 The case was in federal jurisdiction because the plaintiff’s claim ‘arose under’ the *Constitution* (s 76(i) of the *Constitution*): *British American Tobacco* (2003) 217 CLR 30, 52 (McHugh, Gummow and Hayne JJ, with Callinan J agreeing).

51 *Ibid* 66.

52 See, eg, *A-G v Wilts United Dairies Ltd* (1922) 91 LJB 897, 900 in *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 579 (Brennan J). The joint judgment in *British American Tobacco* refers to the related principle that the executive cannot *spend* public money without legislative authority.

53 *British American Tobacco* (2003) 217 CLR 30, 65.

54 See *Auckland Harbour Board v The King* [1924] AC 318.

55 *Commonwealth v Burns* [1971] VR 825, 830 (Newton J) in *British American Tobacco* (2003) 217 CLR 30, 65. Note also that the *Judiciary Act* does not alter the common law position that a debt owed by a government cannot be garnished: see *Froelich v Howard* [1965] ALR 1117.

56 (2001) 131 IR 124 (‘*Taudevin (No 1)*’).

varying the arrangement that was said to exist between him and the Commonwealth. This arrangement arose because, allegedly, he was asked to provide intelligence reports for the Australian Government while working as an aid worker in East Timor.

In this case, section 64 of the *Judiciary Act* was relied on to remove the Commonwealth's immunity from suit (rather than to apply the *NSW Industrial Relations Act* to the Commonwealth).⁵⁷ The Commonwealth argued that section 64 did not operate because the Commonwealth was performing a function peculiar to government. This argument was rejected by the New South Wales Industrial Relations Commission. Three points can be noted.

First, the Commission appeared to equate 'functions peculiar to government' with an immunity of the Commonwealth 'in the area of Crown prerogative'.⁵⁸

Second, the Commission exhibited some reluctance to find that non-statutory powers of the executive government were immune from judicial scrutiny.⁵⁹ The Commission referred, with approval, to statements by Professor Winterton that 'civil liberty would be greatly imperilled if the determination of "necessity" [as used to determine whether a particular power came within the prerogative] were left to the government itself'.⁶⁰ This reluctance would favour a relatively narrow view of whether a function was peculiar to government for the purposes of section 64.

Third, the Commission concluded that, on the material available, there was no suggestion that the work said to be done by Mr Taudevin was concerned with the exercise of a prerogative power by the Commonwealth.⁶¹ In reaching this conclusion, the Commission seems to have considered that the proceedings could not concern a function peculiar to government because Egis Consulting (a private company) was obtaining precisely the same information.⁶²

3 Victorian WorkCover Authority v Commonwealth⁶³ – *Statutory Indemnity to Recover Compensation Payments*

In the final case, *VWA v Commonwealth*, the question was whether the Victorian WorkCover Authority ('VWA') could rely on section 138(1) of the

57 The Commonwealth argued that *Commonwealth v Mewett* – where a plurality held that the conferral of federal jurisdiction over s 75(iii) cases removes the Commonwealth's immunity from suit – was limited to common law causes of action: *Taudevin (No 1)* (2001) 131 IR 124, 147. The Commonwealth argued further that s 56 of the *Judiciary Act* was not applicable, because an action under s 106 of the *Industrial Relations Act 1996* (NSW) was not 'in contract or tort': at 148.

58 *Taudevin (No 1)* (2001) 131 IR 124, 152. Here, the Commission seems to be using 'prerogative' in the sense of powers that are unique to the Crown (rather than all non-statutory powers of the Crown). On the different meanings of the 'prerogative', see George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 425–6.

59 *Taudevin (No 1)* (2001) 131 IR 124, 153.

60 George Winterton, *Parliament, The Executive and the Governor-General – A Constitutional Analysis* (1983) 115–16 in *Taudevin (No 1)* (2001) 131 IR 124, 153.

61 *Taudevin (No 1)* (2001) 131 IR 124, 153.

62 *Ibid* 152; see also 144, 146, addressing a constitutional immunity argument. The Commission commented that the Commonwealth's stance meant that the Commission had only limited material before it at that stage: at 153.

63 (2004) 187 FLR 296 ('*VWA v Commonwealth*').

Accident Compensation Act 1985 (Vic) (*‘Victorian Compensation Act’*) to seek a partial indemnity from the Commonwealth.

Under section 138(1), the VWA has a right to be indemnified by a third party, if a third party is liable for an injury which has attracted a workers compensation payment. Here, the VWA had made compensation payments to Ms Stewart, who was injured in 1998 in a café on Commonwealth-owned land. The Commonwealth accepted that it, as occupier, was partly liable for Ms Stewart’s injury. Justice Kaye held that section 138(1) did not apply to the Commonwealth of its own force.⁶⁴ Accordingly, the question was whether section 138(1) was applied to the Commonwealth by section 64 of the *Judiciary Act*.

The Commonwealth argued that section 64 did not operate because proceedings under section 138(1) of the *Victorian Compensation Act* are only ever brought by the VWA. Therefore, it was argued, the VWA was performing a function peculiar to government, and there was no comparable suit ‘between subject and subject’ by reference to which the Commonwealth’s rights could be equalised under section 64.

Justice Kaye held, however, that a function is only ‘peculiar’ to the government in that sense if the function involves particular rights, immunities and privileges peculiar to the Crown.⁶⁵ Section 138(1) was not ‘peculiar’ because an indemnity proceeding was the sort of suit that could be brought between subjects. Justice Kaye held that, in any event, employers were legally entitled to bring indemnity proceedings under section 138(1).⁶⁶ Section 138(1) could, therefore, be applied to the Commonwealth by section 64 of the *Judiciary Act*.

In my view, none of these recent cases provides any clear guidance on which government functions will be ‘peculiar’. Both *Taudevin (No 1)* and *VWA v Commonwealth* refer to the prerogative powers (that is, special privileges and immunities of the Crown). However, as noted at the outset of this discussion, section 64 of the *Judiciary Act* is clearly designed to abrogate at least some of the Commonwealth’s and the States’ special privileges and immunities; otherwise, it would have no effect.

C Three Other Arguments to Avoid the Application of Section 64

Before attempting to identify which functions are ‘peculiar’ to government, it may be useful to consider three other arguments that may be deployed to avoid the operation of section 64 of the *Judiciary Act*.

1 Section 64 Can Be Displaced by Other Commonwealth Legislation

The first argument is that section 64 of the *Judiciary Act* might, in some circumstances, be displaced by other Commonwealth legislation. For example, if Commonwealth legislation does not apply to the Commonwealth or the States,

⁶⁴ Ibid 313–14.

⁶⁵ Ibid 309; see also 311 citing *Commonwealth v Lawrence* [1960] NSW 312.

⁶⁶ *VWA v Commonwealth* (2004) 187 FLR 296, 312. Moreover, the Victorian WorkCover Authority was assigned, by statute, the rights of the authorised insurer. Therefore, these rights were capable of being the same as in a suit between subject and subject: at 310.

that legislation will not be applied by section 64. The other Commonwealth legislation is taken to repeal section 64 to this extent.⁶⁷ Similarly, if State legislation is inconsistent with other Commonwealth legislation under section 109 of the *Constitution*, that State legislation will not be applied by section 64.⁶⁸ It would seem to follow that section 64 would not apply Territory legislation that was repugnant to other Commonwealth legislation,⁶⁹ and would not apply State or Territory legislation if another Commonwealth Act ‘otherwise provided’ for the purposes of section 79 of the *Judiciary Act*.⁷⁰

Consequently, the ‘peculiar government function’ exception (whatever its scope) will not arise when the Commonwealth is performing a statutory function. That is because section 64 of the *Judiciary Act* only operates on common law principles and State or Territory legislation, and section 64 will not pick up a State Act that ‘alter[s], impair[s] or detract[s] from’⁷¹ a Commonwealth statutory function (nor presumably a common law principle or Territory Act that has this effect). Equally, a State will not need to argue that it is performing a ‘peculiar government function’ if other Commonwealth legislation has displaced the operation of section 64. These points are illustrated by *DTR Securities Pty Ltd v Deputy Commissioner of Taxation*.⁷²

The question in *DTR Securities* was whether an action for the recovery of ‘additional tax’ under the *Income Tax Assessment Act 1936* (Cth) (*ITAA 1936*) was subject to the limitation period in section 18(1) of the *Limitation Act 1969* (NSW) (*NSW Limitation Act*).

The New South Wales Court of Appeal focused on whether the Deputy Commissioner was performing a function peculiar to government. Justice of Appeal McHugh (with Glass JA agreeing) held the application of section 18(1) would not interfere with any fiscal right of the Commonwealth.⁷³ Justice of Appeal Samuels, in dissent, considered that the application of the *NSW Limitation Act* to the recovery of Commonwealth revenue would inhibit the exercise of the critical government function of assessing and collecting tax.⁷⁴

67 *Bass* (1999) 198 CLR 334, 351–2 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

68 *Dao v Australian Postal Commission* (1987) 162 CLR 317, 330–2; *Deputy Commissioner of Taxation (Qld) v Moorebank Pty Ltd* (1988) 165 CLR 55, 64. When a State Act is only partially inconsistent with a Commonwealth Act, s 64 may be able to operate on so much of the State Act that is not inconsistent: *Evans Deakin* (1986) 161 CLR 254, 265 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

69 The test for determining whether NT legislation is in conflict with Commonwealth legislation is one of ‘repugnancy’: see *Northern Territory v GPAO* (1999) 196 CLR 553, 579–83 (Gleeson CJ and Gummow J, with Hayne J agreeing). Note that ACT legislation is of no effect if it cannot operate concurrently with Commonwealth legislation: see *Australian Capital Territory Self-Government Act 1988* (Cth) s 28.

70 State or Territory legislation regulating the exercise of jurisdiction does not apply of its own force to the exercise of federal jurisdiction. It is applied as federal law by s 79 of the *Judiciary Act*. An inconsistency between such a State Act (as applied by s 79) and another Commonwealth Act is not resolved by s 109 of the *Constitution*, but by s 79. See generally Hill and Beech, above n 19, 36–9.

71 See, eg, *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J) in *Telstra v Worthing* (1999) 197 CLR 61, 76.

72 (1987) 8 NSWLR 204 (*‘DTR Securities’*).

73 *Ibid* 220. In support of this conclusion, McHugh JA noted that s 18 of the *Limitation Act 1969* (NSW) would be applied by s 64 of the *Judiciary Act* as a Commonwealth law: at 220.

74 *DTR Securities* (1987) 8 NSWLR 204, 214.

In the High Court, however, the interpretation of the *ITAA 1936* was the decisive factor. The Court held that the *NSW Limitation Act* was inconsistent with the *ITAA 1936*, with the consequence that section 18(1) could not be applied by section 64 of the *Judiciary Act*.⁷⁵ Accordingly, it was not necessary for the High Court to consider whether section 64 could ‘apply the provisions of State laws in circumstances where their application would interfere with the discharge of an essentially government function such as the collection of taxes’.⁷⁶

2 State or Territory Legislation or Common Law Principle Inapplicable in Its Terms

Second, it might be possible to argue that the State or Territory legislation, or common law principle, is not capable of applying to the Commonwealth or States, even as ‘translated’ by section 64 of the *Judiciary Act*. Section 64 is capable of applying State and Territory legislation to the Commonwealth or a State when that legislation does not otherwise apply to a government. However, section 64 does not authorise a court to rewrite State or Territory legislation if there is some other reason why it cannot apply to the Commonwealth or a State.

These points are illustrated by *Austral Pacific*. It will be recalled that the question in that case was whether Airservices was liable to make payments under the *Queensland Reform Act*, which provided for contributions between tortfeasors. The High Court accepted that section 64 was capable of applying the Act to Airservices. However, the relevant provisions only permitted contributions to be obtained from a third party ‘who is, or would if sued have been, liable’.⁷⁷ Under sections 44 and 45 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), Airservices would only be ‘liable’ for these purposes if its employee had made an election. No election had been made. Therefore, although section 64 could apply the *Queensland Reform Act* to Airservices, Airservices was not liable to make a contribution under that Act.⁷⁸

Accordingly, it will be unnecessary to rely on the ‘peculiar government function’ exception if there is something about the nature of the function (rather than the nature of the functionary) which makes the relevant common law principle or State or Territory Act inapplicable in its terms. To take a simple example, section 64 is capable of applying State unfair contracts legislation to the Commonwealth, but section 64 would not convert a political agreement where

75 *Deputy Commissioner of Taxation v DTR Securities Pty Ltd* (1988) 165 CLR 56, 69.

76 See *Deputy Commissioner of Taxation (Qld) v Moorebank Pty Ltd* (1988) 165 CLR 56, 68, which was heard together with an appeal from *DTR Securities (Deputy Commissioner of Taxation v DTR Securities Pty Ltd* (1988) 165 CLR 56).

77 *Law Reform Act 1995* (Qld) s 6(c).

78 *Austral Pacific* (2000) 203 CLR 136, 148–9 (Gleeson CJ, Gummow and Hayne JJ), 159 (McHugh J), 170 (Callinan J).

there was no intention to create legal relations into a ‘contract’.⁷⁹ This point also explains the fourth example from *Commonwealth v Lawrence* set out earlier – in an action for loss of services brought by the Commonwealth or a State (where it is necessary to establish that the person is a servant), section 64 would not treat a person as a ‘servant’ who was not in fact a servant.⁸⁰

3 *Suit ‘between Subject and Subject’*

Third, in some cases, it may be possible to argue that there is no comparable suit ‘between subject and subject’. Justice Hayne made this point in the *Mining Act Case*, in rejecting an argument by Western Australia that section 64 of the *Judiciary Act* applied the *Mining Act 1978* (WA) to land owned by the Commonwealth:

That is not to make the rights of the parties to the present proceeding as nearly as possible the same as they would be in a suit between *subject and subject*. [Western Australia] seeks to make the rights of the parties to the present proceeding as nearly as possible the same as they would be in a suit between *the State* and a subject.⁸¹

I would suggest that the phrase ‘between subject and subject’, combined with the reference to a ‘suit’, means that section 64 only equates the rights of the Commonwealth and the States to those of a subject when the proceedings raise issues that could arise between subjects.⁸²

That analysis, if accepted, would mean that section 64 would not operate in criminal proceedings or judicial review proceedings. It is true that each type of proceeding *can* arise between subjects in limited circumstances – criminal proceedings may be brought by way of private prosecution,⁸³ and judicial review

79 See *DTR Securities* (1987) 8 NSWLR 204, 219 (McHugh JA) referring to *South Australia v Commonwealth* (1962) 108 CLR 130. In the *Mining Act Case*, Gummow J held that s 64 of the *Judiciary Act* would not apply State mining legislation to Commonwealth owned land because ‘[t]he phrase “as nearly as possible” could not operate to alter the nature of respective rights in relation to different subject matter’: *Mining Act Case* (1999) 196 CLR 392, 438–9. Of course, s 64 can have the effect of applying some State or Territory legislation to the Commonwealth that otherwise would not apply: see above n 8.

80 See above n 42.

81 *Mining Act Case* (1999) 196 CLR 392, 476 (emphasis in original). There were other reasons why s 64 could not apply; in particular, proceedings in the Western Australian mining court did not involve a ‘suit’: at 414 (Gleeson CJ and Gaudron J), 439 (Gummow J).

82 See Zines, ‘Binding Effect of State Law’, above n 46, 3. Zines observes that the definition of ‘cause’ in the *Judiciary Act* expressly includes criminal proceedings. ‘Suit’, by contrast, is defined in s 2 as including ‘any action or original proceeding between parties’. Cf *DTR Securities* (1987) 8 NSWLR 204, 218 (McHugh JA), who stated that the phrase ‘between subject and subject’ in s 64 of the *Judiciary Act* meant ‘as if it were a suit between subject and subject’.

83 See, eg, *National Australia Bank Ltd v McFarlane* (2005) Aust Torts Reports 81-819, 68,095; Alec Samuels, ‘Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals’ [1986] *Criminal Law Review* 33.

may sometimes be available against a non-government body.⁸⁴ However, these limited exceptions do not alter the character of criminal or judicial review proceedings. Private prosecutions are an ‘exceptional case’,⁸⁵ with the criminal trial ordinarily involving ‘an accusatorial process in which the power of the State is deployed against an individual accused of crime’.⁸⁶ Judicial review is only concerned with the exercise of ‘public’ powers (even when sought against a non-government body). Consequently, I would argue, neither criminal proceedings nor judicial review proceedings can be equated to a ‘suit’ ‘between subject and subject’ for the purposes of section 64 of the *Judiciary Act*.

(a) *Criminal and ‘Regulatory’ Proceedings*

Admittedly, there was probably never a question of section 64 subjecting one government to a criminal liability imposed by another government.⁸⁷ However, my suggested analysis would mean that section 64 would not operate in criminal proceedings brought by a government against a citizen. Moreover, this analysis would also prevent section 64 from operating in ‘regulatory’ proceedings (that is, proceedings where a government is seeking a penalty) because these proceedings do not arise between subject and subject. These ‘regulatory’ proceedings would include customs prosecutions⁸⁸ and proceedings under the *Corporations Act 2001* (Cth) to disqualify a person as a director.⁸⁹

An argument that section 64 of the *Judiciary Act* does not operate in ‘regulatory’ proceedings might seem at first to be contrary to *Naismith v*

84 The availability of review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) would depend on whether the decision is made ‘under’ a Commonwealth Act: on this issue, see, eg, *NEAT Domestic Pty Ltd v AWB Limited* (2003) 216 CLR 277; Graeme Hill, ‘The *Administrative Decisions (Judicial Review) Act* and “under an Enactment”: Can *NEAT Domestic* Be Reconciled with *Glasson*?’ (2004) 11 *Australian Journal of Administrative Law* 135. The availability of common law judicial review would depend on whether the non-government body is performing a ‘public’ function: on this issue, see, eg, *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd (No 2)* (2004) 186 FLR 289, 290–2 (Shaw J); Andrew Buckland and Jayne Higginson, ‘Judicial Review of Decisions by Private Bodies’ (2004) 42 *Australian Institute of Administrative Law Forum* 37; Justice Raymond Finkelstein, ‘Crossing the Intersection: How Courts Are Navigating the “Public” and “Private” in Judicial Review’ (2006) 48 *Australian Institute of Administrative Law Forum* 1.

85 See *Davern v Messel* (1984) 155 CLR 21, 67 (Deane J, dissenting in the result).

86 *R v Carroll* (2002) 213 CLR 635, 643 (Gleeson CJ and Hayne J).

87 It would take the clearest possible statement of intention to conclude that one polity intended to subject another polity to a criminal offence: see, eg, *Telstra v Worthing* (1999) 197 CLR 61, 75. Accordingly, a general provision like s 64 would not be construed as intending to subject a State to a criminal offence that otherwise would not be applicable.

88 See *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

89 See *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 (‘*Rich*’). In *Rich*, the High Court emphasised that the application of the privilege against exposure to penalty depended on whether the relief sought was a ‘penalty’, and not whether the proceedings were ‘punitive’ rather than ‘protective’: at 144–7, 116–18 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also *Diez v DPP (Cth)* (2004) 62 NSWLR 1, 10, where an argument was raised (but ultimately not pressed) that s 64 of the *Judiciary Act* could make the Commonwealth liable to pay costs for proceedings under the *Proceeds of Crime Act 1987* (Cth).

McGovern.⁹⁰ The High Court held in that case that the Commonwealth's common law immunity from discovery was removed in a taxation prosecution. However, that result did not depend solely on section 64, but also on section 237 of the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) which applied 'the usual practice and procedure of the Court in civil cases' to taxation prosecutions.⁹¹ I would suggest that, without section 237, a taxation prosecution could not have been compared to a suit 'between subject and subject' for the purposes of section 64 of the *Judiciary Act*.

(b) Judicial Review Proceedings

In addition, the argument that section 64 requires a comparable suit between subject and subject might also exclude judicial review proceedings from the scope of section 64. Of course, there is no sharp division between 'civil' and 'judicial review' proceedings because questions of public law, such as the ultra vires actions of public officials, can arise in 'private' law proceedings (particularly actions in tort).⁹² Again, however, the category of 'judicial review' proceedings can be defined by reference to the relief that is sought – generally remedies such as mandamus, prohibition and certiorari can only be sought against the government.⁹³

Admittedly, this third argument is closely related to the issue of peculiar government functions. In *VWA v Commonwealth*, for example, Kaye J determined whether there was a suit 'between subject and subject' by considering whether the Commonwealth was performing a function peculiar to government. Even so, I would argue that there is an advantage in considering the requirement for a suit 'between subject and subject' separately because it provides a simple reason for section 64 of the *Judiciary Act* not to apply in certain types of proceeding. More generally, if any of the three alternative arguments considered here is made out, it will not be necessary to consider whether the Commonwealth or State was performing a function peculiar to government.

D Preferred Test for Peculiar Government Functions

To complete the analysis of peculiar government functions, I will set out my preferred test for determining which government functions are 'peculiar' such that section 64 of the *Judiciary Act* does not operate.

90 (1953) 90 CLR 336. The NSW Court of Appeal in *DTR Securities* certainly understood *Naismith v McGovern* as precluding this argument: *DTR Securities* (1987) 8 NSWLR 204, 218 (McHugh JA), 213 (Samuels JA, dissenting in the result).

91 See *Naismith v McGovern* (1953) 90 CLR 336, 341.

92 See *Enfield City Corporation v Development Assessment Corporation* (2000) 199 CLR 135, 143–4.

93 But see above n 84. Note that when an obligation of natural justice is implied from a contract, the court does not order prerogative remedies: see, eg, *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759, 780 (Campbell J); Daniel Stewart, 'Non-Statutory Review of Private Decisions by Public Bodies' (2005) 47 *Australian Institute of Administrative Law Forum* 17, 27.

1 *Prerogative Powers and Commonwealth's Immunity from State Law Are Not Relevant*

As noted earlier, cases such as *Taudevin (No 1)* and *VWA v Commonwealth* suggest that a government function is 'peculiar' if the Commonwealth or State is exercising privileges or immunities of government (prerogative powers). With respect, this does not seem to be the relevant test because the clear purpose of section 64 is to abrogate at least some of the Commonwealth's and States' special privileges and immunities. For example, *Naismith v McGovern* held that section 64 abrogated the governmental immunity from discovery, and *Maguire v Simpson* held that section 64 abrogated the governmental immunity from limitation periods.

A related point is that the Commonwealth's constitutional immunity from State laws does not appear to be the relevant test either. On current authorities, the States cannot affect the Commonwealth's executive capacities, but can regulate the Commonwealth in the exercise of those capacities.⁹⁴ One of the Commonwealth's executive capacities is its immunity from suit, which cannot be affected by State law.⁹⁵ However, *Evans Deakin* indicates that section 64 of the *Judiciary Act* can and does abrogate this immunity.⁹⁶ Moreover, the Commonwealth has clear constitutional power to affect its own executive capacities, and also has the constitutional power to affect the States' executive capacities.⁹⁷ Therefore, there is no constitutional reason for using the Commonwealth's implied immunity from State law as the basis for determining the scope of section 64 of the *Judiciary Act*.

2 *Analogy with the Melbourne Corporation Doctrine*⁹⁸

However, as I will explain, the limits on the Commonwealth's legislative power to alter the rights of the States in federal cases do seem to provide a useful means for identifying the special privileges and immunities that fall outside the scope of section 64 of the *Judiciary Act*.

The most obvious limit on the Commonwealth's power to affect the rights of the States in federal cases is the States' constitutional immunity from Commonwealth laws (the *Melbourne Corporation* doctrine). This doctrine provides a close point of comparison with section 64. The *Melbourne Corporation* doctrine limits the extent to which the Commonwealth can treat the States in the same way as citizens, just as the phrase 'as nearly as possible' limits the extent to which section 64 equates the rights of the States (or the Commonwealth) with the rights of a subject.

The relevant aspect of the *Melbourne Corporation* doctrine is that which prevents a Commonwealth law from interfering with the 'integrity and

94 *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410.

95 *Ibid* 447 (Dawson, Toohey and Gaudron JJ).

96 See above n 27.

97 *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, 424–5 (Brennan CJ), 440–1 (Dawson, Toohey and Gaudron JJ).

98 See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

autonomy’ of the States.⁹⁹ To take a simple example of a function peculiar to government, it seems most unlikely that section 64 could operate so as to require a State to disclose Cabinet documents. An integrity and autonomy analysis supports this intuition – there is a question whether a Commonwealth law could validly compel the disclosure of State Cabinet documents whenever those documents were sought by a party, rather than, for example, making disclosure subject to a claim of public interest immunity.¹⁰⁰ If that result could not be achieved directly, it is unlikely that section 64 could achieve that result *indirectly*, by applying common law principles or State legislation that otherwise would not apply.¹⁰¹ The phrase ‘as nearly as possible’ recognises this constitutional limit on Commonwealth power.¹⁰²

What does this analysis mean for section 64 of the *Judiciary Act* in its application to the Commonwealth? As far as section 64 applies to the Commonwealth, there is no constitutional question of section 64 interfering with the Commonwealth’s ‘integrity and autonomy’. To take the example used earlier, a Commonwealth law could probably require the disclosure of *Commonwealth* Cabinet documents.¹⁰³ Even so, the wording of section 64 strongly indicates that it is intended to have the same operation in relation to the Commonwealth as it has in relation to the States.¹⁰⁴ Accordingly, I would argue, as a matter of statutory construction, section 64 preserves for the Commonwealth the same sorts of rights that are preserved for the States by the *Melbourne Corporation* doctrine. Consistently with this argument, it has been suggested that section 64 would not

99 See, eg, *Re Australian Education Union; Ex parte Victoria* (1994) 184 CLR 188, 232–3. Notions of discrimination are not relevant here because a Commonwealth law does not ‘discriminate’ for these purposes by removing a privilege that only a State has: *Queensland Electricity Corporation v Commonwealth* (1985) 159 CLR 192, 217 (Mason J). In any event, it is unclear, following *Austin v Commonwealth* (2003) 215 CLR 185, whether discrimination is a freestanding criterion of invalidity: see, eg, Amelia Simpson, ‘State Immunity from Commonwealth Laws: *Austin v Commonwealth* and Dilemmas of Doctrinal Design’ (2004) 32 *University of Western Australia Law Review* 44, 50–5.

100 By analogy, Brennan J noted whether the *Melbourne Corporation* doctrine would limit the ability of a Commonwealth search and seizure law to compel the production of State Cabinet documents: *Jacobsen v Rogers* (1995) 182 CLR 572, 597–8. In court proceedings, there is no absolute immunity from disclosing Cabinet documents; however, a court would only order the disclosure of Cabinet documents in civil proceedings in ‘quite exceptional circumstances’: *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

101 There is a general principle that the Commonwealth or a State cannot do indirectly what the *Constitution* prohibits it from doing directly. For example, if a State tax is contrary to s 92 of the *Constitution*, then the State cannot bar the recovery of that invalid tax because that would be to do indirectly what the State is prohibited from doing directly: see *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83.

102 Even without this phrase, s 64 of the *Judiciary Act* would be ‘read down’ so as to be consistent with the *Melbourne Corporation* doctrine under s 15A of the *Acts Interpretation Act 1901* (Cth).

103 Note, however, that Brennan J referred to the possibility that s 61 of the *Constitution* might provide the Commonwealth Cabinet with the same sort of protection as provided to State Cabinets by the *Melbourne Corporation* doctrine: *Jacobsen v Rogers* (1995) 182 CLR 572, 598. See also Geoffrey Lindell, ‘Parliamentary Inquiries and Government Witnesses’ (1995) 20 *Melbourne University Law Review* 383, 401–2, raising a question whether there might be a constitutional implication that would limit the power of the Commonwealth Parliament to override an executive privilege of the Commonwealth executive government.

104 A point that was made in *Commissioner for Railways (Qld) v Peters* (1991) 24 NSWLR 407: see below nn 131, 135.

operate if to equate the rights of the Commonwealth with those of a subject would be ‘incompatible with the position of the Commonwealth’.¹⁰⁵

Of course, sometimes an element of translation may be necessary. For example, defence activities would seem to be one of the clearest examples of a peculiar government function. However, as defence activities are only engaged in by the Commonwealth,¹⁰⁶ there is no easy application of *Melbourne Corporation* principles to these activities. Even so, general notions of constitutional immunity could well be relevant in this situation.¹⁰⁷

3 Examples from Commonwealth v Lawrence

This analysis can be tested by considering again the examples from *Commonwealth v Lawrence* referred to earlier.

(a) Priority in Liquidation and Immunity from Limitation Periods

Example (1) was the priority of government debts in liquidation and their immunity from limitation periods. An ‘integrity and autonomy’ analysis would support the view that this example should no longer be followed. The Commonwealth has clear constitutional power to alter the States’ and its own priority in liquidation,¹⁰⁸ and would seem to have ample legislative power to remove the States’ and its own immunity from limitation periods in federal cases.¹⁰⁹ (In any event, the reference to section 64 preserving the governments’ immunity from limitation periods is contrary to *Maguire v Simpson*.)

(b) Disposition of Crown Land

Example (3) was the special rules relating to the disposition of Crown land. A direct application of ‘integrity and autonomy’ is complicated by the Commonwealth’s express power to acquire property from the States on just terms (section 51(xxxi) of the *Constitution*).¹¹⁰ Even so, general notions of inter-governmental immunity are likely to limit the extent to which government owned land could be equated with privately owned land. For example, Commonwealth restrictions on the use of land might not be able to apply to the buildings that

105 See *DTR Securities* (1987) 8 NSWLR 204, 214 (Samuels JA, dissenting in the result) adopting *Evans Deakin* (1986) 161 CLR 254, 265 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

106 Under s 114 of the *Constitution*, the States cannot raise or maintain any naval or military force without the consent of the Commonwealth Parliament.

107 As noted, Gummow J held in the *Mining Act Case* that s 64 of the *Judiciary Act* would not apply State mining legislation to land acquired by the Commonwealth for defence purposes because the Commonwealth was performing a function peculiar to government: see above n 36 and accompanying text. However, Gleeson CJ and Gaudron J held that the Commonwealth did not have any implied immunity in relation to land owned for defence purposes: *Mining Act Case* (1999) 196 CLR 392, 418.

108 See *Commissioner of Taxation for the Commonwealth v EO Farley Ltd (in liq)* (1940) 63 CLR 278.

109 At least those limitation periods which bar the remedy. A Commonwealth law removing an immunity from this sort of limitation period would be supported by s 77 and s 51(xxxix) of the *Constitution*: see below Part IV(C)(2).

110 It should be noted that, with limited exceptions, an interest in land owned by the Commonwealth can only be disposed of in accordance with Pt X of the *Lands Acquisition Act 1989* (Cth): see *Lands Acquisition Act 1989* (Cth) s 117. This express provision will override s 64 of the *Judiciary Act*: see above Pt III(C)(1).

house the principal organs of a State.¹¹¹ In many situations, however, a government may be subject to the same laws as a citizen in dealing with its land.¹¹²

(c) *Action for Loss of Services*

Example (4) was that, in an action for loss of services brought by the Commonwealth or a State, section 64 of the *Judiciary Act* would not treat a person as a ‘servant’ who was not. As noted, this example illustrates that section 64 will not apply a common law principle or State or Territory Act that is inapplicable in its terms, even when ‘translated’ by section 64.¹¹³ Moreover, it should also be noted that there are constitutional limits on the Commonwealth’s powers to affect the relations between a State and its employees, particularly those engaged at the higher levels of government.¹¹⁴

(d) *Special Rules for Contracting on Behalf of Government*

The remaining example in *Commonwealth v Lawrence* was the special rules for authority to contract on behalf of the government (example (2)). There is a good argument that section 64 would preserve these special rules, given that section 64 preserves the operation of the *Auckland Harbour Board* principle. Both principles are concerned with proper controls on how public money is spent. Arguably, section 64 is not concerned to override a common law principle or legislation that promotes the accountability of the executive.

An ‘integrity and autonomy’ analysis tends towards the same result. It is likely that the *Melbourne Corporation* doctrine would place some limits on the Commonwealth’s power to affect how a State Parliament controls a State

111 *Tasmania v Commonwealth* (1983) 158 CLR 1, 214 (Brennan J) (*‘Tasmanian Dam Case’*). Justice Gummow has noted that there would be a ‘serious constitutional question’ if a State purported to take or resume land owned by the Commonwealth: *Mining Act Case* (1999) 196 CLR 392, 435. Similarly, one State cannot compulsorily acquire property in another State: see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 543–4 (Brennan CJ, dissenting in the result), 558 (Dawson J, dissenting in the result), 586 (McHugh J, dissenting in the result). In any event, proceedings raising issues about resumption of land are unlikely to satisfy the statutory requirement for a comparable suit ‘between subject and subject’.

112 For example, *Whiteford v Commonwealth* (1995) 38 NSWLR 100 held that s 64 could apply to the Commonwealth a NSW provision that required a landlord to bring proceedings for possession of a residential property in a State tribunal, rather than a court. The NSW Court of Appeal rejected an argument that the words ‘as nearly as possible’ meant that s 64 did not operate in that case: at 109–10 (Kirby P), 113 (Sheller JA). In the *Mining Act Case*, Gleeson CJ and Gaudron J stated that there was no general constitutional difficulty with legislation of one polity applying to land held by another polity: *Mining Act Case* (1999) 196 CLR 392, 409. Previously, there was an argument that ‘[t]he Commonwealth [was] not bound by State legislation which would adversely affect its property, revenue or prerogatives’: see *Trade Practices Commission v Manfal Pty Ltd (No 2)* (1990) 27 FCR 22, 31 (Wilcox J, with Northrop J agreeing).

113 See above n 42. Note that, in many respects, there may be no objection to assimilating government contracts of employment with private employment contracts: see, eg, *Jarratt v Commissioner of Police (NSW)* (2005) 221 ALR 95, 108, 111 (McHugh, Gummow and Hayne JJ).

114 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 233; *Victoria v Commonwealth* (1996) 187 CLR 416, 503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

executive government,¹¹⁵ and the Commonwealth's power to prescribe rules about when a person had the necessary authority to contract on behalf of a State. There may perhaps be no objection to a Commonwealth law touching on or regulating these areas. However, section 64 (if applicable) would abrogate entirely the special principles that would otherwise apply. That complete abrogation, as distinct from mere regulation, may intrude too much on the States' integrity and autonomy.¹¹⁶

4 *Other Limits on the Commonwealth's Legislative Power to Affect Rights of States*

Apart from the *Melbourne Corporation* doctrine (which is an implied limit on Commonwealth power), there is an issue of the Commonwealth's positive power to enact legislation affecting the rights of the States. This issue arises because section 64 of the *Judiciary Act* operates on any case in federal jurisdiction to which a State is party, regardless of whether the State is a plaintiff or defendant, and regardless of whether the rights in issue derive from Commonwealth legislation or not.¹¹⁷

As I explain below,¹¹⁸ the legislative sources of power for section 64, in its application to the States, seem to be section 78 of the *Constitution* (which is limited to conferring 'rights to proceed') and sections 51(xxxix) and 77 (which enable the Commonwealth to enact measures incidental to the conferral or exercise of federal jurisdiction). That in turn means that section 64, in its application to the States, may only operate on laws that regulate the exercise of jurisdiction. That argument, if accepted, would be reason to limit section 64 to abrogating those government privileges and immunities that relate to a government as litigant, but not other privileges and immunities that affect a State's substantive rights and liabilities.

Of course, these constitutional considerations do not directly affect section 64 in its application to the Commonwealth. To this extent, section 64 is wholly

115 The *Auckland Harbour Board* principle is the corollary of the basic constitutional principle that the executive government cannot spend money without legislative authority. In *Solomons*, Kirby J stated that '[s]ubject to the *Constitution* [particularly s 105A], the power of a State to control its finances, to raise income and expend monies from out of its Consolidated Revenue Fund as it sees fit, is a prerequisite to the viability of the State as a polity within the Commonwealth': *Solomons* (2002) 211 CLR 119, 168–9.

116 Admittedly, the distinction between mere regulation and substantial interference may not always be obvious; however, this distinction seems to have been important in *Austin v Commonwealth* in determining whether a Commonwealth law infringed on a State's 'integrity and autonomy'. In that case, Commonwealth taxing laws of general application could affect the remuneration of State judges, but Commonwealth laws could not substantially interfere with the States' freedom to determine the method of remunerating State judges: *Austin v Commonwealth* (2003) 215 CLR 185, 263, 264 (Gaudron, Gummow and Hayne JJ). By analogy, Professor Zines argues that the existing doctrine of Commonwealth immunity from State laws turns on a similar distinction between prohibition and regulation (although he is critical of that result): Leslie Zines, 'The Nature of the Commonwealth' (1998) 20 *Adelaide Law Review* 83, 92–3.

117 When a State is a defendant, s 64 of the *Judiciary Act* is at least partly supported by s 78 of the *Constitution*. When the rights at issue owe their existence to Commonwealth law, the head of power under which that law was enacted would also support a Commonwealth law removing the States' immunity from suit, and removing the States' various privileges and immunities as litigants.

118 See below Part IV(C)(2).

supported by the Commonwealth's executive power (section 61 of the *Constitution*), read with the express incidental power (section 51(xxxix) of the *Constitution*). However, it could again be argued that section 64 is intended to have the same scope in relation to both the Commonwealth and the States. According to this argument, the limits that are constitutionally required when section 64 applies to the States would be picked up as a matter of statutory construction when section 64 applies to the Commonwealth.¹¹⁹

E Summary of Functions Peculiar to Government

This section of the article has considered suggestions that section 64 of the *Judiciary Act* will not operate when the Commonwealth or a State is performing a function peculiar to government. Cases such as *British American Tobacco* appear to accept that there are some privileges and immunities that are not removed by section 64; however, it has been difficult to identify what those special privileges and immunities are. I have suggested that the prerogative, and the Commonwealth's constitutional immunity from State law, are not the relevant tests. That is because section 64 clearly abrogates at least some of the Commonwealth's and States' prerogative immunities and privileges, and section 64 also affects at least some of the Commonwealth's and States' executive capacities.

Instead, the States' constitutional immunity from Commonwealth law (particularly notions of 'integrity and autonomy') seems to provide a more useful means for distinguishing between privileges and immunities that are abrogated by section 64 of the *Judiciary Act*, and those that are not. Of course, these constitutional notions do not apply when section 64 is directly applied to the Commonwealth. However, I have suggested that the same limits would apply as a matter of statutory construction to section 64 in its application to the Commonwealth because section 64 is intended to have the same scope of operation in relation to the Commonwealth as it has in relation to the States.

Finally, it should be remembered that there are other arguments that can be deployed to avoid the operation of section 64. First, section 64 may be displaced by other Commonwealth legislation. Second, there may be something about the nature of the function being performed that means that the State or Territory legislation or common law principle is inapplicable in its terms, even as 'translated' by section 64. Finally, in regulatory and judicial review proceedings, section 64 may not operate because there is no comparable suit 'between subject and subject'. If any of these arguments is successful, it will be unnecessary to determine whether the Commonwealth or a State is performing a function peculiar to government.

¹¹⁹ Note, however, that the joint judgment in *British American Tobacco* accepted the possibility that s 64 of the *Judiciary Act* might operate more broadly in relation to the Commonwealth than it does in relation to the States: see below n 126.

IV APPLICATION OF SECTION 64 OF THE *JUDICIARY ACT* TO THE STATES

The second unresolved question about section 64 of the *Judiciary Act* is whether it can apply validly to the States.¹²⁰ Section 64 can have a dramatic effect on the rights of a State in a case in federal jurisdiction. As we will see, in *Commissioner for Railways (Qld) v Peters*,¹²¹ section 64 effectively supplied a plaintiff with a cause of action against the Queensland Commissioner for Railways by applying New South Wales legislation that otherwise would not have applied. In *British American Tobacco*, Western Australia could not rely on the notice requirement in section 6 of the *WA Crown Suits Act* in a case in federal jurisdiction because that requirement was contrary to section 64.¹²²

A Issue – Application to Substantive Rights and When State Is a Plaintiff

The argument against validity derives from the expansive operation that section 64 of the *Judiciary Act* has in its application to the Commonwealth. It is clear that section 64 will affect the substantive rights of the Commonwealth, not just the procedural rights. Indeed, *Evans Deakin* indicates that section 64 can, in effect, provide a plaintiff with a cause of action against the Commonwealth, by applying a State Act to the Commonwealth that otherwise would not apply. There is a serious question whether these conclusions can be applied to the States. Although the Commonwealth has broad power to determine its own liabilities,¹²³ it is not clear that the Commonwealth would have any such broad power over a State merely because the State was party to a case in federal jurisdiction.¹²⁴ There is some doubt whether the power in section 78 of the *Constitution* to confer ‘rights to proceed’ would enable the Commonwealth to alter the substantive rights and liabilities of a State.¹²⁵ In any event, section 78 does not seem to be relevant when a State is a plaintiff.

120 This issue was noted in *Maguire v Simpson* (1977) 139 CLR 362, 401 (Mason J), 404–5 (Jacobs J); *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 203 (Gibbs J). See also Kneebone, above n 13, 116–19.

121 (1991) 24 NSWLR 407 (*Peters*).

122 *British American Tobacco* (2003) 217 CLR 30, 61 (McHugh, Gummow and Hayne JJ, with Callinan J agreeing). There were other reasons why s 6 of the *Crown Suits Act 1947* (WA) could not apply; for example, s 6 could not be picked up independently of s 5 of that Act (which was inconsistent with a federal right to proceed): at 57 (McHugh, Gummow and Hayne JJ, with Callinan J agreeing), 47–8 (Gleeson CJ), 87 (Kirby J).

123 *Evans Deakin* (1986) 161 CLR 254, 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ) (‘[t]here can be no doubt that the Commonwealth Parliament has full power to make laws governing the liability of the Commonwealth’).

124 The fact that a case is in federal jurisdiction probably does not, in itself, give the Commonwealth Parliament power to alter the substantive rights and liabilities of the parties: Justice Bradley Selway, ‘The Australian “Single Law Area”’ (2003) 29 *Monash University Law Review* 30, 36–7.

125 In *Evans Deakin*, Gibbs CJ, Mason, Wilson, Deane and Dawson JJ doubted whether the Commonwealth ‘has a general power to legislate to affect the substantive rights of the States in proceedings in the exercise of federal jurisdiction’: *Evans Deakin* (1986) 161 CLR 254, 263. But see *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 610 (McHugh J).

In *British American Tobacco*, the Attorney-General of South Australia (intervening) argued that section 64 was wholly invalid in its application to the States. The argument was that section 64 could not validly apply substantive laws to the States (particularly when the States were plaintiffs), and further that section 64 could not be read down to apply only to the extent that it was valid. However, the High Court rejected the second step in the argument, holding that there would be no difficulty with section 64 being read down in its application to the States if necessary.¹²⁶ It was not necessary to rule on the first part of South Australia's argument because Western Australia was a defendant in *British American Tobacco*, and section 64 was removing a procedural immunity of the State. *British American Tobacco*, therefore, did not address whether section 64 could validly affect the substantive rights and liabilities of the States in federal cases.

B Peters – Section 64 Is Supported by Section 78 of the Constitution

The validity of section 64 in its application to the States was considered by the New South Wales Court of Appeal in *Peters*. The issue in that case was whether the Queensland Commissioner for Railways was liable to make compensation payments under the *Workers Compensation Act 1926* (NSW) ('*NSW Compensation Act*') to a worker who was injured in New South Wales while performing work for the Commissioner. The worker argued that, even if the *NSW Compensation Act* did not apply to the Commissioner of its own force, it could be applied by section 64 of the *Judiciary Act*.¹²⁷ The Commissioner argued in response that section 64 could not validly impose 'substantive' liabilities on a State because that would be beyond the scope of the Commonwealth's legislative power.¹²⁸ The Court of Appeal rejected the Commissioner's argument, holding that section 64 did apply the *NSW Compensation Act* to the Commissioner. In doing so, the Court held section 64 was supported by section 78 of the *Constitution*, and section 51(xxxix) if need be.

1 Reasoning of New South Wales Court of Appeal

The reasoning in *Peters* relies heavily on High Court authorities considering the application of section 64 to the Commonwealth.

President Kirby (with Waddell AJA agreeing on this point) stated that, if uninstructed by High Court authority, there would be 'great force' in a

126 *British American Tobacco* (2003) 217 CLR 30, 66 (McHugh, Gummow and Hayne JJ, with Callinan J agreeing). That is, s 64 might conceivably affect a broader range of rights when the Commonwealth – rather than a State – is a party.

127 It was clear from *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 that the Commissioner is 'the State' for these purposes.

128 *Peters* did not discuss whether it would be contrary to the *Melbourne Corporation* doctrine for s 64 to have this operation. However, the liability imposed by the *Workers' Compensation Act 1987* (NSW) would not seem to be a significant impairment of Queensland's ability to discharge its constitutional functions (to adopt the approach of Gaudron, Gummow and Hayne JJ in *Austin v Commonwealth* (2003) 215 CLR 185, 264).

submission that section 64 does not itself impose substantive liabilities on the States that do not otherwise affix by valid Commonwealth or State laws.¹²⁹ However, *Maguire v Simpson* and other cases clearly held that section 64 could impose substantive liabilities on the Commonwealth.¹³⁰ Moreover, the language of section 64 indicated that it was to apply in the same way to the Commonwealth and the States.¹³¹ Therefore, if section 64 was supported by section 78 of the *Constitution* in its application to the Commonwealth (as *Maguire v Simpson* held), section 78, supplemented by section 51(xxxix), would also support section 64 in its application to the States as defendants.¹³² President Kirby explained the doubts expressed in *Evans Deakin* about whether section 64 could validly apply substantive liabilities to the States¹³³ as reflecting an initial reaction that section 64 only applied to procedural matters. That initial reaction had, however, been rejected in *Maguire v Simpson* in the light of the history and context of section 78 of the *Constitution*.¹³⁴

Justice of Appeal Priestley also placed much emphasis on the conclusion in *Maguire v Simpson* that section 64 could alter the substantive rights and liabilities of the Commonwealth. His Honour stated that there is no reason

why the legislative competence of the Commonwealth is any less in conferring rights to proceed against the States than the Commonwealth (section 78 of the *Constitution*) or why the words of section 64, which make no distinction between the Commonwealth and State, should not bring about the same result for them both.¹³⁵

Moreover, the history of section 78 of the *Constitution* and early Commonwealth Crown suits legislation indicated that the ‘rights to proceed’ referred to in section 78 extended to the substantive rights and liabilities of the Commonwealth and States.¹³⁶

2 Unanswered Questions about Section 64 Following Peters

Despite the Court’s agreement on this point, *Peters* leaves some questions unanswered about the validity of section 64 of the *Judiciary Act* in its application to the States.¹³⁷ First, the Court of Appeal’s conclusion is based on High Court decisions holding that section 64 can validly affect the substantive rights and liabilities of the Commonwealth. However, the source of power for the Commonwealth to alter its own liabilities is not limited to section 78 of the *Constitution* – the executive power (read with section 51(xxxix)) provides a

129 *Peters* (1991) 24 NSWLR 407, 430.

130 *Ibid* 430–3.

131 *Ibid* 433.

132 *Ibid* 434.

133 See above n 125.

134 *Peters* (1991) 24 NSWLR 407, 435.

135 *Ibid* 443.

136 *Ibid* 443–4, discussing the scope of the words ‘whether in contract or tort’ in s 58 of the *Judiciary Act*.

137 The High Court granted special leave to appeal from the decision of the NSW Court of Appeal and heard argument: see Lee Aitken, ‘State Liability under the *Constitution* after *Peters*’ (1992) 3 *Public Law Review* 221, 221. However, that appeal was discontinued before the High Court delivered reasons.

further source of power.¹³⁸ To the extent that the result in cases like *Evans Deakin* requires support from the Commonwealth's executive power, and not just section 78, this result cannot be applied to the States. Second, as the Court itself acknowledged, the conclusion in *Peters* only applies when a State is a defendant, but section 64 also applies when a State is a plaintiff.

C Alternative Analysis – Sections 51(xxxix) and 77 of the *Constitution*

There is an alternative analysis of section 64 that explains its application to the States (including the States as plaintiffs), which relies on sections 51(xxxix) and 77 of the *Constitution*. Under those provisions, the Commonwealth may enact measures that are incidental to the grant or exercise of federal jurisdiction.¹³⁹ Admittedly, the Commonwealth's incidental powers in this area are not overly broad. For example, it is not incidental to the conferral of federal jurisdiction under section 77(iii) for the Commonwealth to attempt to alter the Constitution of a State Court,¹⁴⁰ nor is it incidental for the Commonwealth to purport to confer jurisdiction additional to that mentioned in sections 75 and 76 of the *Constitution*.¹⁴¹

1 Comparison with Section 79 of the Judiciary Act

Even so, the Commonwealth's incidental power does authorise some significant measures. In particular, section 51(xxxix) of the *Constitution* seems to be the source of power for section 79 of the *Judiciary Act*.¹⁴² As noted, section 79 applies the legislation of the State or Territory where a court is exercising federal jurisdiction, unless the *Constitution* or Commonwealth legislation 'otherwise provides'.

Section 79 provides a particularly relevant point of comparison here with section 64. Like section 64, section 79 is said to apply State and Territory legislation as 'surrogate federal law'.¹⁴³ And, as with section 64, the scope of section 79 has been a matter of some debate – section 79 in its terms seems to

138 Lee Aitken, 'The Liability of the Commonwealth under Section 75(iii) and Related Questions' (1992) 15 *University of New South Wales Law Journal* 483, 513. The Commonwealth is said to have an implied power to assert or waive its immunities: see *State Chambers of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 357 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

139 Section 51(xxxix) of the *Constitution* confers power to legislate with respect to 'matters incidental to the execution of any power vested by this *Constitution* in ... the Federal Judicature'. Section 77 confers power 'with respect to' the conferral of jurisdiction, which enhances Commonwealth legislative power in substantially the same way as that phrase enhances the Commonwealth's legislative power under ss 51 and 52: *Abebe v Commonwealth* (1999) 197 CLR 510, 525–7 (Gleeson CJ and McHugh J), 556 (Gaudron J, dissenting in the result), 587 (Kirby J).

140 See, eg, *Russell v Russell* (1976) 134 CLR 495, which held that the Commonwealth could not require a State court exercising federal jurisdiction to sit in closed court.

141 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 555 fn 284 (McHugh J).

142 See *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 587 (Gleeson CJ, Gaudron and Gummow JJ, with Hayne and Callinan JJ agreeing). It has generally been assumed that 's 79 is to be supported under s 51(xxxix) of the *Constitution* as a law with respect to matters incidental to the execution of powers vested by Ch III in th[e] Federal Judicature': at 587.

143 See, eg, *Solomons* (2002) 211 CLR 119, 134 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), 150 (Kirby J).

apply *all* State and Territory legislation that is capable of being applied by a court, but there is a question whether section 79 could validly apply to State or Territory legislation that creates substantive rights and liabilities ('substantive' legislation).

I have suggested elsewhere with Andrew Beech that there are two possible explanations of how section 79 operates in relation to substantive State and Territory legislation.¹⁴⁴

- (1) Section 79 might operate on substantive legislation in the manner of a choice of law rule, directing the application of an independently existing system of law (that is, the legislation of the State or Territory where the court is sitting). On this analysis, the Commonwealth's incidental powers enable it to *apply* substantive State or Territory legislation but not to *amend* that legislation.
- (2) Alternatively, section 79 might not operate on substantive State or Territory legislation at all, but might instead operate only on legislation that regulates the exercise of federal jurisdiction. On this analysis, substantive legislation would apply of its own force, subject to inconsistency with the *Constitution* or with Commonwealth legislation.

Explanation (1) cannot apply to section 64 of the *Judiciary Act*. The clear effect of section 64 is to alter the law that would otherwise exist, and, therefore, it does not merely operate as a choice of law rule.¹⁴⁵ That leaves explanation (2), which, applied to section 64, would mean that section 64 does not operate at all on legislation that creates substantive rights and liabilities.

2 *Is Section 64 Limited to 'Incidental' Laws?*

Accordingly, one analysis of section 64 is that it only operates on laws that are incidental to the grant or exercise of federal jurisdiction ('incidental' laws).¹⁴⁶ Consistently with this analysis, section 64 only operates when there is a 'suit', and, therefore, (like section 79) only operates on laws that can be applied by courts.¹⁴⁷ On this analysis, section 64 of the *Judiciary Act* would perform two main functions.

¹⁴⁴ Hill and Beech, above n 19, 31–5.

¹⁴⁵ By contrast, s 79 of the *Judiciary Act* picks up State and Territory laws with their meaning unchanged: see above n 19.

¹⁴⁶ It is true that the High Court has doubted the utility of the distinction between 'substantive' and 'procedural' laws: see, eg, *Bass* (1999) 198 CLR 334, 350 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *British American Tobacco* (2003) 217 CLR 30, 63 (McHugh, Gummow and Hayne JJ, with Callinan J agreeing). However, the proposed category of 'incidental' laws reflects the source of Commonwealth legislative power.

¹⁴⁷ In relation to s 79 of the *Judiciary Act*, see *Solomons* (2002) 211 CLR 119, 134, 136 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ). The requirement for a 'suit' means that s 64 does not apply to proceedings before a body that does not exercise federal judicial power (that is, a 'court' within s 77 of the *Constitution*): *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, 448 (Dawson, Toohey and Gaudron JJ), 474 (Gummow J), 511–12 (Kirby J); above n 81 (discussing the *Mining Act Case*). On whether a State administrative tribunal could be a 'court' within s 77(iii) of the *Constitution*, see *Trust Company of Australia Ltd v Skiwing Pty Ltd* [2006] NSWCA 185 (Unreported, Spigelman CJ, Hodgson and Bryson JJA, 13 July 2006).

The first function would be removing all of the special privileges and immunities that the States would otherwise have as a litigant for cases in federal jurisdiction.¹⁴⁸ As noted earlier, it is not contrary to the States' constitutional immunities for a Commonwealth law to remove a privilege that only a State has.¹⁴⁹ If that special privilege or immunity is contained in State legislation (as in *British American Tobacco*), that legislation will be inconsistent with section 64 and inoperative by reason of section 109 of the *Constitution*.¹⁵⁰

The second function would be making applicable to the States any 'incidental' legislation that did not otherwise apply of its own force. 'Incidental' legislation would clearly include all 'procedural' laws; that is, laws that regulate the mode or conduct of court proceedings.¹⁵¹ However, 'incidental' legislation would also include at least some laws that are often classified as 'substantive'. For example, I would argue that limitation provisions that bar remedies¹⁵² and legislation providing for contribution between tortfeasors¹⁵³ both regulate the exercise of jurisdiction, and are thus within the scope of section 64. On the other hand, 'incidental' legislation would not include legislation that creates a cause of action. Accordingly, if this alternative analysis of section 64 were accepted, it would cast doubt on the result in *Peters*. That is because *Peters* held that section 64 could subject Queensland to obligations under New South Wales legislation that did not apply to Queensland of its own force.

This alternative analysis of section 64 of the *Judiciary Act* is driven by the limits on the Commonwealth's incidental powers under sections 51(xxxix) and 77 of the *Constitution*. However, confining section 64 to 'incidental' legislation is also consistent with the scope of section 78 of the *Constitution*, which would still be relevant to the extent that section 64 applies to a State as defendant.¹⁵⁴ Although the 'rights to proceed' in section 78 are not limited to purely procedural

148 Such as the common law immunity from discovery: see above n 5. Admittedly, the *Melbourne Corporation* doctrine would place *some* limits on what documents could be discovered from a State; for example, Cabinet documents: see above n 103.

149 See above Part III(D)(2).

150 See above n 124.

151 On the difference between 'procedural' and 'substantive' laws in the choice of law context, see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 543–4 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

152 Cf *Maguire v Simpson*, which held that s 64 applied State limitations legislation to the Commonwealth – both provisions that barred the remedy and provisions that extinguished the right: see *Limitation Act 1969* (NSW) ss 14(1), 63(1). A limitation law that extinguishes the right is not incidental to the exercise of jurisdiction, but is rather 'an essential condition of the new right conferred': *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 277 (Gummow J, with Brennan CJ, Dawson, Gaudron and McHugh JJ agreeing).

153 See *Austral Pacific* (2000) 203 CLR 136 (concerning the Commonwealth). Chief Justice Gleeson, Gummow and Hayne JJ stated that there was a 'strong argument' that a law for contribution between tortfeasors was picked up by s 79 of the *Judiciary Act* (rather than s 64), even though that right could only exist by statute: at 142, 143. The significance of that conclusion is that s 79 is supported by s 51(xxxix) and s 77 of the *Constitution*, like s 64 of the *Judiciary Act* in its application to the States as plaintiffs.

154 Note, however, that cases such as *British American Tobacco* suggest that the right to proceed against a State in federal cases derives from the grant of federal jurisdiction: see above nn 29–31.

matters,¹⁵⁵ there must be some doubt (despite *Peters*) as to whether this expression extends to laws that create substantive rights and liabilities.¹⁵⁶

3 *Consequences of Alternative Analysis – Application to the Commonwealth*

If this alternative analysis were accepted, it might be reason to argue that section 64 operates more narrowly in its application to the Commonwealth than previously thought. The text of section 64 strongly suggests that the scope of its operation is the same, whether the Commonwealth or a State is a party.¹⁵⁷ Therefore, if section 64 does not operate on ‘substantive’ legislation in its application to the States, it could be argued that section 64 does not operate on ‘substantive’ legislation in its application to the Commonwealth either. Clearly, that argument is contrary to *Maguire v Simpson* and *Evans Deakin*. However, since *Maguire v Simpson* and *Evans Deakin* were decided, the Commonwealth’s constitutional immunity from State laws has been considerably narrowed by the decision in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*.¹⁵⁸ Accordingly, there is less need for section 64 to be given a broad interpretation in its application to the Commonwealth because a much greater range of State legislation is now capable of applying to the Commonwealth executive of its own force.¹⁵⁹

Admittedly, the High Court has not shown any inclination to revisit the question of whether section 64 applies ‘substantive’ laws to the Commonwealth. There is no constitutional difficulty with section 64 having this broad operation in relation to the Commonwealth.¹⁶⁰ The joint judgment in *British American Tobacco* refused leave to reopen *Maguire v Simpson* and *Evans Deakin* on this

155 *Commonwealth v Mewett* (1997) 191 CLR 471, 549 (Gummow and Kirby JJ). ‘The Crown immunity doctrine straddled the divide between substance and procedure’: at 549. In *Maguire v Simpson*, Barwick CJ and Jacobs J held that s 78 of the *Constitution* authorises laws altering the substantive rights of the Commonwealth as a defendant: *Maguire v Simpson* (1977) 139 CLR 362, 370–1, 405.

156 Interestingly, the Australian Law Reform Commission did not make any recommendations about whether the Commonwealth should legislate to make the States liable in common law and equity in federal cases because, in the Commission’s view, the Commonwealth did not have legislative power to do so: ALRC Report No 92, above n 5, [25.52].

157 This point is forcefully made in *Peters* (1991) 24 NSWLR 407, 433.

158 (1997) 190 CLR 410 (*‘Re Residential Tenancies Tribunal (NSW)’*).

159 Ibid 428 (Brennan CJ). Before *Re Residential Tenancies Tribunal (NSW)*, commentators observed that s 64 of the *Judiciary Act* could, in practice, overcome the Commonwealth’s previous broad constitutional immunity from State laws: Zines, *High Court and the Constitution*, above n 43, 368–9.

160 See above n 123. Moreover, it is constitutionally possible for s 64 to have a different operation in relation to the Commonwealth and in relation to the States: see above n 126.

point.¹⁶¹ For the moment, therefore, there seems to be little prospect of the Commonwealth successfully challenging this aspect of section 64 doctrine.¹⁶²

D Summary of Application of Section 64 of the *Judiciary Act* to the States

In summary, section 64 can have a significant effect on the States in cases in federal jurisdiction by making the States subject to some laws that otherwise would not apply, and by removing special privileges or immunities that would be available in a case in State jurisdiction. There is an unresolved question, raised most recently in *British American Tobacco*, whether section 64 is wholly valid in its application to the States. The New South Wales Court of Appeal held in *Peters* that section 64 is supported by section 78 of the *Constitution* in its application to the States as defendants, even when section 64 affects the substantive rights and liabilities of the State. An alternative analysis is that section 64 of the *Judiciary Act* can validly apply to the States (including the States as plaintiffs), if limited in scope to laws that are incidental to the grant or exercise of federal jurisdiction. If limited in this way, section 64 is supported by sections 51(xxxix), 77 and 78 of the *Constitution*.

V CONCLUSION

It is clear that section 64 of the *Judiciary Act* abrogates special government privileges and immunities that would prevent a citizen from bringing an action against a government in ‘private’ law. The only questions that arise are exactly which privileges and immunities, and the extent to which they are abrogated. Section 64 has been interpreted expansively, particularly in its application to the Commonwealth. *Maguire v Simpson* held that section 64 affected the Commonwealth’s substantive, and not just procedural, rights. *Evans Deakin* held that section 64 removed the Commonwealth’s immunity from suit, and could also provide a plaintiff with a cause of action. This expansive interpretation of section 64 is, in part, because any special government privilege or immunity detracts from the general principle that governments should be ruled by the law.¹⁶³ Moreover, *Maguire v Simpson* and *Evans Deakin* were decided when the Commonwealth had a broad constitutional immunity from State law. At that

161 *British American Tobacco* (2003) 217 CLR 30, 62–3 (McHugh, Gummow and Hayne JJ, with Callinan J agreeing).

162 Cf *ibid* 63, which left open the correctness of the conclusion in *Evans Deakin* that s 64 applies to the Commonwealth a single State provision that creates both a right and confers jurisdiction on a court to grant a remedy in respect of that right (a so-called ‘double function’ provision). Section 64 does not confer jurisdiction, so a State ‘double function’ provision could only be applied by s 64 (to the extent that the provision created a right) if there were another Commonwealth provision conferring federal jurisdiction to determine the relevant right.

163 See ALRC Report No 92, above n 5, [22.44]. Commentators have suggested that *Commonwealth v Mewett* and *Re Residential Tenancies Tribunal (NSW)* are ‘symptomatic of a growing body of High Court jurisprudence that suggests that most forms of Crown immunity have little place in contemporary society’: Matt Hall, ‘The *Judiciary Act* and the Future of Commonwealth Immunity’ (2001) 78 *Reform* 63, 67.

time, section 64 was the main way in which the Commonwealth executive could be made subject to State laws of general application.¹⁶⁴

Despite the broad interpretation given to section 64, there are two possible limits on its scope. The logically prior limit concerns the type of rights to which section 64 applies. In particular, there is an issue about the extent of the Commonwealth's legislative power to alter the rights and liabilities of the States in federal cases. I have suggested that, in its application to the States, section 64 may be limited to operating on laws regulating the exercise of jurisdiction. That would mean, for example, that section 64 would only abrogate the States' special privileges and immunities as litigants, and not other privileges and immunities affecting the States' substantive rights and liabilities. This argument is similar to the argument rejected in *Maguire v Simpson* that section 64 only operates on procedural rights; although, my suggested category of 'incidental' laws would not be limited to matters of pure procedure.¹⁶⁵ *British American Tobacco* indicates that, simply as a matter of precedent, this argument is unlikely to be accepted as far as section 64 applies to the Commonwealth. But this argument remains an open one as far as section 64 applies to the States.

The other possible limit on section 64 is whether section 64 is excluded when the Commonwealth or a State is performing a 'function peculiar to government'. As a practical matter, the peculiar government function exception will mainly be significant for the Commonwealth, rather than the States. The first limit identified (if accepted) would mean that section 64 would not operate on the substantive rights and liabilities of the States, where issues of peculiar government functions are most likely to arise. I have suggested that constitutional notions of 'integrity and autonomy' provide some indication of when government functions will be 'peculiar' for the purposes of section 64.¹⁶⁶ Moreover, I have suggested that the statutory requirement for a comparable suit 'between subject and subject' means that section 64 does not operate in 'regulatory' proceedings (where a government is seeking to impose a penalty), or in judicial review proceedings.¹⁶⁷

It is apparent that, despite its longevity, section 64 of the *Judiciary Act* is still a source of considerable debate. This article has sought to clarify two areas where the operation of section 64 is uncertain. Even so, it must be acknowledged that my suggested analysis would still depend on matters of contestable judgment. In particular:

- the question of whether the Commonwealth or a State was performing a function peculiar to government would be guided by the requirements of 'integrity and autonomy' in the *Melbourne Corporation* doctrine;

164 See above n 159 and accompanying text. Professor Zines has stated that '[i]t was largely because of this interpretation and application of s 64 that the question of State power to make laws binding the Commonwealth or its agents was avoided in the High Court, and to a considerable degree elsewhere, for 35 years': Zines, 'Binding Effect of State Law', above n 46, 3.

165 See above nn 153–5.

166 See above Part III(D)(2).

167 See above Part III(C)(3).

- the statutory requirement for a comparable suit ‘between subject and subject’ would require examination of whether the remedy sought in proceedings is the sort that can only be (or typically is only) brought by a government, such as a penalty; and
- the scope of section 64, in its application to the States, would depend on whether the law regulated the exercise of jurisdiction.

Any greater level of certainty in this area would require major legislative reforms of the kind discussed by the Australian Law Reform Commission in 2001.¹⁶⁸

¹⁶⁸ See ALRC Report No 92, above n 5, chs 22–9. Briefly, some of the major recommendations were that Commonwealth legislation should abolish the procedural immunities of the Commonwealth, and of the States and Territories in federal cases: at 468–9, 472, Recommendations 23.1, 23.3, 23.4–23.5. The Commission also recommended that Commonwealth legislation state explicitly whether it is intended to bind a State or Territory (at 523, Recommendations 27.1–27.3), and that the Commonwealth be bound by State or Territory legislation unless the Commonwealth had exempted itself by regulation: at 537–9, Recommendations 28.1–28.9.