Is there a *principle* to direct the analogizing process? The author convincingly rejects *Tudor's* suggestion that there is a head of charity consisting of purposes tending to promote moral or spiritual welfare,[28] but seems to offer no principle of his own to guide future development. In the *English Law Reporting Case* Russell, L.J. suggested that purposes beneficial to the community are *prima facie* charitable, but the Preamble provides a "line of retreat" in case the court is faced with a purpose which could not have been within the contemplation of the Statute of Elizabeth.[29] That approach, in turn, was forcefully criticized by the High Court of Australia in *Royal National Agricultural and Industrial Association* v. *Chester*.[30] Perhaps the most promising statement is in the *Australian Law Reporting Case,* where Barwick, C.J. suggested that the unifying factor in Lord Macnaghten's fourth category may be the provision of some of the indispensables of a settled community.[31] One Australian commentator has remarked that Barwick, C.J.'s approach may "lure the inquirer into the pursuit of greater imponderables, manifestly unsuited to judicial illumination".[32] It would be interesting to have Mr. Picarda's opinion.

This book will be of great use to practitioners, law teachers, students and those administering charitable funds. Regrettably, however, the price may put it beyond the reach of many — in the absence, of course, of charitable assistance.

R. P. AUSTIN*

Governmental and Intergovernmental Immunity in Australia and Canada by Colin H. H. McNairn, Canberra, Australian National University Press, 1978, xiv + 205 pp. (including index). $16.95.

Introduction

In the half dozen years since migrating from Canada, I have often wondered why more attempts are not made to compare the laws of Australia and Canada in various areas. The essential similarities between the two countries have always suggested to me that such comparisons could be mutually profitable. The book being reviewed is one of those relatively infrequent comparative attempts. It deals with a particular problem of statutory (including constitutional) interpreta-

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[28] *Picarda,* 109.
[29] [1972] Ch. 73 at 87-8.
[30] (1974) 3 A.L.R. 486 at 489.
[31] (1971) 125 C.L.R. 659 at 669.
[32] *Jacobs, supra* n. 21 at 137.

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tion, namely, the extent to which statutes can and do bind the Crown in Australia and Canada, whether that Crown which is part of the enacting legislature or that which is part of the other level of government in the federation, whether central or regional. I do not find it surprising that the book's author is a Canadian. I say this because when I reflect on my six years' exposure to Australian law and compare it to my ten years' prior exposure to Canadian law, it seems to me that Australian judge-made law is generally of a significantly higher quality than Canadian. Since the Canadians usually have more to gain than the Australians from an exposure to each other's judical decisions, it seems quite predictable that a comparison such as this would have been made from the Canadian side.

Chapter One

Chapter One of the book consists of a general discussion of the problem as it concerns that Crown which is part of the enacting legislature. The author purports to discern here a judicial "general retreat"[1] from the rule in the *Bombay Case*[2] that if a statute does not expressly bind the Crown, then it does so by implication only if otherwise "its beneficient purpose must be wholly frustrated".[3] Since, however, his strongest evidence of this retreat consists of a decision of the Guyanese Court of Appeal, a decision of the A.C.T. Supreme Court from which an appeal to the High Court was dismissed without reference to the point and a decision of the Federal Court of Canada reversed in the Supreme Court,[4] its generality may be doubted. For reform of the *Bombay* rule, one's hopes must centre on the legislatures, not the courts, although as Stephen, J. pointed out in *Bradken Consolidated Limited* v. *B.H.P.*,[5] a recent High Court case to be mentioned again later, when the legislatures have interested themselves in the matter, rather than mitigating the harshness of the rule, they have generally made it even harsher (or, at least, attempted to[6]). One exception to this experience is the legislature of British Columbia, whose reforming statute of 1974 is referred to approvingly by the author.[7] He says nothing, however, about the criticism of reforming statutes of the B.C. type made by the New South Wales Law Reform Commission in 1975 or about its more sophisticated proposed solution to the problems caused by the *Bombay* rule.[8]

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[1] 17.

[2] *Province of Bombay* v. *Municipal Corporation of Bombay* [1947] A.C. 58 (P.C.).

[3] *Id.* 63.

[4] 16. For a recent application of the *Bombay* rule, see *Ex p. Group Projects Pty. Ltd.* [1978] Q.R. 480 at 485 (S.C.).

[5] (1979) 24 A.L.R. 9 at 25.

[6] 18, n. 77. In the *Group Projects Case, supra* n. 4, it was held that the relevant Queensland provision is merely declaratory of the *Bombay* rule, although, *prima facie,* it is harsher.

[7] 22.

[8] *Proceedings by and against the Crown,* L.R.C. 24, Part 14.

In the course of Chapter One there occurs a discussion of cases in which the word "person", when appearing twice in the course of a statute, was argued not to include the Crown on one of those occasions because it admittedly did not include the Crown on the other of those occasions.[9] This discussion may be supplemented by a reference to a High Court case decided after the publication of the book, *McGraw-Hinds (Aust.) Pty. Ltd.* v. *Smith.*[10] The case concerned a provision in a Queensland statute which made it an offence for one "person" to engage in certain commercial conduct with respect to anoher "person". It was clear that the word "person", when used to describe the perpetrator of the offence, did not include the Crown. This led a subject charged with having engaged in the prohibited conduct with respect to the Crown to argue that the word "person", when used to describe the victim of the offence, also did not include the Crown. Not surprisingly, the argument was unanimously rejected by the Court,[11] with Murphy, J. referring to the book being reviewed in the course of his judgment.

Chapter Two

Chapter Two consists of a general discussion of the problem as it concerns the Crown of the other level of government in the federation than that whose legislature has enacted the statute. Illogically, a discussion of the constitutional law aspect of this part of the problem succeeds a discussion which assumes the existence of the constitutional rules later discussed.

So far as the question of the constitutional immunity of the Commonwealth Crown from state statutes is concerned, the author, after dealing with, *inter alia,* the *Cigamatic Case,*[12] asserts:

> At a minimum, it can be said that the state of authority . . . does not foreclose a restriction of the intergovernmental immunity of the federal crown [*sic*] to circumstances in which a state . . . statute would otherwise prejudice a prerogative right.[13]

It seems to me that this assertion ignores the place of Sir Owen Dixon in Australian constitutional jurisprudence. It hardly seems credible that Sir Owen's successors would feel able in a future case to depart from his considered view of the scope of the Commonwealth's immunity from state statutes, a view accepted by his brother judges in his time, merely by characterizing its expression as *obiter;* they would undoubtedly feel obliged to meet it head on. The assertion that the state of authority does not foreclose a narrower view than Sir Owen's of the Commonwealth's immunity from state statutes is only true in the

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9 8-9.
10 (1979) 24 A.L.R. 175.
11 Gibbs, Stephen, Mason, Jacobs, Murphy and Aickin, JJ.
12 *The Commonwealth* v. *Cigamatic Pty. Ltd.* (1962) 108 C.L.R. 372.
13 37.

sense that the High Court is on occasion prepared explicitly to overrule itself.

Why does the author make the assertion quoted above? It is because he would prefer the central Crown's immunity to be restricted to circumstances in which a regional statute would otherwise prejudice a prerogative right.[14] Some of his reasons for this preference are unusual, to say the least. For instance, he argues in favour of a narrow view of the central Crown's immunity because "then a number of otherwise perplexing Canadian decisions denying an immunity claim fall into line".[14a] Can he seriously be suggesting that even the Canadian courts should enunciate a particular rule on a topic as fundamental as this only to avoid the embarrassment of admitting that certain of their earlier decisions were wrongly decided? (The reception which this reason for his favoured rule would meet in the Australian courts hardly bears thinking of!) He also argues in favour of his preference on the ground of symmetry:

> . . . [W]ith this approach we are left with less, or possibly no, discrepancy between the immunity of the federal crown [*sic*] from state or provincial legislation and the immunity of the state or provincial crown [*sic*] from federal legislation . . .[15]

Again, it is difficult to accept that the author is really putting this forward seriously. To quote Dixon, J. (as he then was) in the *State Banking Case*:

> . . . [T]he question what the federal government may do with reference to the States and the question of what a State may do with reference to the federal government . . . are two quite different questions and they are affected by considerations that are not the same.[16]

All other things being equal, let us by all means have symmetry, but this is a case where not all other things are equal.

The discussion of the constitutional immunity of the Commonwealth Crown from state statutes may be supplemented by a reference to various reasons for judgment given in the High Court case of *Maguire* v. *Simpson*,[17] a report of which was not available in time for inclusion in the book. In that case a body within the shield of the Commonwealth Crown made a claim against a fund which had been paid into the Supreme Court of New South Wales. The claim was based on a contract which it had had with the owner of the fund. The question arose whether its claim had been made out of time by virtue of the provisions of the Limitations Act, 1969 (N.S.W.), and it was

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[14] 40.
[14a] 39.
[15] 38.
[16] *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31 at 82.
[17] (1978) 52 A.L.J.R. 125.

argued, *inter alia,* that this statute, which purported to bind the Commonwealth Crown, did so of its own force. The High Court did not find it necessary to deal finally with this argument, finding instead that the statute bound the Commonwealth Crown by virtue of section 64 of the Judiciary Act 1903 (Cth.). However, some comments worth referring to were made about the argument. For instance, Barwick, C.J. said with characteristic imprecision:

> Apart from the provisions of this Part [*viz.*, Part IX of the Judiciary Act], it would be difficult, in my opinion, to conclude that a State could legislate directly to bind the Commonwealth. . . .[18]

Neither Gibbs, Mason nor Jacobs, JJ. expressed an opinion on the ability of state statutes to bind the Commonwealth of their own force, but all referred to the *Cigamatic Case* in a fashion inconsistent with that of the author as disclosed in his assertion quoted above about "the state of authority". Gibbs, J. said,[19] "On the view that I take it is unnecessary to decide whether the decision in . . . *Cigamatic* . . . should be followed. . . ." He said that he therefore expressed no opinion on the matter. Mason, J. said,[20] "In the view I take of this case I have no occasion to consider the doctrine which was enunciated in . . . *Cigamatic* . . ."Jacobs, J.'s comments were more elaborate. He said:

> If any provision of the Judiciary Act governs the matter then the question whether in the absence of that provision the sections of the Limitation [*sic*] Act would be applicable to the . . . [*Commonwealth*] . . ., a question which would probably require a reconsideration of the reasons for decision in . . . *Cigamatic* . . ., is hypothetical . . .[I]t appears to me that the question whether the reasoning in *Cigamatic* involves a revival of the doctrine of implied immunity of instrumentalities and whether it is essentially consistent with the *Engineers' Case* . . . should not be pursued unless its determination is essential to the present decision.[21]

Stephen and Murphy, JJ., the other members of the bench in the case, said nothing about the constitutional immunity of the Commonwealth Crown from state statutes.

To speak more generally now of the constitutional law discussion in Chapter Two, it seems to me that it would have been enriched by

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[18] *Id.* 126. Even Part IX of the Judiciary Act does not allow a state to legislate *directly* to bind the Commonwealth. See also Barwick, C.J.'s judgment in *Miller* v. *Miller* (1978) 22 A.L.R. 119 at 124, in which he held in *obiter* that s. 4(4) [*scil.*, 4(3)!] of the Listening Devices Act, 1969 (N.S.W.), was invalid to the extent that it purported to authorize the forfeiture of a telephonic device owned by Telecom if that device were used by anyone in contravention of the Act.

[19] *Id.* 135.

[20] *Id.* 139.

[21] *Id.* 140.

reference to the American position. I found only two American decisions referred to in the whole book, but neither of them appeared during the course of this chapter.[22] The most recent of them, incidentally, was decided in 1920. Since the author was able to find space to refer to decisions, some of them quite recent, of the courts of Guyana, India, Ireland, New Zealand, Rhodesia and Nyasaland, Scotland and Uganda, one would have thought that room could have been found at least for such an important recent American decision in the area of central government statutes and regional governments as *National League of Cities* v. *Usery*.[23] The centrifugal tendency of this decision leads one to be less willing than one would otherwise have been to accept the author's conclusion that

> In point of fact the magnitude of interference with state or provincial governmental functions which is likely to prove fatal to the application of a general federal statute to the states or provinces would probably have to be such as to pose a serious threat to the independence which those political units enjoy from the central authority under the federal scheme.[24]

A reference to other American decisions could have been equally helpful.

The non-constitutional discussion in Chapter Two of the application of statutes enacted by one level of government in the federation to the Crown of the other level may be supplemented by a reference to the already-mentioned decision of the High Court in *Bradken Consolidated Limited* v. *B.H.P.*,[25] decided since the publication of the book. In that case a question arose as to whether the Trade Practices Act 1974 (Cth.) bound the Queensland Crown, the statute being silent on the point. Those who would have benefited from the application of the statute to that Crown argued that it was only the Crown of the enacting legislature that was entitled to the benefit of the rule that the Crown is not bound by a statute unless expressly stated or necessarily implied and that the Crown in any other right was to be treated no differently than the ordinary subjects of the Crown of the enacting legislature. Gibbs, A.C.J. and Stephen, Mason and Jacobs, JJ. rejected this argument, while Murphy, J. accepted it. In consequence, it was impossible for Bradken to obtain injunctive relief under the Act against a body within the shield of the Queensland Crown in respect of an agreement into which that body had entered with a number of companies. This did not, however, conclude the matter, because Bradken had sought injunctive relief against the companies as well. Did the fact

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[22] *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819), referred to in Chapter Six at 132; *Johnson* v. *Maryland*, 254 U.S. 51 (1920), referred to in Chapter Four at 93.

[23] 426 U.S. 833 (1976).

[24] 43-44.

[25] Note 5, *supra*.

that the Act did not bind the Queensand Crown prevent Bradken from obtaining injunctive relief against those companies in respect of their agreement with the body? Again with Murphy, J. dissenting, the Court held that no injunctive relief could be obtained against the companies, because to grant injunctive relief against them in respect of an agreement into which they had entered with the body would prejudice the Crown just as much as would granting injunctive relief against the body itself in respect of the agreement. This second holding supplements the discussion in Chapter One of the book being reviewed entitled "The Beneficiaries of the Immunity".[26]

Chapter Three

Chapter Three opens with a discussion of the history of the imposition of tort liability on the various manifestations of the Crown in Australia and Canada. So far as the Commonwealth Crown is concerned, a reference to Murphy, J.'s reasons for judgment in *Johnstone* v. *The Commonwealth,*[27] a case decided by the High Court after the publication of the book, may be added. In them, it was said that although provisions of the Judiciary Act had imposed liability in, *inter alia,* tort on the Commonwealth Crown, any repeal of those provisions would not be held to revive the Crown's former immunity. According to His Honour, the judicially-created doctrine of Crown immunity in tort would, if it had persisted to the present day, have been ripe now for judicial overruling in any event.[28] This approach, which would be equally appropriate in all Australian and Canadian jurisdictions, might perhaps provide a device for overcoming the deficiencies in some of those statutes which have imposed only partial tort liability on the Crown.[29]

After the opening discussion referred to above, the rest of Chapter Three is devoted mainly to the question of how far a central government's statute imposing tort liability on the central Crown renders applicable to that Crown in tort actions against it statutes of that regional government whose law governs the action. Again, so far as the Commonwealth Crown is concerned, a reference to the already-mentioned *Maguire* v. *Simpson*[30] may be added. The case did not deal with the position of the Commonwealth Crown as a defendant in a tort action, but, as has already been mentioned, rather with the position

[26] 14-15. The discussion is also supplemented by the *Group Projects Case,* n. 4, *supra.*

[27] (1979) 23 A.L.R. 385.

[28] *Cf. Byrne* v. *Ireland* [1972] I.R. 241 (S.C.). For an excellent article on *Byrne's Case,* see Nial Osborough, "The Demise of the State's Immunity in Tort" (1973) 8 *Irish Jurist* 275.

[29] It might also be useful in overcoming any difficulties caused by the use of the words, "whether in contract or in tort", in section 56 of the Judiciary Act. See L. Katz, *"Australian Airport Services* v. *The Commonwealth* and s. 56 of the Judiciary Act" (1977) 6 *Adel. L. R.* 154 at 155-57.

[30] *Supra* n. 17.

of a body within the shield of the Commonwealth Crown as a plaintiff in a contract action. Yet many of the things said by the Court about the operation of the crucially important section 64 of the Judiciary Act are equally applicable to both situations and lay to rest a number of doubts expressed by the author about the adequacy of Australian law in this regard.

It was held, for instance, by Barwick, C.J. and Gibbs, Mason, Jacobs and Murphy, JJ. that section 64 refers to substantive as well as procedural rights, with Stephen, J. alone regarding the question as "still unresolved".[31] It was also expressly held by Gibbs, Stephen, Mason and Murphy, JJ. that section 64 is ambulatory in its operation. Barwick, C.J. and Jacobs, J. did not deal with this point in their judgments, but since they, like the rest of the Court, held applicable to the body within the shield of the Commonwealth Crown a provision in a state statute enacted later in time than section 64 had been enacted, they too must surely be taken to view section 64 as ambulatory. These holdings would seem to remove the necessity for legislative reform in the area felt by the author when he wrote.

Chapter Three ends with a discussion of the central Crown's position as a plaintiff in a tort action and *Maguire's Case* should likewise be taken into account when reading the discussion in connection therewith so far as the Commonwealth Crown is concerned.

Chapter Four

Chapter Four deals with two topics: first, the applicability to the Crown and its servants and agents of statutes creating offences and, secondly, the applicability of regional statutes to the central Crown in contract actions against it. Some of the points made in connection with this second topic must be read in the light of *Maguire's Case* so far as the Commonwealth Crown is concerned.

Chapter Five

Chapter Five deals with the application of statutes to the Crown as a creditor. After setting out the law in this area, the author concludes the chapter by expressing the view that it is "particularly

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[31] *Id.* 135. One should also note the following remarks by Murphy, J., at 141-42:

> The consequence of this construction of s. 64 is that, in the absence of uniform State laws on a subject, the party to a suit to which the Commonwealth . . . is a party may be dealt with differently (not only procedurally but substantively) according to the State in which the action is heard or decided . . . The issue of the Parliament's competence to use (directly or, as in this case, indirectly) its legislative power to make different laws for those in different States, and so to discriminate between the people of various States was not raised. The effect, if any, of s. 99 of the Constitution was not raised. It was not contended that the discriminatory consequences should tell against imputing to Parliament the intention to deal with substantive law in s. 64.

Sed quaere to what extent section 64 is a "law . . . of . . . commerce" under section 99 of the Constitution.

difficult"[32] to justify the special advantages which the Crown often has as a creditor when its claim has arisen out of an activity "which has obvious commercial features and is closely akin to activities which are pursued in the private sector".[33] For those jurisdictions which have not already done so, he advocates legislation to equate the Crown's position with that of the subject in this area. Where, however, the Crown's claim has arisen as a result of the non-payment of taxes, the author's view is different. He says:

> In this case it is arguable that the state should be entitled to a preferred position since its interest is in securing the receipt of funds to support those essential services on which all subjects have come to rely. A tax debt can be distinguished from other debts because of this general public purpose underlying taxation schemes. Therefore the government in pursuing tax claims may quite properly be accorded certain advantages.[34]

It is interesting to note that the distinction for which the author argues between tax and other debts was not accepted by the Australian Senate's Standing Committee on Constitutional and Legal Affairs when it reported on priority of Crown debts after the publication of the book reviewed.[35] That Committee, relying on, *inter alia,* a 1970 report of the Canadian Study Committee on Bankruptcy and Insolvency Legislation, recommended the abolition of the Commonwealth's priority in respect of tax debts as well as all other debts. It pointed out that the cost of abolition in the tax area would be somewhat less than ten million dollars a year,[36] so that it can hardly be said that abolition would threaten "those essential services on which all subjects have come to rely". Furthermore, the loss suffered by other creditors of the debtor than the Crown is the same regardless of the source of the Crown's claim and the Senate Committee said that it

> . . . seriously doubts whether the community as a whole would support the retention of this priority in its name at the expense of creditors who suffer the consequences of the [bankruptcy or] winding-up more directly.[37]

Chapter Six

The sixth and final chapter of the book deals with the application of taxing statutes to the Crown. Most of it is concerned with the constitutional law aspect of the matter, the power of one level of government in the federation to tax the other. Before going further, I

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[32] 125.
[33] *Ibid.*
[34] *Ibid.*
[35] *Priority of Crown Debts* (A.G.P.S., 1978).
[36] *Id.* 45.
[37] *Id.* 8. The action which the Government proposes to take on the Committee's report was announced in Parliament on September 13, 1979. See the relevant Daily Hansards: Senate, 678; House of Representatives, 1107. The Government's approach, which is similar to that of McNairn, provoked harsh criticism by Senator Missen, the Chairman of the Committee. See Senate, 679-83.

will mention two minor matters arising out of this constitutional discussion. First, the author refers at one stage[38] to the Commonwealth Parliament's legislative power with respect to the federal public service. He says that the source of this power is paragraph 52(ii) of the Constitution; however, that paragraph refers only to "matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth". Clearly, the paragraph is only one of the sources of the Commonwealth Parliament's power in that regard, although where the remainder of the power comes from is not beyond doubt.[39] Secondly, he suggests at another stage[40] that the regional governments in both Australia and Canada could make financial grants to their respective central governments to compensate them for their loss of revenue caused by the constitutional prohibitions against their taxing regional governments' property. Let us imagine this unimaginable event's occurring. A province, let us say, has passed a statute appropriating part of its Consolidated Revenue Fund for this purpose. Section 126 of the British North America Act[41] provides that a province's Consolidated Revenue Fund is "to be appropriated for the Public Service of the Province". Does the appropriation fall within the quoted words, even generously interpreted? It should be noted that since the Supreme Court's decision in *Thorson* v. *A.-G. Canada*[42] and *Nova Scotia Board of Censors* v. *McNeil*[43] this issue could presumably be raised by any resident of the province. Perhaps the courts would deal with the matter by holding that the answer to the question was irrelevant, since even if it were in the negative the statute would amount to an implied exercise by the legislature of its power under section 92(1) of the British North America Act to amend the province's constitution.[44] In any event, the issue does seem more complex than the author's bald statement of the regional governments' power indicates.[45]

To move on now to more important matters, the discussion in Chapter Six regarding the express constitutional inability of the states to "impose any tax on property of any kind belonging to the Commonwealth" may be supplemented by a reference to *Bevelon Investments Pty. Ltd.* v. *City of Melbourne*.[46] Why this High Court decision does not appear in the book is unclear. It was decided in September, 1976,

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[38] 133.

[39] See C. Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) at 126.

[40] 138-39.

[41] 30 & 31 Vic., c. 3 (U.K.). *Cf.* the Constitution Act, 1902 (N.S.W.) section 39.

[42] (1974) 43 D.L.R. (3d) 1.

[43] (1975) 55 D.L.R. (3d) 632.

[44] *Cf. McCawley* v. *R.* [1920] A.C. 691 (P.C.); *Cooper* v. *Commissioner of Income Tax* (1907) 4 C.L.R. 1304.

[45] See also P. Hogg, *Constitutional Law of Canada* (1977) at 72. *Cf.* F. Scott, *Essays on the Constitution* (1977) at 296-297, 398-399.

[46] (1977) 12 A.L.R. 391.

but presumably a report of it did not reach the author in time for its inclusion.

The facts of the case were as follows: Bevelon owned an office building in Melbourne, part of which it had leased to the Commonwealth for five years. The leased premises were occupied by Australia Post, Telecom and two government departments. Under Victorian legislation[47] local governments were authorized to levy rates on occupiers of land, including parts of buildings.[48] However, the legislation provided[49] that if the Commonwealth or any federal agency were the occupier and were not liable to pay rates in respect of that occupancy, then the owner was liable to be rated. Australia Post and Telecom were expressly immunized from State taxes by their constituting statutes,[50] while the Commonwealth was immune from rates in respect of its occupancy either by virtue of section 114 of the Constitution, its implied immunity from State laws in general or its implied immunity from state taxing laws in particular; accordingly, the City of Melbourne levied a rate on Bevelon in respect of that part of the building leased to the Commonwealth. Bevelon objected, arguing, *inter alia,*[51] that the levying of the rate on it infringed section 114.

In five separate judgments, the six members of the Court who heard the case rejected the argument.[52] Assuming that "property of any kind belonging to the Commonwealth" was involved here, still a majority took the view that a state tax was not a tax on such property unless it was either payable by the Commonwealth or was a charge on the property.[53] Bevelon had argued that even though the tax was not payable by the Commonwealth, still owners would pass it on to the Commonwealth, so that it might as well be treated as a tax on the Commonwealth in respect of its property. In three of the judgments, this argument was referred to. Murphy, J. said:

> It [*viz.*, Bevelon] also contended, and I agree, that the natural tendency is for the burden of the rates to be passed on to

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[47] Local Government Act, 1958.

[48] *Id.* sections 251 and 254.

[49] *Id.* section 267.

[50] Postal Services Act, 1975, section 83; Telecommunications Act, 1975, section 80. For the author's discussion of the constitutionality of such statutes, see 155-58.

[51] Bevelon also argued that section 267 was invalid by virtue of paragraph 52(i) the Constitution, which confers on the Commonwealth Parliament exclusive legislative power with respect to "places acquired by the Commonwealth for public purposes . . ." This argument was unanimously rejected. It may be noted that the view expressed by the author of the book being reviewed, at 101, that land in which the Commonwealth has merely a leasehold interest can fall within the words just quoted, is no longer tenable in light of what was said by the Court in rejecting Bevelon's argument based on paragraph 52(i).

[52] Barwick, C.J. and Gibbs, Stephen, Mason, Jacobs and Murphy, JJ. Stephen and Mason, JJ. delivered the joint judgment.

[53] Jacobs, J. left open the question whether a state tax could be said to be imposed "on property of any kind belonging to the Commonwealth" even though imposed on someone other than the Commonwealth. He was satisfied, however, that the tax could not be so described in the circumstances of this case.

> the Commonwealth. The broad prohibition in s 114 should not be defeated by technical differences in concepts of property . . . The applicant's submissions on s 114 therefore have considerable force. But there is a strong presumption that an Act of Parliament is valid. In my opinion, that presumption has not been displaced.[54]

Gibbs, J. said:

> Counsel also suggested that a municipality, by rating land leased by the Commonwealth, might indirectly impose a burden on the Commonwealth. It is sufficient to answer this contention in the words of Griffith CJ in *Attorney-General for Queensland* v. *Attorney-General for Commonwealth* (1915) 20 CLR 148 at 162: "The question of the ultimate incidence of taxation is an interesting and sometimes a difficult one, but it has no bearing on the construction of sec 114".[55]

Barwick, C. J. said:

> [A]ccording to the applicant's argument, by taxing the owner because the occupant of the property is not liable to be taxed in respect of that occupancy, the statute places an impediment in the way of the Commonwealth when it needs or desires to lease property. It was asserted by counsel as notorious that if the intending lessor was liable to pay rates in respect of the premises intended to be leased, the asking rental would for that reason be higher, at least by the amount expected to be paid for rates. Of this there was no evidence. Nor can I accept it as a proposition judicially known. I suppose the factors which determine rental are multifarious; there may possibly be a discount offered rather than a premium demanded for an occupancy by the Commonwealth of a large number of floors in a building under a single lease. But however that may be, by no stretch of reasoning can it properly be concluded that, because due to the section an owner may ask a higher rental than otherwise he might, a tax is thereby imposed on the intending lessee, in this instance the Commonwealth, upon or in respect of the subject matter of the lease.[56]

It is submitted that, insofar as it is suggested in these passages that a state tax is not invalid merely because it can be expected that the taxpayer will pass it on to the Commonwealth, the suggestion ought not to be accepted in the form in which it is made. It is further submitted that the suggestion requires the qualification that the state tax, if passed on, would not put the Comonwealth in the position of having been discriminated against. For instance, let us imagine a state statute

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[54] *Supra* n. 46 at 407.
[55] *Id.* 398.
[56] *Id.* 395.

which obliged tenants to pay a tax of $100, but which provided that if the Commonwealth were a tenant, then its landlord would be obliged to pay $200 instead in respect of it. It seems to me most doubtful that the High Court would uphold such a tax, at least insofar as it applied to landlords of the Commonwealth, merely by pointing out that its legal incidence did not fall on the Commonwealth.[57]

If it be accepted that a state tax which, if passed on to the Commonwealth by the taxpayer, would lead to its being discriminated against should be invalid, then there is difficulty in accepting the interpretation given to the Victorian rating legislation by at least some of the judges.

Of course, if the rate to be paid by the owner in respect of the Commonwealth's occupancy were no greater than the rate which an ordinary occupant would himself have paid, then clearly no complaint could be made against the rating legislation. The passing on of the rate by the owner would merely put the Commonwealth in the same position as any ordinary occupant. However, some of the judges interpreted the legislation in issue as authorizing the imposition of a greater rate on the owner in respect of the Commonwealth-occupied land than would have been levied on an ordinary occupant of the land. For instance, Gibbs, J. said that the legislation

> expressly states that the rate is levied upon the owner of the rateable property; it is implicit in this statement that the owner is levied in respect of his own interest and not in respect of the interest of someone else. The applicant is rated by reference to the value of its own property, and not by reference to the value of the Commonwealth's leasehold interest.[58]

Stephen and Mason, JJ. said that the levy was not "calculated by reference to the value of the Commonwealth's leasehold interest",[59] but rather was imposed "in respect of the annual value of the rateable property to the owner".[60]

That the value of the owner's interest in the leased land will be greater than the value of the Commonwealth's leasehold interest is practically inevitable. This is so even in circumstances like those of *Bevelon,* in view of the relative shortness of leases in such situations and the unlikelihood of the Commonwealth's taking space in a building nearing the end of its useful life. Therefore, the interpretation given

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[57] Certainly, the American Supreme Court would not do so. For a recent illustration of its approach in this area, see *United States* v. *County of Fresno* 429 U.S. 452 (1977). Likewise, the *obiter dicta* of Latham, C.J. and Dixon, J. (as he then was) in *West* v. *Commissioner of Taxation* (N.S.W.) (1937) 56 C.L.R. 657 at 669 (*per* Latham, C.J.) and 681 (*per* Dixon, J.), would also support a finding of unconstitutionality of such a tax.

[58] *Supra* n. 46 at 397.

[59] *Id.* 402.

[60] *Id.* 401.

to the rating legislation by Gibbs, Stephen and Mason, JJ. gives rise to the prospect of discrimination against the Commonwealth. Its rent bill alone could well be greater on this interpretation than would be the rent and rates bills together of an ordinary tenant occupying the same space.

Jacobs and Murphy, JJ. seemed to go even further than Gibbs, Stephen and Mason, JJ., interpreting the legislation as authorizing the rate on the owner to be based on the value of his and the Commonwealth's interests together. This value must be greater than that of the Commonwealth's interest alone.

Thus it is submitted that the result in the case is unsatisfactory, given the interpretation of the rating legislation offered by various members of the Court. Only if the legislation were interpreted as requiring the owner to pay rates based on a value for the Commonwealth-occupied land no greater than that of the Commonwealth's leasehold interest would it be acceptable. It should perhaps be said in conclusion on this matter that the argument made above in no way depends on the fact that section 114 of the Constitution was raised in the case; it depends instead on the general prohibition against the states' legislating so as to discriminate against the Commonwealth and would be applicable to any state tax whatever which might be passed on to the Commonwealth.

Conclusion

Having commented on matters arising in the course of each of the chapters of the book being reviewed, I should now make some comments of a general nature about the book.

First, I cannot refrain from criticizing those responsible for the book's presentation. They have shown an antagonism to capital letters which, although admittedly all the rage in the 1930's, seems somewhat dated now. They have found themselves unable to end every footnote with a full stop; how they determined which footnotes were to receive part of the precious ration is unfathomable. They have shown the strength of their belief that the law book-buying public does not choose a book by its cover by producing one of notable ugliness. Finally, when giving citations in the footnotes of cases collected in the English Reports, they have omitted reference to the nominate reports in which those cases originally appeared, an omission which the authorities in both Australia and Canada disapprove.[61] What can have been the point of all this—to save money?

Next and far more important, what of the book's contribution to enlightenment in the areas with which it deals? Well, it must be said immediately that the book will be of much greater value to the

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[61] Campbell and MacDougall, *Legal Research: Materials and Method* (1967) at 189; Christie, *Legal Writing and Research Materials* (1970) at 48.

Canadian reader than the Australian, simply because the Canadian law dealt with in the book had never been dealt with in a comprehensive way before. The Australian reader, on the other hand, has had Hogg's *Liability of the Crown*[62] and, for instance, the chapter in Howard's *Australian Federal Constitutional Law*[63] entitled "Balance of Power", which, taken together, cover much of the Australian ground covered in the book being reviewed. To some extent, the author's treatment suffers by comparison to that of Hogg and Howard, because his is far less readable. At the same time, though, his account has the advantage of being more recent and of including some older Australian and much Canadian material not canvassed in theirs. In spite of my earlier criticisms of particular aspects of the book, I consider it to be a substantial contribution in its field and well worth the careful study that an understanding of it requires.

LESLIE KATZ*

Collective Bargaining and Compulsory Arbitration in Australia, by John Niland, Sydney, New South Wales University Press Limited, 1978, VII + 174 pp. (including Appendices I to V and bibliography). $6.75 (paperback).

Much of this book is directed to showing that, on balance, bargaining is preferable to arbitration as a method of resolving industrial disputes. As its author notes, academic intellectual analysis is unlikely to bring about a change in present practice, however much it may clarify issues and sharpen debate. This is just as well, for some of Professor Niland's theoretical analysis is unconvincing, although it occupies much of the book. His empirical work, based on a survey of 87 trade unions in New South Wales, is more persuasive, for it does seem to indicate that bargaining of some sort occurs now, outside and inside the present system, and that it has a fair measure of acceptance (at least when some form of arbitration is also available). The author's prediction that bargaining is likely to increase is plausible and one cannot disagree with his view that, this being so, we ought not ignore it but should consciously choose a policy to deal with it.

Professor Niland is Professor of Economics and Head of the Department of Industrial Relations at the University of New South Wales and has had experience of collective bargaining overseas where,

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[62] 1971.
[63] *Op. cit. supra* n. 39.
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