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Uther’s Case (1947): Justice Dixon and the Troubled Legacy of the Commonwealth Immunity Doctrine

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I Introduction

Sir Owen Dixon has been remembered overwhelmingly as a ‘great’ judge, and indeed as one of the greatest judges of the 20th century.1 His dissenting judgment in Re Foreman & Sons Pty Ltd; Uther v Commissioner of Taxation (‘Uther’s Case’)2 has, in spite of considerable shortcomings, endured to become a great dissent. In Uther’s Case, Dixon J rejected the prevailing reciprocal understanding of the relationship between the Commonwealth and the states and instead developed a doctrine that placed the Commonwealth in a privileged position. His conception of the Commonwealth’s immunity from state laws, which was ultimately accepted and applied by a majority of the High Court in 1962 in Commonwealth v Cigamatic Pty Ltd (in liq) (‘Cigamatic’),3 has had a lasting impact. Despite a wealth of academic criticism, the Court has declined4 to overrule what has been described as a problematic5 and even heretical6 doctrine. In this chapter

2 (1947) 74 CLR 508.
3 (1962) 108 CLR 372.
4 Invitations to the High Court to overrule Cigamatic were declined in Maguire v Simpson (1977) 139 CLR 362 and Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (1997) 190 CLR 410 (‘Residential Tenancies Tribunal’).
we examine various factors that have enabled Dixon J’s dissent in *Uther’s Case* to prevail.

The majority in *Uther’s Case* held, consistently with previous cases,7 that, subject to inconsistent Commonwealth legislation, state laws could validly apply to the Commonwealth. The state legislation in question was a New South Wales Act which provided for a priority order of debts in the case of the winding up of a company.8 Under the legislation, claims for Commonwealth sales tax and payroll tax were in the class of unsecured debts to be paid after the payment of other specified debts. The majority held that it was within the constitutional competence of New South Wales to restrict or abolish the prerogative right of the Commonwealth in this way. Justice Dixon disagreed, holding that the state legislation was invalid in its application to the Commonwealth. As is explained below, Dixon J’s reasoning was underpinned by his comparatively well-formed conception of the Australian federation. Although that was ‘necessarily a dual system’, in Dixon J’s view it was one in which the Commonwealth had ‘supremacy’ because of the *Constitution’s* affirmative grant of power to legislate with respect to specific topics and the paramountcy accorded to federal laws by s 109 of the *Constitution*.9

Fifteen years later, Dixon J’s dissent in *Uther’s Case* was ultimately adopted by the Court in *Cigamatic*.10 By that time, Dixon had been Chief Justice for a decade. He was ‘perhaps at the height of his powers’,11 and was able to command the support of four other Justices. The facts of *Cigamatic* were very similar to those of *Uther’s Case*, and a majority of the Court joined with Dixon CJ in overruling the earlier decision, holding that the state companies legislation could not alter the priority of the Commonwealth in the order of the payment of debts.12

In this chapter we explore various interrelated factors that have contributed to the enduring legacy of Dixon J’s dissenting reasons. First, 

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7 See, eg, *Pirrie v McFarlane* (1925) 36 CLR 170; *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 170.
8 *Companies Act 1936 (NSW)* s 297. 9 *Uther’s Case* (1947) 74 CLR 508, 529.
12 (1962) 108 CLR 372. Justices McTiernan and Taylor dissented, holding that the Court should not overrule *Uther’s Case*. 

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we examine Dixon J’s conception of the Australian federation, including his conviction concerning the inappropriateness of a state regulating the legal relations of the Commonwealth with its own subjects. Second, we discuss Dixon’s influence as Chief Justice of the Cigamatic Court, which facilitated the adoption by the Court of what in 1947 had been a minority view. This includes some reflections on Dixon CJ’s intellectual leadership of the Court and also the changing dynamics of the Court over this period. Third, and linked to the second point, the continuing reverence for Dixon that continues to the present day has helped to entrench and cement his view of the nature of the federation. Fourth, we consider the centralising imbalance inherent in the doctrine, in contrast to the earlier reciprocal approaches, and how this corresponds with the political reality of the ascendancy of Commonwealth power in the federation. To conclude, we offer a brief examination of the influence of Dixon J’s dissent in the cases since Cigamatic, contending that despite the possible dilution of the Commonwealth immunity doctrine, Dixon J’s reasoning in Uther’s Case, as accepted in Cigamatic, remains important.

II Justice Dixon’s Conception of the Federation

According to Dixon J, the state legislation considered in Uther’s Case sought to regulate the relationship between the Commonwealth and its own subjects. Central to his dissent was the proposition that it is exclusively for the Commonwealth, and not the states, to regulate relations between the Commonwealth government and its subjects: ‘to define or regulate the rights or privileges, duties or disabilities, of the Commonwealth in relation to the subjects of the Crown is not a matter for the States.’\(^{13}\) The appeal of Dixon J’s position lies in this simple, fundamental and at least superficially attractive proposition.

Justice Dixon, at least by 1947, seems to have possessed within his own mind a relatively well-formed conception of the Australian federation.\(^{14}\) As Professor Leslie Zines observed, Dixon J’s dissent in Uther’s Case rested

\(^{13}\) Uther’s Case (1947) 74 CLR 508, 528.

\(^{14}\) The development of Dixon J’s views can be traced through his judgments. See, eg, Australian Railways Union v Victorian Railways Commissioners (1930) 44 CLR 319, 390; West v Commissioner of Taxation (NSW) (1937) 56 CLR 657, 682–3; Federal Commissioner of Taxation v E O Farley Ltd (1940) 63 CLR 278, 308; Essendon Corporation v Criterion Theatres Ltd (1947) 74 CLR 1, 22.
on his particular theory of federalism, which both built upon and qualified the approach established by *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (‘Engineers’ Case’) in 1920. That case had, of course, exploded the previously prevailing doctrines of reserved state legislative powers and the implied immunity of state and Commonwealth instrumentalities. The Court instead established a rule that the enumerated grants of legislative power to the Commonwealth were generally to be understood as authorising legislation applying to the states and their agents and instrumentalities. The principle was generally thought to be reciprocal.

We can only speculate as to the genesis of Dixon’s federal vision. It appears to have been driven, at least in part, by his dissatisfaction with aspects of the *Engineers’ Case*. It may well have been influenced by his experiences and views formed as a barrister appearing in the High Court in the decades either side of the *Engineers’ Case*.

Fundamentally, Dixon ‘conceive[d] a State as deriving from the law; not the law as deriving from a State’. Australian governments and legislatures were subordinate to the Constitution and the rule of law. Each of the states and the Commonwealth were conceived of as ‘governments separately organised’: ‘[t]he Constitution predicates their continued existence as independent entities’. While neither a states-righter nor an arch-federalist, within this framework Dixon elevated the Commonwealth to a position of superiority over the states and accepted an approach to

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16 (1920) 28 CLR 129.
17 *Engineers’ Case* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ); Zines, *The High Court and the Constitution*, above n 15, 488. Keven Booker and Arthur Glass have suggested that, while this is generally how the *Engineers’ Case* has been interpreted, the judgment is not definitive on this point: see Keven Booker and Arthur Glass, ‘The Engineers Case’ in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 34, 59.
20 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).
21 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J) (‘Melbourne Corporation’).
the interpretation of constitutional grants of power which facilitated the continuing expansion of central power.\textsuperscript{22}

Justice Dixon’s theory of intergovernmental relations began with the proposition – which is far from self-evident and seemingly in tension with the thrust of the \textit{Engineers’ Case}\textsuperscript{23} – that ‘[i]n a dual political system you do not expect to find either government legislating for the other’.\textsuperscript{24} However, consistently with the reasoning in the \textit{Engineers’ Case}, the existence of express and affirmative grants of legislative power to the Commonwealth was held to displace this basic proposition, as far as Commonwealth legislation binding the states was concerned. The legislative powers of the states, being general and residual, rather than specific and affirmatively granted by the \textit{Constitution}, remained subject to the general proposition against ‘legislating for’ the Commonwealth.

In his judgment in \textit{Melbourne Corporation v Commonwealth} (‘\textit{Melbourne Corporation’}), a decision delivered the day before argument in \textit{Uther’s Case} commenced, Dixon J had observed that what a state may do with reference to the federal government and what the Commonwealth might do with reference to the states were ‘two quite different questions’, affected by different considerations.\textsuperscript{25} Although the decision in \textit{Melbourne Corporation} depended upon an implication limiting the legislative power of the Commonwealth to control the states, Dixon J’s judgment emphasised the strength of the Commonwealth vis-a-vis the states:

\begin{quote}
The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper\end{quote}

\textsuperscript{22} See, eg, \textit{Australian National Airways Pty Ltd v Commonwealth} (1945) 71 CLR 29, 81, 85 (Dixon J); \textit{Bank of New South Wales v Commonwealth} (1948) 76 CLR 1, 332–4 (Dixon J); \textit{R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd} (1964) 113 CLR 207, 225–6. But the breadth of federal powers would nevertheless be constrained by textual and purposive considerations: cf \textit{R v Brislan; Ex parte Williams} (1935) 54 CLR 262.

\textsuperscript{23} As Anne Twomey has commented, ‘[i]t is difficult to understand how the majority judgment in the \textit{Engineers’ case} can be used to support the proposition that the Commonwealth’s enumerated powers can be used to bind the States, without recognizing that it also rejected the proposition that one polity cannot legislate to bind the other’: Twomey, above n 5, 526.

\textsuperscript{24} \textit{Uther’s Case} (1947) 74 CLR 508, 529. Note the use of the second person – a technique employed by Dixon for declamatory effect; cf \textit{R v Kirby; Ex parte Boilermakers’ Society of Australia} (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (‘\textit{Boilermakers’ Case}’).

\textsuperscript{25} (1947) 74 CLR 31, 82.
for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth.

These two considerations add great strength to the implication protecting the operation of State law affecting the exercise of federal power. But they also amplify the field protected. Further, they limit the claim of the State to protection from the exercise of Commonwealth power.26

In his dissent in *Uther’s Case* Dixon J gave effect to this reasoning by holding that the powers of the states did not extend to abolishing the Commonwealth’s ‘fiscal right’27 to priority in payment of debts. The states, being unable to point to any affirmative grant of power (such as the Commonwealth power to make laws with respect to bankruptcy and insolvency), were thus said to be in a weaker position than the Commonwealth.28

In Dixon J’s conception, the inability of the states to legislate so as to regulate relations between the Commonwealth and its subjects was not said to be implied from the Constitution. Rather, Dixon J focussed, unconvincingly,29 upon the absence of any affirmative grant of power to the states to legislate for the Commonwealth. Having observed that the general legislative power of the states was ‘diminished and controlled’ by the Constitution, he continued:

[I]t is not a question whether the power of the Parliament of a Colony becoming a State continues as at the establishment of the Commonwealth. The Colony of New South Wales could not be said at the establishment of the Commonwealth to have any power at all with reference to the Commonwealth. Like the goddess of wisdom the Commonwealth *ideo inciitum* sprang from the brain of its begetters armed and of full stature. At the same instant the Colonies became States, but whence did the States obtain the power to regulate the legal relations of this new polity with its subjects? It formed no part of the old colonial power. The Federal Constitution does not give it. Surely it is for the peace, order and good government of the Commonwealth, not for the peace, welfare and good government of New South Wales, to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict. It is a question of the fiscal and governmental

26 Ibid 82–3.
28 *Uther’s Case* (1947) 74 CLR 508, 529. See also *Victoria v Commonwealth* (1957) 99 CLR 575, 611–12 (Dixon CJ) (‘Second Uniform Tax Case’).
29 See text accompanying nn 32–43 below.
rights of the Commonwealth and, as such, is one over which the State has no power.30

It is a measure of the influence of Dixon J’s reasoning in Uther’s Case that all of the majority Justices in Cigamatic, not just Dixon himself, were content largely to adopt his reasons in the earlier decision without further elaboration.31 Thus it is essentially Dixon J’s initial reasoning in Uther’s Case that has, through its adoption in Cigamatic, had lasting significance.

The resulting ‘Cigamatic doctrine’ has prompted a long line of critique from both academic and practising lawyers.32 The constitutional basis for the doctrine has been questioned repeatedly, with John Doyle QC (when Solicitor-General for South Australia) concluding frankly that ‘the basis of Cigamatic is unclear, and to the extent it can be discerned, not persuasive’.33

Justice Dixon’s reasoning, focusing on the absence of any affirmative specific grants of power to the states, failed to acknowledge the true nature of plenary state legislative power.34 In addition, commentators have pointed out that the ‘supremacy’ derived from s 109 of the Constitution does not support any general implication of Commonwealth superiority or immunity.35 R P Meagher and W M C Gummow, in their well-known 1980 article, argued that the doctrine represented a ‘revival in fresh garb of one aspect of the immunity of instrumentalities doctrine’ that was rejected in the Engineers’ Case.36

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30 Melbourne Corporation (1947) 74 CLR 31, 82–3.
33 Doyle, above n 32, 49.
35 See, eg, Twomey, above n 5, 528. 36 Meagher and Gummow, above n 6, 29.
The obscurities surrounding the application of the doctrine have led to it being described as ‘almost unworkable’.37 These difficulties arise because the precise scope of the Commonwealth’s immunity which was recognised by Dixon J in Uther’s Case, and by the majority in Cigamatic, was, and has remained, unclear. The absence of a logical foundation for the doctrine in the Constitution precludes resolution of such uncertainty by reference to first principles.

In Uther’s Case itself, Dixon J acknowledged that ‘[g]eneral laws made by a State may affix legal consequences to given descriptions of transaction and the Commonwealth, if it enters into such a transaction, may be bound by the rule laid down’.38 Likewise, in Commonwealth v Bogle, Fullagar J (Dixon CJ, Webb and Kitto JJ agreeing) maintained that ‘the State Parliament has no power over the Commonwealth’, yet recognised that ‘[t]he Commonwealth may, of course, become affected by State laws’, giving the example of a contract entered into in Victoria, in which case ‘the terms and effect of that contract may have to be sought in the Goods Act 1928 (Vic)’.40 And in Cigamatic, Dixon CJ distinguished state legislative power ‘to control or abolish a federal fiscal right’ and state power ‘to make some general law governing the rights and duties of those who enter into some description of transaction, such as the sale of goods, and of the Commonwealth in its executive arm choosing to enter into a transaction of that description’.41 This ‘affected by’ aspect of the doctrine was also the subject of much commentary and criticism,42 and would eventually be rejected.43

III Chief Justice Dixon’s Influence over the Cigamatic Court

By the time of Cigamatic, Dixon CJ’s influence over the Court was considerable and his conception of the nature of the federation was endorsed by a majority of the Court. Dixon was, by all accounts, a towering figure on the Australian High Court. After being called to the Bar in 1910, he first appeared before the High Court in December 1911 at the age of 25. Dixon quickly developed a formidable reputation and took silk in 1922. Despite

his success at the Bar, Dixon was hesitant to accept a judicial appointment and in 1926 declined offers of a permanent position on the Supreme Court of Victoria and the role of Chief Judge of the Commonwealth Court of Conciliation and Arbitration. In 1929, aged 42, he somewhat reluctantly accepted appointment to the High Court. He was appointed Chief Justice in 1952 following the retirement of Sir John Latham. Dixon’s tenure on the Court spanned 35 years, though it was punctuated by two diplomatic postings: one as Australian Minister to Washington between April 1942 and September 1944, and one as UN-appointed mediator between India and Pakistan in 1950.

Although Dixon disliked judicial work, describing it as hard and unrewarding, his contribution to the Court, and to Australian law, is immense. As a member of the High Court for three-and-a-half decades, Dixon was known and celebrated for many things, most famously, perhaps, his professed judicial method of ‘strict and complete legalism.’ It is now rarely remembered that in his early days on the Court Dixon was known as the ‘Great Dissenter’, due mainly to a series of dissents in the 1930s in relation to s 92 of the Constitution. But when the entire period of his service on the Court is considered, Dixon was a relatively infrequent dissenter. It has been calculated that in his 35 years on the High Court he

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51 Graham Fricke, Judges of the High Court (Hutchinson, 1986) 118. This point is also noted in the discussion of Dixon’s reputation in Andrew Lynch, ‘Unrequited but Still Great: The Dissent of Justices Dixon and Evatt in R v Federal Court of Bankruptcy; Ex parte Lowenstein (1938)’ in ch 3 of this book.
52 See Willard v Rawson (1933) 48 CLR 316; R v Vizzard; Ex parte Hill (1933) 50 CLR 30; O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW) (1935) 52 CLR 189; Bessell v Dayman (1935) 52 CLR 215.
Justice Dixon in Uther’s Case

Delivered 1699 judgments, and that in just 5.5 per cent of these (94) did he find himself in dissent.53

The adoption of Dixon J’s dissenting views by a majority of the Court in Cigamatic can be explained partly on the basis of the influence that Dixon CJ wielded by that time.54 While some dissenting judgments can be seen as appealing to the sympathies of a future Court or as recording a defeated argument for the sake of posterity, Dixon’s long tenure on the Court and his eventual dominance meant that he personally presided over the vindication of his dissent in Uther’s Case. By 1962, Dixon had been on the Court for more than three decades, including a decade as Chief Justice. His intellect and legal ability, across all areas of the Court’s work, commanded respect and contributed to his ‘intellectual dominance’ over the Court.55 Chief Justice Dixon also worked to generate consensus on the Court, in contrast to some of his predecessors. This included the circulation of draft judgments to the other members of the Court.56 As Sir Douglas Menzies later reflected:

His authority was, of course, enormous, and when he was concerned that a decision should go in a particular way, his aim was to get his own judgment out first for circulation to other members of the Court. To differ from him was a course always taken with hesitation and never without foreboding.57

Chief Justice Dixon’s influence was acknowledged in the insightful and prescient observation of Geoffrey Sawer, writing in 1961 about the theory of Commonwealth immunity favoured by Dixon J in Uther’s Case and by Fullagar J in Commonwealth v Bogle:58

In view of the success which Sir Owen Dixon has had in establishing as doctrine what were once obiter dicta or dissents in judgments given by him, we may assume that if a suitable case arises, the doctrine will be very strongly pressed, and although the Chief Justice does not hold a position comparable with that of Marshall CJ in his hey-day, there is nevertheless an antecedent probability that a view held by him will command a majority;

54 Sackville, above n 34, 60.
56 Ayres, above n 44, 57.
58 (1953) 89 CLR 229.
its chance of doing so is, to say the least of it, not reduced by its having the support of Fullagar J as well.\(^{59}\)

In addition, the Court at the time of the *Cigamatic* judgment was a very different place than it had been in earlier years. When Dixon J was appointed in 1929 the Court was divided and fractured.\(^ {60}\) Divisions and disagreement were prevalent, and reportedly Dixon J was for a time the only member of the Court to whom all of the others regularly spoke.\(^ {61}\) Justice Starke was particularly critical of Evatt and McTiernan JJ, referring to them as ‘the parrots’ on account of their tendency to agree with Dixon J.\(^ {62}\) Justice Starke also refused to discuss or circulate his draft judgments to the other members of the Court, sending his judgments to the Registrar in a sealed envelope with instructions not to open them until the day of judgment delivery.\(^ {63}\) By the time of *Cigamatic*, the composition of the Court had changed considerably and many of the personal divisions between judges had diminished with Dixon CJ at the helm.\(^ {64}\) These changing internal dynamics, combined with Dixon CJ’s influence, help to explain why his dissenting judgment – although scarcely an exemplar of the ‘strict and complete legalism’ which he espoused in ‘federal conflicts’\(^ {65}\) – was ultimately adopted by a majority of the Court.

### IV Precedent and Continuing Reverence for Sir Owen Dixon

In the decades since *Cigamatic*, the doctrine developed by Dixon J in *Uther’s Case* remains accepted by the Court, despite the considerable criticism it has generated. This ongoing legacy can be understood in part, we suggest, by the Court’s commitment to precedent, its unwillingness to address constitutional issues unless absolutely necessary, and the reverence for Dixon that continues to the present day.

\(^ {59}\) Sawer, above n 32, 583.  \(^ {60}\) Ayres, above n 44, 56.  \(^ {61}\) Ibid 57.  
\(^ {64}\) Ibid 875. Matthew Groves and Russell Smyth have noted that the dissent rate in the Dixon Court was lower than it had been for most of the period that Latham was Chief Justice: Groves and Smyth, above n 53, 271.  
\(^ {65}\) Dixon, ‘Address upon Taking the Oath of Office as Chief Justice of the High Court of Australia’, above n 50, 249.
Sir Owen Dixon occupies an almost hallowed place in Australian legal history. During his lifetime he received numerous honours and awards, and the Court over which he presided was well regarded throughout the common law world. Since his retirement and death the accolades have continued, and there is a voluminous academic literature documenting his contribution. His reputation has by now become steeped in mythology, and despite some attempts to present a more nuanced approach by pointing to flaws or criticisms, his reputation remains almost untouchable.

This immense reputation, in combination with the doctrine of precedent, perhaps helps to explain the judicial reluctance to overturn, or even squarely to confront, the Commonwealth immunity doctrine. Although the High Court is not bound by its own decisions, the doctrine of precedent retains importance. The precise relationship between judicial dissent and a willingness to overrule previous decisions is a slippery one, in part because the application of precedent in a final court is fluid. Dixon himself was a strong advocate of the importance of precedent and of the view that the Court should only overrule its own decisions in exceptional circumstances. In Cigamatic itself, Dixon CJ only saw the need to depart from Uther’s Case in relation to the specific issue on which he thought the majority had fallen into ‘fundamental error’. Dixon’s approach to precedent, enshrined through his exposition of the judicial method, has permeated current conceptions of the judicial task. That Dixon J was the main proponent of the Commonwealth immunity doctrine has certainly enhanced its precedential force.

66 See, eg, Mason, above n 63, 878; Sir Garfield Barwick, ‘The Late Sir Owen Dixon’ (1972) 126 CLR v, ix.
70 Dawson and Nicholls, above n 18, 548–52; Wright v Wright (1948) 77 CLR 191, 210 (Dixon J).
71 (1962) 108 CLR 372, 377, 379. For another well-known instance in which Dixon CJ refused to adhere to precedent in respect of propositions which he regarded as both ‘miscalculated and wrong’ and ‘fundamental’, see Parker v The Queen (1963) 111 CLR 610, 632.
73 See Australian Postal Commission v Dao (1985) 3 NSWLR 565, 598 (McHugh JA).
After *Cigamatic*, the Court deferred invitations to reconsider that decision through reliance on an expansive construction of s 64 of the *Judiciary Act 1903* (Cth).\(^{74}\) That section provides:

> In any suit to which the Commonwealth or a State is a party, the rights of the 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.

This enables state laws, which might otherwise fall foul of *Cigamatic*, to be applied as if they were Commonwealth laws. By the operation of s 64 the Commonwealth has, in effect, voluntarily placed itself (in most civil cases at least) in the same legal position that would have obtained had the Commonwealth immunity doctrine not existed.

A consequence has been that the Commonwealth immunity doctrine has rarely called for direct application, but has remained an accepted part of Australian constitutional law for decades. By the time the opportunity did arise for reconsidering the doctrine, in a case involving a decision of a state administrative tribunal (rather than a state court exercising federal jurisdiction), and thus not attracting the operation of s 64 of the *Judiciary Act*,\(^ {75}\) the decision in *Cigamatic* had stood for some 35 years.

The result is that Dixon J’s fundamental propositions concerning the nature of the federation, which underpin the Commonwealth immunity doctrine, have remained part of the fabric of Australian constitutional law. As such, they have continued to exert a broad influence on the outlook and decisions of the Court, despite the very limited direct application of the doctrine itself.

**V Centralising Power and Accord with Political Reality**

The resilience of Dixon J’s dissent in *Uther’s Case* and its progeny, the Commonwealth immunity doctrine, may also be explained in part by its apparent congruity with the political realities of the Australian federation in the modern era.

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\(^{75}\) *Residential Tenancies Tribunal* (1997) 190 CLR 410.
The supremacy of Commonwealth legislation by reason of s 109 of the Constitution meant that the rejection of the doctrine of implied governmental immunities in the Engineers’ Case was of ‘more benefit to the Commonwealth than the States’.76 A central tenet of the Engineers’ Case doctrine was that the express grants of legislative power to the Commonwealth were to be interpreted according to ordinary principles of statutory construction and not subject to any presumption against interference with the states. Thus, with s 109 giving primacy to Commonwealth laws, the Engineers’ Case had the immediate effect of strengthening the position of the Commonwealth and centralising power.

With some notable but relatively minor exceptions,77 the trend of subsequent decisions concerning legislative power has been to accept the expansion of federal power through the application of a liberal approach to the construction of the enumerated grants of legislative power to the Commonwealth,78 at the expense of the states.79 These developments both supported and reflected the political reality of the gradual ascendancy of central power in Australia. To adopt one aspect of what Windeyer J famously said of the Engineers’ Case, they have been ‘a consequence of developments that had occurred outside the law courts as well as a cause of further developments there’.80

The approach adopted by Dixon J in Uther’s Case, and ultimately the decision in Cigamatic, while apparently running counter to the justification given in the Engineers’ Case itself, is consistent with the trend towards the amplification of central power in the Australian federation. There has been little incentive for High Court judges, regarded generally as

79 This may be contrasted with a more restrictive approach applied to those few legislative powers expressly reserved to the states: Bourke v State Bank of New South Wales (1990) 170 CLR 276, 288.
80 Victoria v Commonwealth (1971) 122 CLR 353, 396–7 (‘Payroll Tax Case’).
sympathetic to the expansion of central power,\textsuperscript{81} to reverse \textit{Cigamatic}. Although it could scarcely be regarded as essential to it, the \textit{Cigamatic} doctrine complements the reality of the gradual evolution towards the dominance of the Commonwealth.

VI Conclusion: The Continuing Legacy of \textit{Uther’s Case}

The basic idea espoused by Dixon J in \textit{Uther’s Case} – that the relations between the Commonwealth and its subjects are not properly the domain of state legislative power – remains the accepted doctrine of the Court. The doctrine itself and its foundations have been referred to with express or apparent approval in various cases in the decades following the decision in \textit{Cigamatic}.\textsuperscript{82}

In \textit{Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority} (‘\textit{Residential Tenancies Tribunal}’), a majority of the Court appeared to accept and reiterate this central aspect of Dixon J’s analysis in \textit{Uther’s Case}.\textsuperscript{83} Despite this, it was accepted that neither ‘the Crown nor its agents [presumably meaning the Commonwealth] enjoy any specific immunity from the operation of laws of general application, State or federal’.\textsuperscript{84} A majority in \textit{Residential Tenancies Tribunal} took issue with the awkward distinction between state laws that ‘bind’ the Commonwealth and those merely ‘affecting’ the Commonwealth,\textsuperscript{85} but the new distinction between a law which modifies or impairs Commonwealth executive ‘capacities’ and a law ‘which assumes those capacities and merely seeks to regulate activities . . . which it carrie[s] on in common with other citizens’\textsuperscript{86} seems no more satisfactory, and was ultimately defended as resting on the same fundamental principles.

Only time will tell to what extent the \textit{Residential Tenancies Tribunal} represents a ‘watered down’ version of the Commonwealth immunity


\textsuperscript{82} See, eg, \textit{Payroll Tax Case} (1971) 122 CLR 353, 373 (Barwick CJ; Owen J agreeing), 410 (Walsh J); \textit{Pape v Commissioner of Taxation} (2009) 238 CLR 1, 85 (Gummow, Crennan and Bell JJ); \textit{Australian Postal Commission v Dao} (1985) 3 NSWLR 565, 595–9 (McHugh JA).

\textsuperscript{83} (1997) 190 CLR 410, 424–5 (Brennan CJ), 440–1 (Dawson, Toohey and Gaudron JJ), 451 (McHugh J).

\textsuperscript{84} Ibid 443 (Dawson, Toohey and Gaudron JJ).

\textsuperscript{85} Ibid 447 (Dawson, Toohey and Gaudron JJ).

\textsuperscript{86} Ibid 438–9 (Dawson, Toohey and Gaudron JJ).
doctrine: it appears to remain more than merely a reciprocal application of the *Melbourne Corporation* doctrine. In any event, the foundations underlying Dixonian federal theory appear to have endured.

Justice Dixon’s reasoning in *Uther’s Case* also remains influential in more subtle ways. Thus, for example, in *Pape v Commissioner of Taxation*, Gummow, Crennan and Bell JJ, referencing *Cigamatic*, spoke of ‘the comparative superiority of the position of the Commonwealth in the federal structure’ as a ‘difficulty’ confronting a submission advanced in that case to the effect that the executive power, whether of the Commonwealth or a state, ‘continues to be subservient to legislative power irrespective of whether the source of the legislative power is State or Commonwealth’.

In *Hughes v The Queen*, six Justices of the Court accepted, apparently without the need for express justification, the proposition that ‘a State by its laws cannot unilaterally invest functions under that law in officers of the Commonwealth’. In the later case of *O’Donoghue v Ireland* it was said that ‘[a]n important difference between *Hughes* and the present proceedings is that here the officers in question are those of a State, not the Commonwealth, and the conferral of authority is by a law of the Commonwealth, the *Extradition Act 1988* (Cth)*.

In the latter case, a majority of the Court accepted that the unilateral imposition by a law of the Commonwealth of *functions or powers* on state magistrates was constitutionally permissible, but left open the question whether Commonwealth law could unilaterally impose *duties* on state officers. This lopsided approach to the ‘cross-vesting’ of executive power can only be explained by reference

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87 See *Residential Tenancies Tribunal* (1997) 190 CLR 410. According to Brennan J, ‘the States have no legislative power that can modify a grant of power to the Crown in right of the Commonwealth by a law of the Commonwealth nor any legislative power that can modify a prerogative power conferred by the Constitution and the *Melbourne Corporation* principle ‘is irrelevant to the scope of any State legislative power’: at 424–6. Justices Dawson, Toohey and Gaudron stated that ‘[i]n the application of the principle, however, it is necessary to differentiate between the Commonwealth on the one hand and the States on the other’: at 440.

88 Notably, however, Bradley Selway QC expressed the view that ‘[t]he majority necessarily rejected the reasoning that supported *Cigamatic*, although . . . they were remarkably coy about saying so’: Bradley Selway, ‘The Nature of the Commonwealth: A Comment’ (1998) 20 Adelaide Law Review 95, 99.


92 Ibid 614, 623 (Gleeson CJ), 630 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
to considerations of the kind that motivated Dixon J’s dissent in *Uther’s Case*.

Despite its difficulties, Dixon J’s conception of federation ‘remains of continuing importance’.93 The Dixonian view of the Australian federation continues to reverberate in contemporary assumptions concerning the relationship between the Commonwealth and the states. Thus has a controversial and imperfect dissent, penned by a great judge, become a great dissent.

93 Hayne, above n 46, 220.