

## PRIVATE LAW ACTIONS AGAINST THE GOVERNMENT (PART 1) — REMOVING THE GOVERNMENT'S IMMUNITY FROM SUIT IN FEDERAL CASES

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*[A citizen cannot sue the government without a 'right to proceed', that is, a law removing the government's immunity from suit. Current High Court doctrine holds that, in cases in federal jurisdiction, a right to proceed derives by implication from the grant of jurisdiction. This article subjects that doctrine to critical analysis. The current doctrine does not appear to give any role to s 78 of the Australian Constitution, which grants power to the Commonwealth Parliament to confer rights to proceed in federal cases. It is suggested that, at most, it could be argued that Australian governments do not retain any immunity from suit in constitutional cases and (possibly) in cases coming within the High Court's constitutionally guaranteed jurisdiction under s 75 of the Australian Constitution. This suggested approach leaves room for the operation of s 78 of the Australian Constitution and also for provisions such as ss 56 and 58 of the Judiciary Act 1903 (Cth).]*

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## I INTRODUCTION

The well-known statement that the *Australian Constitution* is framed against the assumption of the rule of law<sup>1</sup> is commonly taken to mean two things. First, it is the role of the courts to determine whether government action (both Commonwealth and state) is consistent with the *Australian Constitution*. This principle can be traced to the American decision of *Marbury v Madison*.<sup>2</sup> Second, it is the role of the courts to determine whether executive action is lawful more generally.<sup>3</sup> In the case of the Commonwealth, s 75(v) of the *Australian Constitution* in particular indicates that there is an entrenched level of judicial review for decisions by Commonwealth officers.<sup>4</sup>

However, the lawfulness of government action is not only ensured through proceedings for judicial review. Proceedings raising issues of 'private' law (in the sense of causes of action that can also arise in suits between citizens)<sup>5</sup> are another important check on government action. Gleeson CJ, Gummow, Kirby and Hayne JJ make this point in *City of Enfield v Development Assessment Commission*:

Significant questions of public law, including those respecting ultra vires activities of public officers and authorities, are determined in litigation which does not answer the description of judicial review of administrative action by the medium of the prerogative writs or statutory regimes such as that provided by the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Examples of

<sup>1</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J) ('*Communist Party Case*').

<sup>2</sup> 5 US (1 Cranch) 137 (1803). Fullagar J famously stated that the principle in *Marbury v Madison* was accepted as 'axiomatic' in Australia: *Communist Party Case* (1951) 83 CLR 1, 262–3.

<sup>3</sup> See, eg, *A-G (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan J), where it was held that the courts' duty is not just to pronounce on whether government action is constitutionally valid, but 'extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law.'

<sup>4</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157/2002*'). For a sample of the extensive literature on this topic, see John Basten, 'Constitutional Elements of Judicial Review' (2004) 15 *Public Law Review* 187; Jeremy Kirk, 'The Entrenched Minimum Provision of Judicial Review' (2004) 12 *Australian Journal of Administrative Law* 64.

<sup>5</sup> '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). Admittedly, even with 'private' law actions there can be specific doctrines that relate only to governments, such as the special considerations arising with disclosure of confidential government information: see *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51–2 (Mason J). I am grateful to Justice Paul Finn for this point.

other vehicles are the actions for recovery of moneys exacted *colore officii* or paid by mistake, and those for trespass, detinue and conversion where the plaintiff challenges the validity of the authority relied upon by the defendant as an answer to the allegedly tortious acts.<sup>6</sup>

To bring a ‘private’ law action against the government, a plaintiff requires three things:

- 1 a cause of action (a legally recognised right against the government);<sup>7</sup>
- 2 a court with jurisdiction (relevantly, authority to determine the subject matter of the cause of action, and jurisdiction over the defendant);<sup>8</sup> and
- 3 a right to proceed.<sup>9</sup>

The right to proceed is a law removing the government’s immunity from suit. Under the 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’).<sup>10</sup> This common law government immunity from suit will be applied in federal cases pursuant to s 80 of the *Judiciary Act 1903* (Cth) (‘*Judiciary Act*’), unless that immunity is contrary to the *Australian Constitution* or to any applicable statutory law conferring a right to proceed.<sup>11</sup>

This article considers the source of the right to proceed against the Commonwealth and the states in cases in federal jurisdiction — in particular, whether this right is derived by implication from the *Australian Constitution* or from Commonwealth legislation enacted under s 78 of the *Constitution*.<sup>12</sup>

<sup>6</sup> (2000) 199 CLR 135, 143–4 (citations omitted).

<sup>7</sup> In federal cases, it is necessary that the cause of action raises a ‘matter’: that is, an ‘immediate right, duty or liability to be determined by the Court’: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

<sup>8</sup> ‘Jurisdiction’ can mean (1) the court’s jurisdiction over the person; (2) the subject matter over which the court has authority to decide; or (3) the geographical extent of the law area: see, eg, *Lipohar v The Queen* (1999) 200 CLR 485, 517 (Gaudron, Gummow and Hayne JJ).

<sup>9</sup> Cf Susan Kneebone, *Tort Liability of Public Authorities* (1998) 336, who suggests that these different concepts can be conflated into the cause of action and jurisdiction.

<sup>10</sup> See generally Peter W Hogg and Patrick J Monahan, *Liability of the Crown* (3<sup>rd</sup> ed, 2000) 4–9. Justice Selway argues that the traditional understanding of government immunity from suit is flawed and involves, among other things, ascribing to the whole of government immunities that had previously belonged only to the sovereign: Justice Bradley Selway, ‘Of Kings and Officers — The Judicial Development of Public Law’ (2005) 33 *Federal Law Review* 187.

<sup>11</sup> *Judiciary Act* s 80 provides:

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.

<sup>12</sup> In non-federal cases, the right to proceed will depend on a state or territory law conferring that right: see, eg, *Court Procedures Act 2004* (ACT) s 21; *Crown Proceedings Act 1988* (NSW) s 5; *Crown Proceedings Act 1958* (Vic) ss 22–3.

Section 78 of the *Australian Constitution* provides:

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power [of the Commonwealth].

On its face, s 78 authorises the Commonwealth Parliament to remove the Commonwealth and the states' immunity from suit for cases in federal jurisdiction. As is well-known, most Australian colonies had legislated prior to federation to remove their immunity from suit.<sup>13</sup> The terms of s 78 of the *Australian Constitution* indicate that a right to proceed is separate from, and in addition to, other requirements for bringing a suit in federal jurisdiction. Specifically, it might be thought that, without a right to proceed, a plaintiff could not successfully sue the Commonwealth or a state in federal jurisdiction, even though the plaintiff's claim had been brought in a court with jurisdiction over the subject matter of the claim.

However, the High Court's current approach ties the removal of government immunity from suit in federal cases to the conferral of federal jurisdiction. For example, there is said to be a right to proceed against the Commonwealth, in all courts and in all cases, deriving from s 75(iii) of the *Australian Constitution*.<sup>14</sup> I argue that this approach is flawed, and that it would be preferable to consider two factors separately: (1) the need for courts to supervise the constitutional validity of government action; and (2) the special status of the High Court's jurisdiction guaranteed by s 75 of the *Australian Constitution*.

## II MEWETT AND BRITISH AMERICAN TOBACCO — THE RIGHT TO PROCEED DERIVES FROM THE GRANT OF FEDERAL JURISDICTION

The High Court's current approach is set out in *Commonwealth v Mewett*<sup>15</sup> (concerning a claim in tort against the Commonwealth) and *British American Tobacco Australia Ltd v Western Australia*<sup>16</sup> (concerning a claim against a state to recover amounts paid on account of a constitutionally invalid tax). In both cases, a plurality of the Court held that the plaintiff's right to proceed against the relevant government derived from the conferral of federal jurisdiction.

### A *The Previous Approach — Sections 56, 58 and 64 of the Judiciary Act*

Before *Mewett* and *British American Tobacco*, the weight of authority suggested that the right to proceed against the Commonwealth or a state in federal jurisdiction derived from provisions in the *Judiciary Act*. There was, however, some debate as to which was the relevant provision.

<sup>13</sup> See Paul Finn, *Law and Government in Colonial Australia* (1987) ch 6. On the historical background leading to the enactment of the first such statute in South Australia, see Greg Taylor, 'John Baker's Act: The South Australian Origins of Australian Claims-against-the-Government Legislation' (2004) 27 *University of New South Wales Law Journal* 736.

<sup>14</sup> See below Part II(B).

<sup>15</sup> (1997) 191 CLR 471 ('*Mewett*').

<sup>16</sup> (2003) 217 CLR 30 ('*British American Tobacco*').

1 *Sections 56 and 58*

Several provisions in the *Judiciary Act* seem to confer express rights to proceed, particularly s 56 (for claims against the Commonwealth) and s 58 (for claims against a state).<sup>17</sup> Section 56(1) provides:

A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth:

- (a) in the High Court;
- (b) if the claim arose in a State or Territory — in the Supreme Court of that State or Territory or in any other court of competent jurisdiction of that State or Territory; or
- (c) if the claim did not arise in a State or Territory — in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory.<sup>18</sup>

Section 58 provides that claims against a state in federal jurisdiction, ‘whether in contract or in tort’, may be brought in the supreme court of that state or (if the High Court has original jurisdiction) in the High Court.

There are obvious limits on the scope of the rights to proceed conferred by ss 56 and 58 of the *Judiciary Act*. Both provisions are limited to claims ‘whether in contract or in tort’, and only apply in specified courts.

2 *Section 64*

The High Court’s decision in *Commonwealth v Evans Deakin Industries Ltd*<sup>19</sup> indicates that a right to proceed in federal cases could also derive from s 64 of the *Judiciary Act*.<sup>20</sup> 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.

Unlike ss 56 and 58 of the *Judiciary Act*, s 64 applies to all cases in federal jurisdiction,<sup>21</sup> and is not limited by reference to the subject matter of the claim, or to particular courts.

<sup>17</sup> *Judiciary Act* s 57 deals with suits ‘whether in contract or in tort’ in the High Court by a state against the Commonwealth, and s 59 deals with suits in the High Court between states. Sections 57 and 59 only refer to the High Court, because of the limits on the subject matter jurisdiction of state courts contained in *Judiciary Act* s 38(b) and (d). Curiously, no provision in the *Judiciary Act* expressly confers on the Commonwealth a right to proceed against a state: see Michael Pryles and Peter Hanks, *Federal Conflict of Laws* (1974) 187–9.

<sup>18</sup> Section 56(2) defines which courts are courts of ‘competent jurisdiction’ for the purposes of s 56(1)(b) and (c).

<sup>19</sup> (1986) 161 CLR 254 (*‘Evans Deakin’*).

<sup>20</sup> 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 *Mewett* (1997) 191 CLR 471, 502, Dawson J relied on *Evans Deakin* to conclude that s 64 conferred a right to proceed against the Commonwealth. McHugh J agreed on this point: at 552.

<sup>21</sup> Although note that s 64 *only* operates in cases in federal jurisdiction: see, eg, *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 349–50 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (*‘Bass’*).

Writing in 1996 (before *Mewett* was decided by the High Court), Susan Kneebone stated that '[t]he bulk of authority favours the view that s 78 of the *Constitution*, read with ss 56 and 64 of the *Judiciary Act*, is responsible for the removal of the Commonwealth's immunity in tort.'<sup>22</sup>

#### B *Mewett* — *The Right To Proceed against the Commonwealth*

In *Mewett*,<sup>23</sup> however, a plurality of the High Court held that laws enacted under s 78 of the *Australian Constitution* were not the source of the right to proceed when the Commonwealth was sued in contract or tort. The immediate question in that case was whether Commonwealth legislation extinguishing the right to bring common law claims against the Commonwealth amounted to an 'acquisition of property' in its operation on time-barred claims. In considering whether these claims were 'property' for the purposes of s 51(xxxi) of the *Australian Constitution*, the Court had to determine the source of the Commonwealth's liability, and whether these claims could be said to derive only from provisions such as ss 56 or 64 of the *Judiciary Act*. All members of the Court held that common law claims against the Commonwealth were 'property', even if time-barred. However, there were two views expressed on the source of the right to proceed.

Four members of the High Court — Gummow and Kirby JJ in a joint judgment, with Brennan CJ and Gaudron J agreeing — held that the right to proceed against the Commonwealth in cases in contract or tort derives from s 75(iii) of the *Australian Constitution*, which confers original jurisdiction on the High Court in matters in which the Commonwealth is a party.<sup>24</sup> That conclusion has been repeated in several subsequent decisions, without further discussion.<sup>25</sup>

By contrast, the other members of the Court in *Mewett* — Dawson J, with Toohey and McHugh JJ agreeing — held that the right to proceed against the Commonwealth derives from laws enacted under s 78 of the *Australian Constitution* — either s 56 or s 64 of the *Judiciary Act*.<sup>26</sup> As noted, this approach represented the weight of judicial authority before *Mewett*.<sup>27</sup>

<sup>22</sup> 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, 128. See also Pryles and Hanks, above n 17, 185–6.

<sup>23</sup> (1997) 191 CLR 471.

<sup>24</sup> *Ibid* 545–52 (Gummow and Kirby JJ), 491 (Brennan CJ), 527 (Gaudron J).

<sup>25</sup> See *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136, 157 (McHugh J); *Smith v ANL Ltd* (2000) 204 CLR 493, 502 (Gaudron and Gummow JJ); *British American Tobacco* (2003) 217 CLR 30, 57–8 (McHugh, Gummow and Hayne JJ); *Blunden v Commonwealth* (2003) 218 CLR 330, 336 (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*Blunden*'). See also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262 (Gaudron, Gummow and Kirby JJ).

<sup>26</sup> (1997) 191 CLR 471, 495–503 (Dawson J) (relying on *Judiciary Act* s 64), 513 (Toohey J) (relying on *Judiciary Act* s 56), 532 (McHugh J).

<sup>27</sup> See above n 22 and accompanying text.

1 *Gummow and Kirby JJ — The Right To Proceed Derives from Conferral of Federal Jurisdiction*

Gummow and Kirby JJ noted that there were four types of proceedings that were possible under the *Australian Constitution* which were ‘not encompassed by the common law as it developed in England.’<sup>28</sup>

- First, the *Constitution* contemplates actions between the Commonwealth and a state in tort or in contract.
- Second, the *Constitution* contains provisions that themselves confer legal rights and obligations that can be enforced through the exercise of federal judicial power. For example, ss 89(iii) and 93(ii) initially required the Commonwealth to make payments to the states, and gave the states an enforceable right to receive the money.<sup>29</sup>
- Third, s 75(v) of the *Constitution* authorises the grant of injunctive relief against officers of the Commonwealth (which includes Ministers of State), to restrain acts that are beyond their constitutional or legislative authority. In England, by contrast, it was not clear until *M v Home Office*<sup>30</sup> that the courts could grant injunctions against Ministers of State.
- Fourth, a citizen may sue a government in tort, and claim that the law upon which the government relies for justification is constitutionally invalid.

From these examples, their Honours appear to have concluded that it would be incompatible with the system of federal judicial power for the Commonwealth to retain an immunity from suit.<sup>31</sup>

(a) *Constitutional Cases*

The second and fourth examples given above are both illustrations of the proposition that a common law immunity from suit could not prevent the courts from determining whether the Commonwealth had exceeded its constitutional powers. It may readily be accepted that a claim of government immunity from suit in that situation would ‘cut across the principle in *Marbury v Madison*’<sup>32</sup> (that ultimately it is the courts who determine whether government action is consistent with the Constitution). The Commonwealth and states could not enact legislation that purported to grant an immunity from suit when the constitutional validity of government action was being challenged — if the action was consti-

<sup>28</sup> *Mewett* (1997) 191 CLR 471, 547–8.

<sup>29</sup> *Australian Constitution* s 89(iii) provides that:

Until the imposition of uniform duties of customs ... the Commonwealth shall pay to each State month by month the balance (if any) in favour of the State [after crediting the amounts in s 89(i) and debiting the amounts in s 89(ii)].

Section 93(ii) provides that:

During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides ... subject to [s 93(i)], the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

<sup>30</sup> [1994] 1 AC 377.

<sup>31</sup> *Mewett* (1997) 191 CLR 471, 548.

<sup>32</sup> *Ibid.*

tutionally invalid, the purported immunity would itself be in breach of the same constitutional provision that invalidated the original government action.<sup>33</sup> It follows that a common law principle could not have this effect either, because the common law must conform to the *Australian Constitution*.<sup>34</sup>

However, it does not follow that the *Australian Constitution* must remove the Commonwealth's immunity from suit in *all* cases. As the minority in *Mewett* point out, the principle in *Marbury v Madison* would only require that the Commonwealth's immunity from suit be removed in cases where the plaintiff's claim depended on establishing that the Commonwealth had exceeded its constitutional powers. In other words, *Marbury v Madison* does not require the removal of the Commonwealth's immunity from suit in non-constitutional cases.<sup>35</sup>

In this context, 'constitutional' cases means matters 'arising under [the] *Constitution*' within s 76(i) of the *Australian Constitution*,<sup>36</sup> and therefore would cover any case where the claim, or a defence, owes its existence to the *Australian Constitution*.<sup>37</sup> For example, a common law action for moneys had and received would be a 'constitutional' case, if the moneys were paid on account of a constitutionally invalid tax.<sup>38</sup> Of course, s 76(i) also includes matters 'involving [the] interpretation' of the *Australian Constitution*. However, this phrase would not be relevant in 'private' law claims, because the requirement for a citizen to have standing would mean that constitutional challenges brought by private citizens would ultimately rest on a claim or defence that owed its existence to the *Australian Constitution*.<sup>39</sup>

(b) *Cases between the Commonwealth and a State*

Unlike the second and fourth examples, the first example given by Gummow and Kirby JJ — the possibility of suits in tort and contract between the Commonwealth and the states — does not seem to demonstrate any great incompatibility between the common law government immunity from suit and the federal

<sup>33</sup> Cf *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 ('*Antill Ranger*'). However, *Antill Ranger* leaves open the possibility that a government may be able to place some limits on how government action is challenged: at 100 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ), 103 (Fullagar J); see also *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633, 659–60 (Fullagar J).

<sup>34</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

<sup>35</sup> *Mewett* (1997) 191 CLR 471, 497 (Dawson J).

<sup>36</sup> *Australian Constitution* s 76(i) provides that: 'The Parliament may make laws conferring original jurisdiction on the High Court in any matter ... arising under this *Constitution*, or involving its interpretation'.

<sup>37</sup> Cf the test for when a matter 'arises under' a Commonwealth law in *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

<sup>38</sup> See *British American Tobacco* (2003) 217 CLR 30, 52 (McHugh, Gummow and Hayne JJ), 89 (Callinan J).

<sup>39</sup> The Attorney-General of a state or territory would clearly have standing to bring an action that only involved the interpretation of the *Australian Constitution*, such as a challenge to the validity of Commonwealth legislation. In *Combet v Commonwealth* (2005) 224 CLR 494, McHugh and Kirby JJ, in dissent, held that a member of the Commonwealth Parliament, and the Shadow Attorney-General in particular, would also have standing to bring this sort of constitutional challenge: at 556 (McHugh J), 620–1 (Kirby J).



judicial system. Clearly, it is true that this sort of proceeding was ‘not encompassed by the common law as it developed in England’,<sup>40</sup> because England has a unitary legal system. It does not follow, however, that the English common law of government immunity from suit cannot be adapted to a federation.

By analogy, the English common law presumption that statutes do not bind the executive government also arose in a unitary system of government. However, that presumption has been adapted to a federal system, so that there is a presumption that the statutes of one polity do not bind the executive government of that or any other Australian polity.<sup>41</sup> There does not seem to be any reason why a comparable adaptation could not be made to the common law government immunity from suit.<sup>42</sup> Admittedly, the analogy is not exact — a *presumption* that legislation does not apply is not the same as an *immunity* from suit. However, the underlying basis of both doctrines is the same; that is, the apparent incongruity of one part of the government (the Parliament or the courts) issuing a command against another part of government (the executive). Further, in both cases the Parliament can remove the protection afforded by the presumption or the immunity.<sup>43</sup>

(c) *Injunctions against Ministers of State*

The third example given above — that s 75(v) of the *Australian Constitution* authorises injunctions issued against Ministers of State — would at most establish another partial inconsistency between the common law immunity from suit and the federal judicial system in Chapter III of the *Constitution*. To the extent that this example covers a Minister’s lack of *constitutional* authority, it merely illustrates the point made earlier about *Marbury v Madison*. To the extent that this example covers a Minister’s lack of *legislative* authority, it merely demonstrates that government immunity from suit cannot prevent a certain remedy (an injunction) from being granted.<sup>44</sup> That fact says nothing about

<sup>40</sup> *Mewett* (1997) 191 CLR 471, 547 (Gummow and Kirby JJ).

<sup>41</sup> *Jacobsen v Rogers* (1995) 182 CLR 572, 585 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Commonwealth v Western Australia* (1999) 196 CLR 392 (‘*Mining Act Case*’). See generally Greg Taylor, ‘*Commonwealth v Western Australia* and the Operation in Federal Systems of the Presumption that Statutes Do Not Apply to the Crown’ (2000) 24 *Melbourne University Law Review* 77.

<sup>42</sup> For example, there is authority for the proposition that a state court cannot issue mandamus against an officer of the Commonwealth in the exercise of state jurisdiction: *Ex parte Goldring* (1903) 3 SR (NSW) 260, cited with approval in *Kruger v Commonwealth* (1997) 190 CLR 1, 171 fn 676 (Gummow J). In the US, the states retain a robust immunity from suit, even when the cause of action arises under federal law: see *Alden v Maine*, 527 US 706 (1999); and even in federal courts: see *Kimel v Florida Board of Regents*, 528 US 62 (2000); *Board of Trustees of the University of Alabama v Garrett*, 531 US 356 (2001). This immunity does not depend on *United States Constitution* amend 11 — which prevents federal judicial power from extending to actions ‘commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State’ — but rather the ‘structure and history of the [*United States*] *Constitution*’: *Alden v Maine*, 527 US 706, 713, 733 (Kennedy J) (1999).

<sup>43</sup> Of course, the presumption against legislation applying to the executive government of the enacting polity need not be overcome *expressly*; this presumption can be overcome by a sufficiently clear statement of legislative intention that the legislation should apply to the executive government.

<sup>44</sup> The reference to an injunction in *Australian Constitution* s 75(v) is as a ‘public law remedy’: *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 107 (Gaudron and Gummow JJ). However, an injunction may be sought under *Judiciary Act* s 39B(1) — which confers jurisdiction on

whether there could still be a common law immunity from an application for other remedies in a ‘private’ law claim, such as damages. In any event, it is not obvious why there should be any difference between the content of an injunction issued in the exercise of federal judicial power and an injunction issued in the exercise of state judicial power.<sup>45</sup>

(d) *The Common Law Should Be Modified to the Least Extent Necessary*

For these reasons, I would argue that the examples given by the plurality in *Mewett* only establish a partial inconsistency between the *Australian Constitution* and the common law of government immunity from suit. That partial inconsistency is not, I would suggest, a sufficient reason to abandon entirely the common law of government immunity from suit. I shall explain why that is so.

The approach of the plurality in *Mewett* modifies the common law so that it conforms to the *Australian Constitution*, as the High Court did with the common law of qualified privilege in *Lange*.<sup>46</sup> (This is at least true of the sovereign’s common law immunity from being sued in its own courts — the plurality in *Mewett* note arguments that the sovereign was never properly regarded as having an immunity from tort.)<sup>47</sup> Although there has been some debate on this question, in my view ‘constitutionalising’ the common law involves drawing a constitutional implication that limits the judicial power to apply and develop common law doctrines<sup>48</sup> — here, the doctrines of government immunity from suit. Being a constitutional implication, it should be limited to what is ‘logically or practically necessary’.<sup>49</sup> Therefore, the fact that the common law doctrines of government immunity from suit run counter to the *Australian Constitution* in some respects is not a reason to abandon those doctrines altogether.<sup>50</sup> Instead, I would argue, the *Australian Constitution* only requires a partial modification to the

the Federal Court corresponding to *Australian Constitution* s 75(v) — to vindicate what has been described as a ‘private’ law claim: see *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217, 221–2 (Finn J).

<sup>45</sup> Arguably, *M v Home Office* [1994] 1 AC 377, 405 (Lord Woolf), demonstrates that the common law (including equitable principles) has developed, so that there would no longer be an objection to an injunction being issued against a Minister in the exercise of state judicial power.

<sup>46</sup> (1997) 189 CLR 520. See Mark Leeming, ‘The Liability of the Government under the *Constitution*’ (1998) 17 *Australian Bar Review* 215, 215–16.

<sup>47</sup> See *Mewett* (1997) 191 CLR 471, 544 (Gummow and Kirby JJ), where their Honours suggest that the 19<sup>th</sup> century cases may have proceeded on a misunderstanding of a passage from Bracton: see *Bracton on the Laws and Customs of England* (Samuel E Thorne trans, 1968 ed) vol 2, 305–6 [trans of: *De Legibus et Consuetudinibus Angliae*]. Justice Bradley Selway argues explicitly that the High Court should have revised the common law of government immunity from suit, regardless of constitutional considerations: Justice Bradley Selway, ‘The Source and Nature of the Liability in Tort of Australian Governments’ (2002) 10 *Tort Law Review* 14, 34–5.

<sup>48</sup> Graeme Hill and Adrienne Stone, ‘The Constitutionalisation of the Common Law’ (2004) 25 *Adelaide Law Review* 67, 82–7.

<sup>49</sup> To adopt the well-known statement of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135, although this was said to be confined to ‘structural’, rather than ‘textual’, implications. See also Catherine Penhallurick, ‘Commonwealth Immunity as a Constitutional Implication’ (2001) 29 *Federal Law Review* 151, 161–4.

<sup>50</sup> See Hill and Stone, above n 48, 97, arguing that the High Court should be cautious before concluding that common law doctrines are inconsistent with the *Australian Constitution*, and should make as few ‘constitutionally driven’ changes as possible.

common law of government immunity. I explain below the way in which the common law of government immunity from suit might be modified.<sup>51</sup>

Apart from these issues, the plurality's approach in *Mewett* raises an issue about the source of the right to proceed against a state in federal cases. There is, of course, no head of federal jurisdiction that applies generally to the states in the way that s 75(iii) does to the Commonwealth.<sup>52</sup> Rather, a private law action against a state will only be in federal jurisdiction if, for example, the action is brought by a resident of another state,<sup>53</sup> the action 'arises under' the *Australian Constitution* or involves its interpretation,<sup>54</sup> or the action 'arises under' a Commonwealth law.<sup>55</sup>

### C British American Tobacco — *The Right To Proceed against the States*

The High Court considered the source of the right to proceed against a state in *British American Tobacco*.<sup>56</sup> The specific issue in that case was whether a suit against Western Australia in federal jurisdiction could be subject to the notice requirements in the *Crown Suits Act 1947* (WA). That Act confers a right to proceed against the state (s 5), but requires that notice of certain matters be given to the state as soon as practicable, or within three months after the cause of action accrues (s 6). Western Australia argued that noncompliance with s 6 meant that the plaintiff could not bring proceedings against the state to recover money paid pursuant to a constitutionally invalid tax. The plaintiff's claim that the tax was contrary to s 90 of the *Australian Constitution* (which was not challenged by Western Australia)<sup>57</sup> meant that the proceedings were in federal jurisdiction. All members of the High Court held that s 6 of the *Crown Suits Act 1947* (WA) could not validly apply to matters in federal jurisdiction.<sup>58</sup> However, there were different views on the source of the right to proceed against a state in a case in federal jurisdiction.

#### 1 *McHugh, Gummow and Hayne JJ — The Right To Proceed Derives from Conferral of Federal Jurisdiction*

McHugh, Gummow and Hayne JJ (with whom Callinan J agreed) held that the plaintiff's right to proceed against Western Australia derived from the conferral of federal jurisdiction. The relevant head of federal jurisdiction in *British American Tobacco* was matters arising under the *Australian Constitution* or

<sup>51</sup> See below Part III(B).

<sup>52</sup> For this reason, a suit against the Commonwealth in a federal or state court will *always* be in federal jurisdiction, regardless of the source of the rights asserted by the plaintiff: see *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2000) 204 CLR 559, 590 (Gleeson CJ, Gaudron and Gummow JJ), 638 (Hayne and Callinan JJ) ('*Edensor Nominees*').

<sup>53</sup> *Australian Constitution* s 75(iv).

<sup>54</sup> *Australian Constitution* s 76(i).

<sup>55</sup> *Australian Constitution* s 76(ii).

<sup>56</sup> (2003) 217 CLR 30.

<sup>57</sup> That conclusion followed from *Ha v New South Wales* (1997) 189 CLR 465.

<sup>58</sup> *British American Tobacco* (2003) 217 CLR 30, 48 (Gleeson CJ), 64 (McHugh, Gummow and Hayne JJ), 87 (Kirby J), 89 (Callinan J).

involving its interpretation.<sup>59</sup> The Supreme Court of Western Australia was invested with jurisdiction over these matters by s 39(2) of the *Judiciary Act*.

The joint judgment concluded that this conferral of federal jurisdiction removed, by necessary implication, a state's immunity from suit.<sup>60</sup> Two comments can be made about this conclusion.

(a) *Is Abrogation of Immunity from Suit Required for Constitutional Cases?*

First, some passages in the joint judgment indicate that the removal of government immunity from suit is required by the subject matter of s 76(i) proceedings; in other words, that the principle in *Marbury v Madison* means that constitutional cases cannot be defeated by a claim of government immunity.<sup>61</sup> This conclusion only supports removing a government's immunity from suit in constitutional cases. Moreover, this conclusion would suggest that the *conferral of jurisdiction*, in itself, is not what removes the Commonwealth's immunity from suit. Yet the plurality in *Mewett* tied the removal of Commonwealth immunity to the grant or conferral of s 75(iii) jurisdiction, rather than the subject matter of the dispute.

(b) *Is Immunity from Suit Inconsistent with Federal Judicial Power?*

Second, other passages in the joint judgment in *British American Tobacco* could be taken to suggest that the removal of government immunity from suit is required by the nature of federal judicial power. The joint judgment states that a Commonwealth law conferring jurisdiction on a state court over constitutional matters 'necessarily subjects the States to the relevant exercise of the judicial power of the Commonwealth to resolve the controversy reflected in the [s 76(i)] matter'.<sup>62</sup>

It is not clear why the conferral of *federal* judicial power would necessarily remove a government's immunity from suit, when it seems to be accepted that the conferral of *state* judicial power does not have that effect. Moreover, the inclusion in s 78 of the *Australian Constitution* of an express power to grant rights to proceed would seem to indicate that a claim of government immunity from suit can coexist with the conferral of federal jurisdiction (at least in

<sup>59</sup> *Australian Constitution* s 76(i). See *British American Tobacco* (2003) 217 CLR 30, 52 (McHugh, Gummow and Hayne JJ), where *British American Tobacco* was held to be a 'constitutional case' because the common law action for moneys had and received owed its existence to *Australian Constitution* s 90. The joint judgment noted, as a preliminary point, that these proceedings did not come within *Australian Constitution* s 75(iv) — matters '[b]etween States, or between residents of different States, or between a State and a resident of another State' — because the plaintiff corporation was not a 'resident' of a state, and also because the joinder of the state as a defendant meant that there was not complete diversity between the parties: at 51 (McHugh, Gummow and Hayne JJ).

<sup>60</sup> *Ibid* 58: 'as a matter of necessary implication, the conferring of jurisdiction with respect to matters arising under the *Constitution* (or involving its interpretation) involves the conferral of any necessary right to proceed against a State as a party in that matter.'

<sup>61</sup> *Ibid* 58–9.

<sup>62</sup> *Ibid* 59 (emphasis added). See also Mark Leeming, 'The Liabilities of Commonwealth and State Governments under the *Constitution*' (2006) 27 *Australian Bar Review* 217, 226, who argues that government immunity from suit is removed in 'all matters in federal jurisdiction ... by reason of the provisions in ch III [of the *Australian Constitution*], subjecting the government in those matters to the judicial power of the Commonwealth'.

non-constitutional cases). Ordinary characterisation principles would suggest that a power to confer rights to proceed against the Commonwealth or the states includes the power *not* to confer rights to proceed.<sup>63</sup>

2 *Gleeson CJ and Kirby J — The Right To Proceed in Constitutional Cases Is Implied from the Australian Constitution Itself*

The judgments of Gleeson CJ and Kirby J in *British American Tobacco* analysed the right to proceed against Western Australia differently. Gleeson CJ held that the right to proceed against a state in constitutional cases derives by implication from the relevant provision of the *Australian Constitution* that is said to be infringed, rather than from the conferral of federal jurisdiction.<sup>64</sup> His Honour did not place much weight on covering cl 5 in this regard (which provides that the *Australian Constitution* ‘shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth’). According to Gleeson CJ, ‘[i]t may be doubted whether ... [covering cl 5] adds anything to what is necessarily implied in the *Constitution* itself.’<sup>65</sup>

Although Kirby J was a member of the joint judgment in *Mewett*, his Honour agreed with this conclusion of Gleeson CJ.<sup>66</sup>

D *Summary of Recent High Court Authorities*

To summarise, it was thought before *Mewett* that the right to proceed against the Commonwealth and against the states in federal cases derived from provisions of the *Judiciary Act*, such as ss 56, 58 or 64. In *Mewett*, however, a plurality of the High Court held that the grant of s 75(iii) jurisdiction, in itself, removes the Commonwealth’s immunity from suit. The joint judgment in *British American Tobacco* took a similar approach, holding that the conferral of federal jurisdiction on state courts to determine constitutional cases, by necessary implication, removes the states’ immunity from suit.

Two points can be noted immediately. First, the effect of *Mewett* and *British American Tobacco* is that there is a *constitutionally guaranteed* right to proceed against the Commonwealth (even in non-constitutional cases), but only a *statutory* right to proceed against the states in federal jurisdiction (even in constitutional cases). I return to this apparent discrepancy below.<sup>67</sup> Second, some parts of the reasoning in *British American Tobacco* seem to focus on the subject matter of the proceedings, rather than the conferral of jurisdiction as such (which was the focus in *Mewett*).

<sup>63</sup> Enid Campbell, ‘The Citizen and the State in the Courts’ in Paul Finn (ed), *Essays in Law and Government* (1995) vol 2, 1, 12. By analogy, the Commonwealth’s power with respect to overseas trade and commerce includes the power to prohibit that activity: see, eg, *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 11 (Gibbs J). Similarly, the power to enact a law includes a restricted power to repeal the law: *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 356 (Brennan CJ and McHugh J).

<sup>64</sup> *British American Tobacco* (2003) 217 CLR 30, 45–6, accepting a submission by the Attorney-General of the Commonwealth as intervener.

<sup>65</sup> *Ibid* 46.

<sup>66</sup> *Ibid* 87.

<sup>67</sup> See below Part III(B)(2)(a).

It may also be noted that the plurality in *Mewett* and later cases uniformly describe the constitutional right to proceed against the Commonwealth as applying to common law claims in contract or tort.<sup>68</sup> Accordingly, there is a possible argument that this constitutional right to proceed is limited to common law causes of action.<sup>69</sup> That argument, if accepted, would undercut the proposition that it is the conferral of federal jurisdiction, in itself, which removes the Commonwealth's immunity from suit.

### III RESPONDING TO *MEWETT* AND *BRITISH AMERICAN TOBACCO*

Having set out what *Mewett* and *British American Tobacco* decided, this Part of the article responds in three ways. First, it attempts to expose the difficulties of an approach that ties the removal of government immunity from suit to the conferral of federal jurisdiction. Second, it explains my preferred analysis of the right to proceed, which addresses the difficulties that I perceive with the current approach (recognising that that approach is, of course, settled law for now). Third, and perhaps most usefully, it considers what role is left for ss 56 and 58 of the *Judiciary Act*.

#### A *Critical Analysis of Mewett and British American Tobacco*

I have already suggested that the considerations referred to by the plurality in *Mewett* only support modifying the Commonwealth's immunity from suit, rather than abolishing that immunity. The apparent over-breadth of the plurality's approach is a consequence of tying the removal of government immunity from suit to the conferral of jurisdiction. If a right to proceed is implied from s 75(iii) of the *Australian Constitution*, then this right would seem to extend to *all* matters to which the Commonwealth is a party. The focus of the plurality in *Mewett* and *British American Tobacco* on the conferral of jurisdiction leads to two conclusions that are, with respect, open to criticism.

##### 1 *Commonwealth Immunity in State Courts and Other Federal Courts*

First, Gummow and Kirby JJ stated in *Mewett* that the constitutional denial of the Commonwealth's immunity from suit is 'carried forward' when jurisdiction over the matters mentioned in s 75 of the *Australian Constitution* is conferred on state courts and other federal courts under s 77 of the *Constitution*.<sup>70</sup> There seem to be only two ways of interpreting this statement.

- One interpretation is that, as a matter of constitutional law, a conferral of s 75(iii) jurisdiction by Commonwealth legislation *must* also remove the Commonwealth's immunity from suit.

<sup>68</sup> See, eg, *British American Tobacco* (2003) 217 CLR 30, 57–8 (emphasis added), where McHugh, Gummow and Hayne JJ stated that 'in an action against the Commonwealth in contract and tort, it is the common law that provides the source of liability and s 75(iii) denies the operation of what otherwise might be doctrines of Crown or Executive immunity'. Callinan J agreed: at 89.

<sup>69</sup> The Commonwealth put this argument in *Taudevin v Egis Consulting Australia Pty Ltd* [No 1] (2001) 131 IR 124, 146–7 (Wright, Walton and Hungerford JJ).

<sup>70</sup> (1997) 191 CLR 471, 551.

- An alternative interpretation is that, as a matter of statutory construction, a conferral of s 75(iii) jurisdiction by Commonwealth legislation is *presumed* also to remove the Commonwealth's immunity from suit.

For the following reasons, I would suggest that neither of these interpretations is a compelling reason for 'carrying forward' the denial of the Commonwealth's immunity from suit.

(a) *Statutory Conferral of Jurisdiction Need Not Remove Immunity from Suit*

Starting with the first interpretation set out above, it is difficult to see why there would be any constitutional requirement that a conferral of s 75(iii) jurisdiction by Commonwealth legislation must also abrogate the Commonwealth's immunity from suit. The High Court's s 75 jurisdiction is conferred by the *Australian Constitution* itself, but the federal jurisdiction of other courts depends on Commonwealth legislation. Even if it is accepted that the High Court's s 75(iii) jurisdiction cannot be defeated by a claim of government immunity, *Abebe v Commonwealth*<sup>71</sup> indicates that the Commonwealth can validly confer a limited type of jurisdiction on state courts and other federal courts. Accordingly, it is not obvious that, if the Commonwealth decides to confer s 75(iii) jurisdiction on courts other than the High Court, it would be compelled to confer a jurisdiction that also removed the Commonwealth's immunity from suit.

Considering then the second interpretation set out above, it is not clear why a conferral of s 75(iii) jurisdiction by Commonwealth legislation would be presumed, as a matter of statutory construction, also to abrogate the Commonwealth's immunity from suit. The main conferral of s 75(iii) jurisdiction on state courts is effected by s 39(2) of the *Judiciary Act*.<sup>72</sup> As noted above, the *Judiciary Act* contains other provisions that confer rights to proceed against the Commonwealth and the states in federal cases, mainly ss 56, 58 and 64. Ordinary principles of statutory construction would require 'reading together' provisions such as s 39 with ss 56, 58 and 64, so that each provision was given some independent operation.<sup>73</sup>

(b) *Is This Principle Limited to the Conferral of Section 75(iii) Jurisdiction?*

There is a separate question about the extent of the principle that the removal of the Commonwealth's immunity from suit is 'carried forward' when federal

<sup>71</sup> (1999) 197 CLR 510, where the High Court, by majority, upheld the validity of Commonwealth legislation conferring authority on the Federal Court to review migration decisions on only some grounds and not others.

<sup>72</sup> *Judiciary Act* s 39(2) provides that, subject to limited exceptions:

The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it . . .

<sup>73</sup> On this principle of statutory interpretation, see, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 (McHugh, Gummow, Kirby and Hayne JJ). An analogy can also be drawn with the need to reconcile a privative clause with other provisions in an Act that set out the process by which a decision is made: see *Plaintiff S157/2002* (2003) 211 CLR 476, 502–4 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

jurisdiction is conferred on state courts and other federal courts. Does this principle apply to *any* conferral of federal jurisdiction, or only to particular categories of federal jurisdiction?

Gummow and Kirby JJ's judgment in *Mewett* referred generally to the matters coming within the High Court's original jurisdiction under s 75 of the *Australian Constitution*.<sup>74</sup> The joint judgment in *British American Tobacco* extended this principle to constitutional matters.<sup>75</sup> These conclusions appear to depend on different underlying factors. In *Mewett*, the significant factor would seem to be that the High Court's jurisdiction over s 75 matters is conferred by the *Australian Constitution* itself (rather than Commonwealth legislation). For this reason, it seems, the High Court's s 75 jurisdiction could not be defeated by a claim of government immunity. In *British American Tobacco*, the significant factor was that it would be contrary to *Marbury v Madison* for a government defendant to rely on an immunity from suit to resist a constitutional challenge to the validity of government action. I would argue, however, that constitutional matters are the *only* category of federal jurisdiction where the subject matter, in itself, is incompatible with a claim of government immunity from suit.

## 2 *The Role of Section 78 of the Australian Constitution*

The second main criticism of the plurality's approach in *Mewett* and *British American Tobacco* is that it does not leave much scope for the express power to confer rights to proceed contained in s 78 of the *Australian Constitution*.

### (a) *Mewett Analysis of the Role of Section 78*

In *Mewett*, the plurality stated that its interpretation of s 75(iii) of the *Australian Constitution* 'still leaves much scope'<sup>76</sup> for the power conferred by s 78 of the *Constitution*, because the Commonwealth can confer rights to proceed in matters arising under a Commonwealth law (s 76(ii)). Clearly, this limited interpretation is not supported by the text of s 78 — in its terms, s 78 grants the Commonwealth power to confer rights to proceed in respect of *any* of the matters set out in ss 75 and 76 of the *Australian Constitution*.<sup>77</sup> In addition, the plurality do not explain why the Commonwealth's power to confer jurisdiction under s 77 of the *Australian Constitution* is different for s 75(iii) matters than for s 76(ii) matters. As the minority point out, if the conferral of s 75(iii) jurisdiction, by itself, removes Commonwealth immunity from suit, why would not the same be true of the conferral of s 76(ii) jurisdiction?<sup>78</sup> This is particularly so in state courts, given that the conferral of jurisdiction on those courts to hear these different matters is done by a single provision, s 39(2) of the *Judiciary Act*.

<sup>74</sup> (1997) 191 CLR 471, 551.

<sup>75</sup> (2003) 217 CLR 30, 52; see also *Australian Constitution* s 76(i).

<sup>76</sup> (1997) 191 CLR 471, 551 (Gummow and Kirby JJ).

<sup>77</sup> Of course, even the minority in *Mewett* would imply some limits on *Australian Constitution* s 78, because their Honours would accept that there is no scope for government immunity from suit in constitutional cases: see, eg, *ibid* 497 (Dawson J).

<sup>78</sup> See, eg, *ibid*.



*(b) British American Tobacco Analysis of the Role of Section 78*

In *British American Tobacco*, the joint judgment states that the role of s 78 of the *Australian Constitution* is to confer rights to proceed when the Commonwealth confers jurisdiction over any of the matters set out in s 76.<sup>79</sup> (*Mewett* had only given s 76(ii) as an example of a head of federal jurisdiction where s 78 still had some work to do.)<sup>80</sup> At the same time, however, the joint judgment in *British American Tobacco* concludes that the conferral of s 76(i) jurisdiction on a state court, by necessary implication, removes a state's immunity from suit. According to the joint judgment, a Commonwealth law conferring jurisdiction over constitutional matters, although supported by ss 76(i) and 77(iii) of the *Australian Constitution*, 'may also be seen as an exercise of the power under s 78 [of the *Constitution*] to confer rights to proceed against the State in respect of a matter within the limits of the judicial power'.<sup>81</sup> It seems, therefore, that the power conferred by s 78 of the *Australian Constitution* overlaps at least partially, if not wholly, with the Commonwealth's powers to confer federal jurisdiction.<sup>82</sup>

This approach seems to leave s 78 of the *Australian Constitution* with no work to do. It is one thing if an apparently broad conferral of power is limited by another provision,<sup>83</sup> or if there is a partial overlap between different constitutional provisions.<sup>84</sup> However, if a right to proceed can be derived from the conferral of federal jurisdiction itself, then s 78 of the *Australian Constitution* seems to be wholly redundant. It is true that *Mewett* and *British American Tobacco* limit this conclusion to the conferral of jurisdiction over matters involving the Commonwealth and over constitutional matters. However, if regard is had only to the Commonwealth's conferral of jurisdiction, there is no basis for distinguishing between the different categories of federal jurisdiction. Section 77 of the *Australian Constitution* does not draw a distinction in the Commonwealth's power to confer jurisdiction between s 75 matters and s 76 matters, or between s 76(i) matters and s 76(ii) matters. And the same Commonwealth provision — s 39(2) of the *Judiciary Act* — confers jurisdiction on state courts with respect to these matters.

<sup>79</sup> (2003) 217 CLR 30, 58 (McHugh, Gummow and Hayne JJ).

<sup>80</sup> See *Mewett* (1997) 191 CLR 471, 551 (Gummow and Kirby JJ).

<sup>81</sup> *British American Tobacco* (2003) 217 CLR 30, 59 (McHugh, Gummow and Hayne JJ).

<sup>82</sup> Admittedly, there is not necessarily a problem with *Australian Constitution* s 78 overlapping to some extent with other heads of Commonwealth power: see below n 84 and accompanying text.

<sup>83</sup> To take just one example, the '[f]ull faith and credit' requirement in s 118 narrows the scope of s 51(xxv) — 'the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States' — by requiring the Commonwealth to recognise state laws in a manner that gives them full faith and credit.

<sup>84</sup> It may be accepted that *Australian Constitution* s 78 is not the exclusive source of the power to confer rights to proceed: see Kneebone, 'Claims against the Commonwealth and States', above n 22, 102. As was just noted, in s 76(ii) matters, the head of power that created the cause of action would also support a law removing the Commonwealth and the states' immunity from suit. And in s 75(iii) matters, the Commonwealth's executive power (read with s 51(xxxix)) would enable it to remove its own immunity from suit: see 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. Sections 61 and 51(xxxix) are said to give the Commonwealth an implied power to assert or waive its immunities: see *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 357 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) ('*Second Fringe Benefits Tax Case*').

(c) *Less Need for Section 78 of the Australian Constitution When There Is a Commonwealth Statutory Cause of Action*

Those defending the *Mewett* analysis of s 78 of the *Australian Constitution* have suggested that ‘different considerations apply when a statutory cause of action is created’.<sup>85</sup> However, the fact that s 76(ii) jurisdiction will involve a Commonwealth statute creating the cause of action would seem, if anything, to *reduce* the need to rely on s 78 of the *Australian Constitution* to authorise removing a state’s immunity from suit.<sup>86</sup> If the Commonwealth has validly created a cause of action that binds a state,<sup>87</sup> then any state legislation that purported to make that liability subject to state immunity would ‘alter, impair or detract from’<sup>88</sup> the Commonwealth Act, and therefore be inoperative under s 109 of the *Australian Constitution*. It would seem to follow that the powers necessary to create a Commonwealth cause of action would also be sufficient to remove any common law immunity (again, assuming that the Commonwealth Act can validly create the cause of action against a state). Accordingly — and contrary to the plurality’s reasoning in *Mewett* — the power conferred by s 78 of the *Australian Constitution* seems to be most important when the Commonwealth does *not* have power over the substantive rights and liabilities at issue in a case in federal jurisdiction.<sup>89</sup>

3 *Summary of Critical Analysis*

In summary, there are two points in the reasoning in *Mewett* and *British American Tobacco* that are open to criticism. The first is that it is not clear why the removal of immunity that is said to follow from s 75(iii) of the *Australian Constitution* is ‘carried forward’ when this jurisdiction is conferred on state courts and federal courts other than the High Court. This conclusion does not seem to follow, either as a matter of constitutional law, or as a matter of statutory construction.

The second point is that the *Mewett* and *British American Tobacco* approach seems to make s 78 of the *Australian Constitution* wholly redundant. That is because the power to confer rights to proceed in s 78 seems to overlap wholly with the power to confer federal jurisdiction.

<sup>85</sup> Leeming, ‘The Liability of the Government’, above n 46, 228.

<sup>86</sup> To the extent that a Commonwealth Act has created a cause of action that applied against the Commonwealth, an action under that Act would come within *Australian Constitution* s 75(iii), as well as s 76(ii). On the plurality’s approach in *Mewett*, s 75(iii) would supply the right to proceed.

<sup>87</sup> Subject to the doctrine in *City of Melbourne v Commonwealth* (1947) 74 CLR 31 (which deals with the states’ implied constitutional immunity from Commonwealth laws), Commonwealth legislation may validly alter the executive capacities of a state, such as its immunity from suit: see *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1996) 190 CLR 410, 424–5 (Brennan CJ), 440–1 (Dawson, Toohey and Gaudron JJ). It is not contrary to *City of Melbourne v Commonwealth* for a Commonwealth law to remove a privilege that is enjoyed only by a state: see *Queensland Electricity Corporation v Commonwealth* (1985) 159 CLR 192, 217 (Mason J).

<sup>88</sup> See, eg, *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>89</sup> The fact that a case is in federal jurisdiction, in itself, probably does not give the Commonwealth power to alter the substantive rights and liabilities of parties: Justice Bradley Selway, ‘The Australian “Single Law Area”’ (2003) 29 *Monash University Law Review* 30, 36–7.

B *Preferred Analysis of the Source of the Right To Proceed*

Even commentators who support the result in *Mewett* state that the plurality's approach is 'seemingly contrary to the preponderant weight of authority and academic opinion, as well as to the expressed views of those who framed the *Constitution*'<sup>90</sup> (and, I would add, to the text of s 78 of the *Australian Constitution*).<sup>91</sup> Instead, *Mewett* is defended on the basis that it reaches the preferable result.<sup>92</sup> The following discussion therefore sets out a preferred analysis of the right to proceed against governments, and considers the consequences of that approach.

1 *Two Separate Factors — Constitutional Review and the High Court's Section 75 Jurisdiction*

In my view, it would be preferable to consider two factors separately:

- 1 the need for courts to supervise the constitutional validity of legislative and executive action of governments; and
- 2 the special status of the High Court's jurisdiction guaranteed by s 75 of the *Australian Constitution*.

These factors were singled out in the earlier analysis of *Mewett* and *British American Tobacco*.<sup>93</sup>

(a) *Constitutional Review*

Factor 1 is of course given much emphasis in *Mewett*. However, as noted earlier, the plurality in *Mewett* ties this factor (at least in its application to the Commonwealth) to the grant of jurisdiction in s 75(iii) of the *Australian Constitution*. In turn that approach means that there is no constitutionally guaranteed right to proceed against a *state* in constitutional cases.<sup>94</sup> I would argue that the better view is that the common law government immunity from suit is removed in all cases where it is necessary to rule on the constitutional validity of govern-

<sup>90</sup> Leeming, 'The Liability of the Government', above n 46, 215. Justice Selway considered that '[t]he reasoning of the majority in *Mewett* is not altogether satisfactory': Selway, 'Source and Nature of the Liability in Tort', above n 47, 34.

<sup>91</sup> The textual point reinforces the historical point — it may be appropriate to read a constitutional provision narrowly if a natural reading of the provision runs counter to well-established common law principles. For example, *Australian Constitution* s 75(i) — 'matters arising under any treaty' — is interpreted narrowly, because in the Anglo-Australian system a treaty has no effect in domestic law unless implemented by legislation: Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3<sup>rd</sup> ed, 2002) 27–31. By contrast, *Australian Constitution* s 78 reflects what were well-established common law principles at the time of federation.

<sup>92</sup> For example, Leeming writes that 'good arguments ... exist to support the reasoning of the majority', although those arguments do not include precedent or history. He observes that the US experience 'dramatically reinforces the desirability of removing governmental prerogative immunity from suit', and further that the *Judiciary Act* is a statute capable of express or implied amendment: Leeming, 'The Liability of the Government', above n 46, 215, 237. See also Selway, 'Source and Nature of the Liability in Tort', above n 47, 34: 'The result of *Mewett* is at least expedient'.

<sup>93</sup> See above Part III(A)(1)(b).

<sup>94</sup> The High Court's jurisdiction over constitutional cases under *Australian Constitution* s 76(i) depends on Commonwealth legislation to confer that jurisdiction. There is no head of jurisdiction in s 75 that applies generally to the states.

ment action, because to this extent the previous common law is contrary to the *Australian Constitution*.<sup>95</sup> As this conclusion is not tied to the conferral of jurisdiction, it would apply in all courts with jurisdiction over constitutional cases, and would apply in relation to both the Commonwealth and the states. However, as a corollary, this factor would not be reason to abolish the Commonwealth's immunity from suit in non-constitutional cases.

As an aside, my suggested approach would also mean that the Commonwealth or a state would not have any immunity from suit even if a state or territory court were determining a constitutional case without exercising federal judicial power. In principle, a state court of general jurisdiction could determine constitutional cases in the exercise of state judicial power (that is, judicial power conferred by state law).<sup>96</sup> Admittedly, under current arrangements, state courts can only determine constitutional cases in the exercise of *federal* judicial power, because s 39 of the *Judiciary Act* excludes any concurrent state jurisdiction to determine constitutional cases.<sup>97</sup> However, this point would be significant for many territory courts.<sup>98</sup> To this extent, I would challenge the proposition that the *Australian Constitution* only removes the Commonwealth and the states' immunity from suit in cases in federal jurisdiction.<sup>99</sup>

(b) *The High Court's Section 75 Jurisdiction*

Factor 2 (the special status of the High Court's s 75 jurisdiction) could be used to argue that the heads of federal jurisdiction guaranteed by s 75 of the *Australian Constitution* cannot be frustrated by a claim of government immunity from suit. That argument seems persuasive with s 75(v) — this conferral of jurisdiction could be 'stultified'<sup>100</sup> if the Commonwealth could use government immunity to resist an application for the specified remedies.<sup>101</sup> Similarly, it could be argued that s 75(iv) guarantees a neutral forum for disputes between a state and the resident of another state, which should not be defeated by a claim of gov-

<sup>95</sup> On 'constitutionalising' the common law, see above Part II(B)(1)(d).

<sup>96</sup> Note that the *United States Constitution* does not make any provision for the federal government to confer federal judicial power on state courts. Even so, state courts can determine matters that come within *United States Constitution* art III (such as constitutional cases) in the exercise of state judicial power: see generally Richard H Fallon, Daniel J Meltzer and David L Shapiro, *Hart and Wechsler's: The Federal Courts and the Federal System* (4<sup>th</sup> ed, 1996) 450–5.

<sup>97</sup> In relation to federal jurisdiction, see generally *Edensor Nominees* (2000) 204 CLR 559, 571 (Gleeson CJ, Gaudron and Gummow JJ), 638 (Hayne and Callinan JJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 460 (Gummow J) ('*APLA*').

<sup>98</sup> There is no general conferral of federal jurisdiction on territory courts comparable to *Judiciary Act* s 39, although *Judiciary Act* s 67C confers general federal jurisdiction on the Supreme Court of the Northern Territory. Accordingly, it is sometimes necessary for territory courts to rely on authority conferred by territory law to determine cases coming within the subject matters listed in *Australian Constitution* ss 75 and 76, including constitutional cases: 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, 28–9.

<sup>99</sup> *Contra* Leeming, 'The Liabilities of Commonwealth and State Governments', above n 62, 226, who states that government immunity from suit is 'unaffected by the *Constitution*' in non-federal matters.

<sup>100</sup> To adapt the language used in *Edensor Nominees* (2001) 204 CLR 559, 591 (Gleeson CJ, Gaudron and Gummow JJ).

<sup>101</sup> Cf *Mewett* (1997) 191 CLR 471, 548 (Gummow and Kirby JJ), discussing the third example set out in above Part II(B)(1).

ernment immunity.<sup>102</sup> However, this sort of argument is not as strong with s 75(iii). Unlike s 75(v), s 75(iii) applies when the Commonwealth is a *plaintiff* as well as a defendant, and therefore the High Court's s 75(iii) jurisdiction would not be 'stultified' if the Commonwealth were to retain its immunity from suit. And, unlike s 75(iv), s 75(iii) may be required to give state courts the necessary authority to determine the relevant class of matters (that is, matters to which the Commonwealth is a party).<sup>103</sup> Whatever the merits of these arguments, the significant point is that any implication drawn from s 75 would be confined to proceedings in the High Court, and would not affect the availability of government immunity from suit in other courts.

(c) *Two Final Points*

Two final points should be noted about this preferred analysis.

First, the fact that a plaintiff has a guaranteed right to proceed in constitutional cases does not mean that the *Australian Constitution* confers a cause of action sounding in damages if the Commonwealth or a state exceeds its constitutional powers.<sup>104</sup> In other words, the question of whether a plaintiff has a *right to proceed* against a government is separate from whether a plaintiff has a *cause of action*.<sup>105</sup> That in turn means that my preferred analysis — like the plurality's approach in *Mewett* — would not prevent the Commonwealth or the states from legislating to alter their substantive liability.<sup>106</sup>

Second, the guaranteed right to proceed in constitutional cases would not affect the need for a plaintiff to establish that the claim gave rise to a 'matter',<sup>107</sup>

<sup>102</sup> This 'neutral forum' rationale only applies to the extent that s 75(iv) jurisdiction is exercised by the High Court. When federal jurisdiction is conferred on state courts with respect to s 75(iv) matters, the rationale is to provide a neutral *applicable law* (although *Judiciary Act* ss 79 and 80 have the effect that the court usually applies the same law as in a corresponding case in state jurisdiction): see generally Zines, above n 91, 88–90. It is true that s 75(iv) applies whether a state is a plaintiff or defendant; however, it could be argued that the need for a neutral forum is most important when a state is a defendant.

<sup>103</sup> It is strongly arguable that state judicial power does not extend to matters in which the Commonwealth is a party: K H Bailey, 'The Federal Jurisdiction of State Courts' (1940) 2 *Res Judicatae* 109, 111. This is because the Commonwealth's immunity from suit is one of its executive capacities, which the states do not have power to alter: see *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 447 (Dawson, Toohey and Gaudron JJ). Note, however, that the *Australian Constitution* may impliedly remove the Commonwealth's immunity from suit in constitutional cases, even for cases in state jurisdiction: see above nn 96–9 and accompanying text. By contrast, state judicial power clearly extends to matters in which the state is a party: cf *Australian Constitution* s 75(iv).

<sup>104</sup> *Kruger v Commonwealth* (1997) 190 CLR 1; but see *British American Tobacco* (2003) 217 CLR 30, 75–81 (Kirby J).

<sup>105</sup> This distinction between a cause of action and the right to proceed is clearly drawn in *Blunden* (2003) 218 CLR 330, 336 (Gleeson CJ, Gummow, Hayne and Heydon JJ):

It is established by [*Mewett*] that the liability of the Commonwealth in tort is created by the common law and that s 75(iii) of the *Constitution* denies any operation to doctrines of Crown or Executive immunity which otherwise might be pleaded in an action to recover damages in respect of a common law cause of action.

<sup>106</sup> In the case of the Commonwealth, however, *Australian Constitution* s 51(xxxi) limits its ability to alter accrued causes of action: see *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Mewett* (1997) 191 CLR 471; *Smith v ANL Ltd* (2000) 204 CLR 493.

<sup>107</sup> A private law claim will not give rise to a 'matter' if it is not justiciable, such as if the claim raises an 'act of state' by the Commonwealth: see, eg, *Petrotimor Companhia de Petroleos*

nor would it affect the need to establish that the court had jurisdiction over the subject matter of the claim.<sup>108</sup>

## 2 *Consequences of Preferred Analysis — Should Ability To Sue Depend on Legislation?*

Having set out my preferred analysis, I should address a possible objection to the consequences of that approach.

### (a) *A Possible Objection*

The objection is that a plaintiff's ability to sue the government should not be dependent on Commonwealth legislation, because that legislation can be amended or repealed like any other Act.<sup>109</sup> Those making this objection mention the several unsuccessful attempts to amend the *Judiciary Act* so as to limit the Commonwealth's liability.<sup>110</sup> And if the relevant provision of the *Judiciary Act* is s 56, rather than s 64,<sup>111</sup> the right to proceed may be guaranteed by statute only for cases in contract or tort that are brought in the courts specified in s 56. (As I will explain, however, s 56 does not prevent the Commonwealth from *submitting* to the jurisdiction of a court in other cases.)<sup>112</sup>

Of course, this objection would only be relevant to non-constitutional cases — under my preferred analysis, there would be an implied constitutional right to proceed against the Commonwealth and the states in constitutional cases. There are two further responses.

### (b) *Section 78 of the Australian Constitution Leaves the Choice to Parliament*

The first response is that s 78 of the *Australian Constitution* seems to give the Commonwealth Parliament the power to choose whether or not the Commonwealth — and the states for cases in federal jurisdiction — should be amenable to suit. Admittedly, this choice does not extend to constitutional cases, where a

*SARL v Commonwealth* (2003) 126 FCR 354, 373–4 (Black CJ and Hill J). Moreover, not all constitutional issues are justiciable. For example, the courts will not consider whether there has been a breach of *Australian Constitution* s 53, because s 53 deals with 'proposed laws': see, eg, *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*').

<sup>108</sup> Of course, the *Australian Constitution* does not guarantee any court jurisdiction over constitutional cases; rather this jurisdiction must be conferred by Commonwealth legislation: see *Australian Constitution* s 76(i). However, my suggested approach would remove a government's immunity from suit in constitutional cases even when the court was exercising *non-federal* jurisdiction: see above nn 98–9 and accompanying text. A decision from a state supreme court could then be appealed to the High Court under *Australian Constitution* s 73.

<sup>109</sup> Cf Aitken, 'The Liability of the Commonwealth under Section 75(iii)', above n 84, 485: a constitutional right to proceed is required because '[a]ny other conclusion takes one back to a time when a Petition of Right was required to sue the Crown.'

<sup>110</sup> See, eg, Lee Aitken, 'State Liability under the *Constitution* after *Peters*' (1992) 3 *Public Law Review* 221, 225–6; Leeming, 'The Liability of the Government', above n 46, 237 fn 135. The details of the proposed amendments are set out in Kneebone, 'Claims against the Commonwealth and States', above n 22, 131 fn 316. Strictly speaking, those amendments were designed to limit the extent to which *Judiciary Act* s 64 applied state legislation to the Commonwealth where that legislation did not apply of its own force, rather than limiting the right to proceed against the Commonwealth.

<sup>111</sup> Cf above n 26 and accompanying text for different views on whether Commonwealth's immunity is removed by ss 56 or 64. See further below nn 127–30 and accompanying text.

<sup>112</sup> See below Part III(C)(1)(b).

guaranteed right to proceed can be implied from the *Australian Constitution*. However, subject to that qualification, the terms of s 78 demonstrate that the right to proceed in federal cases can indeed depend on Commonwealth legislation. In other contexts, the possibility that a legislative power could be abused has not been reason to read down that power.<sup>113</sup> And the fact that attempts to amend the *Judiciary Act* have been unsuccessful might suggest that the political process is *effective* in preventing governments from attempting to shield themselves from liability altogether.

There is a more general point here. Cases dealing with judicial review have recognised that there is a tension between the need for accountability and a reasonable measure of efficiency in government.<sup>114</sup> A similar tension arises in analysing the source of the right to proceed. Therefore, although it is important that the Commonwealth and states be legally accountable for their unlawful conduct, it is also permissible to give some weight to the countervailing factor of efficiency. For example, the rationale for special notice requirements at issue in *British American Tobacco* would seem to be that governments require early notice of potential liabilities to ensure that sufficient funds are available to meet any liabilities without detracting from the provision of public services. Whatever the merits of the particular notice requirements at issue in *British American Tobacco*, I would argue that the underlying rationale of governmental efficiency is entitled to some weight.

(c) *The Right to Proceed against a State Depends on Legislation*

The second response is to observe that the approach of the joint judgment in *British American Tobacco* means that a state's amenability to suit in constitutional cases is dependent on Commonwealth legislation — namely, the conferral of federal jurisdiction — which can also be amended or repealed. If the states' amenability to suit in constitutional cases can be dependent on Commonwealth legislation, it is not obvious why the Commonwealth's amenability to suit in non-constitutional cases cannot also be. It is strongly arguable that, with a written Constitution, the most important requirement is that governments observe the constitutional limits on their powers. Even if one were concerned to avoid the dangers of government 'self-dealing', there could still be situations when it would be in the Commonwealth's interests to ensure that the states could not be sued in constitutional cases.<sup>115</sup>

I would reject any argument that there is a 'fundamental difference' between the positions of the Commonwealth and the states in this regard. The argument

<sup>113</sup> See, most famously, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>114</sup> See, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 336–7 (Mason CJ), 367 (Brennan J), discussing the definition of 'decision' in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

<sup>115</sup> Consider, for example, the government response to *Ha v New South Wales* (1997) 189 CLR 465. Although the Commonwealth did not have any legal liability, it is possible as a political matter that the states would have looked to the Commonwealth to provide some of the money to pay refunds. Instead, the Commonwealth enacted a retrospective tax equivalent to the invalid duties of excise: see *British American Tobacco* (2003) 217 CLR 30, 49–50 (McHugh, Gummow and Hayne JJ).

seems to be that there must be a right to proceed against the Commonwealth because it is ‘a creature of the *Constitution*’,<sup>116</sup> but there is no corresponding need to have a right to proceed against the states (even in constitutional cases), because they were merely continued in existence by the *Australian Constitution*.<sup>117</sup> The argument appears to commit Sir Owen Dixon’s heresy in reverse.<sup>118</sup> The states are subject to the *Australian Constitution* just as much as the Commonwealth is — what is important is their continuing status as polities of limited powers (albeit that constitutional limits are ever-present in the case of the Commonwealth), rather than how these polities came into existence.<sup>119</sup> Accordingly, my argument that the *Australian Constitution* impliedly removes both the Commonwealth and the states’ government immunity from suit in constitutional cases does not ‘uncritically ... assimilate the liability of the Commonwealth government with the liability of the State governments’.<sup>120</sup> It simply recognises that the *Australian Constitution* binds both the Commonwealth and the states.

### 3 *Summary of Preferred Analysis*

I have suggested that there is much to be said for the view that the right to proceed derives from Commonwealth legislation enacted under s 78 of the *Australian Constitution*, at least in non-constitutional cases. My preferred analysis accepts many of the points made by the plurality in *Mewett*. On this analysis, there would be a constitutionally guaranteed right to proceed against the Commonwealth and the states in constitutional cases in all courts. However, s 78 of the *Australian Constitution* would be left with some significant work to do. Commonwealth legislation would be required to abolish the Commonwealth’s immunity from suit in non-constitutional cases (particularly in courts other than the High Court), and would be required to abolish the states’ immunity from suit for matters in federal jurisdiction (other than constitutional cases).

Admittedly, the conceptual differences between the current High Court approach and my preferred analysis may not translate into a sharp difference in results. If the relevant Commonwealth provision is s 64 of the *Judiciary Act*

<sup>116</sup> Cf Leeming, ‘The Liability of the Government’, above n 46, 231.

<sup>117</sup> It is clearly true that the jurisdiction conferred by *Australian Constitution* ss 75 and 76 in cases involving the states is much less comprehensive than the jurisdiction conferred over matters involving the Commonwealth: *ibid*. However, my argument does not depend on the conferral of jurisdiction, but rather on an implication that an immunity from suit in constitutional cases is inconsistent with the principle in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803). To be fair, Leeming has since argued (following *British American Tobacco*) that the states’ government immunity from suit is removed in any case in federal jurisdiction: see Leeming, ‘The Liabilities of Commonwealth and State Governments’, above n 62, 226.

<sup>118</sup> Cf R P Meagher and W M C Gummow, ‘Sir Owen Dixon’s Heresy’ (1980) 54 *Australian Law Journal* 25, discussing Commonwealth immunity from state laws. See *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 530, where Dixon J stated, in dissent, that the Commonwealth was not bound by state laws because the power to bind the Commonwealth ‘formed no part of the old colonial power’ and ‘[t]he *Federal Constitution* does not give it.’

<sup>119</sup> In *Victoria v Commonwealth* (1971) 122 CLR 353, 395–6 (‘*Payroll Tax Case*’), Windeyer J stated that:

The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the *Constitution* did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers.

<sup>120</sup> Leeming, ‘The Liabilities of Commonwealth and State Governments’, above n 62, 217.



(rather than ss 56 or 58 of that Act), the final result is similar on either approach. This is because s 64 would remove the Commonwealth and the states' immunity from suit in all cases in federal jurisdiction. Moreover, even on the *Mewett* and *British American Tobacco* approach, there might be some scope for the Commonwealth to regulate the manner in which proceedings could be brought against it. Although *British American Tobacco* held that the particular requirements in the *Crown Suits Act 1947* (WA) could not apply to federal cases, some members of the Court appeared to accept that some reasonable regulation might be permissible.<sup>121</sup>

Of course, my preferred analysis is similar to arguments that have already been put in *Mewett*, and rejected by four members of the High Court. However, it is still useful to highlight the contested factors underlying the High Court's current approach — particularly any suggestion that an immunity from suit is incompatible with the conferral of federal judicial power<sup>122</sup> — in case it is sought to reason from the conclusions in *Mewett* in other contexts.

### C Function of Judiciary Act Sections 56 and 58 Following *Mewett*

Despite my criticisms of *Mewett* and *British American Tobacco*, those cases of course represent the settled law for now. One issue raised by these cases is the function that ss 56 and 58 of the *Judiciary Act* now perform. As noted earlier, s 56 provides that a person making a claim against the Commonwealth 'whether in contract or in tort' may bring a suit against the Commonwealth in the courts specified in s 56. Section 58 makes similar provision in relation to the states, for cases in federal jurisdiction.

Using s 56 as an example, it only refers to the High Court and the supreme court of the state or territory in which the claim arose. On its face, s 56 therefore seems to contemplate the possibility that a claim against the Commonwealth in contract or tort could not be heard in the supreme court of another state or territory, despite the fact that the claim was otherwise within the court's subject matter jurisdiction. Similarly, s 56 would seem to prevent such a claim from being heard in the Federal Court, as that Court is not a court 'of' a state or territory for the purposes of s 56(1)(b) or (c). The question is whether s 56 can have this operation, consistently with the right to proceed which *Mewett* held is guaranteed by s 75(iii) of the *Australian Constitution*. Similarly, can s 58 limit the right to proceed against a state in federal cases, consistently with *British American Tobacco*?

<sup>121</sup> (2003) 217 CLR 30, 47 (Gleeson CJ), 54 fn 96 (McHugh, Gummow and Hayne JJ). See also *Antill Ranger* (1955) 93 CLR 83, 100 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ), 103 (Fullagar J); *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633, 659–60 (Fullagar J).

<sup>122</sup> See above Part II(C)(1)(b).

1 *The Function of Section 56 — Options*

The first step is to identify the function performed by s 56 of the *Judiciary Act*.<sup>123</sup> The options seem to be:

- 1 s 56 is a conferral of jurisdiction;
- 2 s 56 is a choice of law rule; or
- 3 s 56 removes the Commonwealth's immunity from suit.<sup>124</sup>

(a) *Does Section 56 Remove Commonwealth Immunity from Suit?*

I would suggest that the correct analysis is Option 3 — that s 56 removes the Commonwealth's immunity from suit.

The difficulty with Options 1 and 2 is that other provisions in the *Judiciary Act* already seem to perform those functions. With jurisdiction (Option 1), s 39 confers jurisdiction on state courts to determine suits against the Commonwealth. It is true that s 56 effectively operates as a conferral of jurisdiction on most *territory* courts;<sup>125</sup> however, at the time that s 56 was enacted, there were only state courts, which had jurisdiction under s 39. That suggests that the original function of s 56 was something other than a conferral of jurisdiction. With choice of law (Option 2), it is clear that ss 79 and 80 of the *Judiciary Act* determine the applicable law for cases in federal jurisdiction.<sup>126</sup>

It might be thought that a similar difficulty arises with Option 3, because the majority in *Evans Deakin* held that s 64 of the *Judiciary Act* removes the Commonwealth's immunity from suit.<sup>127</sup> However, the fact that this interpretation apparently leaves no work for s 56 to do is reason to criticise the interpretation of s 64 in that case.<sup>128</sup> In *British American Tobacco*, the joint judgment

<sup>123</sup> See generally Pryles and Hanks, above n 17, 184–92, 196–9.

<sup>124</sup> I doubt whether *Judiciary Act* s 56 could be analysed as a substantive (albeit qualified) defence for the Commonwealth to a cause of action in contract or tort, rather than a qualified removal of the Commonwealth's immunity from suit. Section 58 of that Act makes the same provision as s 56 in relation to claims in contract and tort against a state. The source of power for s 58 is *Australian Constitution* s 78, which is limited to conferring rights to proceed. The similarity in wording between *Judiciary Act* ss 56 and 58 suggests that (like s 58) s 56 is not a substantive defence to the relevant causes of action.

<sup>125</sup> As noted in above n 98, there is no general conferral of federal jurisdiction on territory courts, except the Supreme Court of the Northern Territory. However, in other territory courts, s 56 would amount to a conferral of jurisdiction, when read with *Acts Interpretation Act 1901* (Cth) s 15C. Section 15C(a) provides that:

Where a provision of an Act, whether expressly or by implication, authorizes a civil or criminal proceeding to be instituted in a particular court in relation to a matter ... that provision shall be deemed to vest that court with jurisdiction in that matter ...

<sup>126</sup> *Edensor Nominees* (2001) 204 CLR 559, 587 (Gleeson CJ, Gaudron and Gummow JJ), citing *South Australia v Commonwealth* (1962) 108 CLR 130, 140 (Dixon CJ), holding that ss 79 and 80 'direct where this Court shall go for the substantive law'. See further Peter Nygh, 'Choice of Law in Federal and Cross-Vested Jurisdiction' in Fiona Wheeler and Brian Opeskin (eds), *The Australian Federal Judicial System* (2000) 335, 353–6.

<sup>127</sup> See *Mewett* (1997) 191 CLR 471, 502 (Dawson J), citing *Evans Deakin* (1986) 161 CLR 254, 262–3 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

<sup>128</sup> See *Evans Deakin* (1986) 161 CLR 254, 270–3, where Brennan J held, in dissent, that s 64 did not operate unless the plaintiff had a right to proceed which derived from elsewhere. See also Dennis Rose, 'The Government and Contract' in Paul Finn (ed), *Essays on Contract* (1987) 233, 236–7.

expressly endorsed the conclusion in *Evans Deakin* that s 64 can effectively provide a plaintiff with a cause of action.<sup>129</sup> The joint judgment did not, however, endorse the conclusion that s 64 confers a right to proceed (albeit that their Honours held that the right to proceed in that case derived by implication from the conferral of federal jurisdiction).<sup>130</sup>

(b) *Breavington and Mewett Analysis of Section 56*

The High Court considered the function of s 56 of the *Judiciary Act* in *Breavington v Godleman*.<sup>131</sup> The issue arose in that case because a tort action was brought in Victoria against a body that was ‘the Commonwealth’ in respect of a motor accident that occurred in the Northern Territory.<sup>132</sup> All members of the Court held that s 56 did not prevent the claim from being brought in the Supreme Court of Victoria. That was because s 56 merely conferred a defence to an action being brought in courts other than those specified, and the Commonwealth could choose to waive that defence.<sup>133</sup> As understood in *Breavington*, s 56 is therefore not a conferral of jurisdiction, but rather a potential limit on the exercise of jurisdiction by courts other than those specified in s 56.

The joint judgment in *Mewett* contains two passages on the function of s 56 of the *Judiciary Act*. At one point, Gummow and Kirby JJ appear to accept the *Breavington* analysis of s 56:

Section 56 of the *Judiciary Act* recognises, rather than provides the origin of, Commonwealth liability. It does so by identifying the forum in which certain (but not all) actions against the Commonwealth may be instituted. It deals solely with contract and tort and is facultative in nature. If sued in contract or tort, the Commonwealth may submit to the jurisdiction of a court which is invested with federal jurisdiction by s 39(2) of the *Judiciary Act*, even though that court is not a court specified in s 56.<sup>134</sup>

Elsewhere, their Honours state that s 56 is ‘also’ a conferral of jurisdiction.<sup>135</sup>

<sup>129</sup> *British American Tobacco* (2003) 217 CLR 30, 63–4 (McHugh, Gummow and Hayne JJ), 90 (Callinan J). Similarly, in *Bass*, the joint judgment stated that ‘it follows from *Evans Deakin* that s 64 may operate to confer a cause of action against the Commonwealth which would not have existed “if s 64 had not equated the substantive rights of the parties to those in a suit between subject and subject”’: (1999) 198 CLR 334, 350 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (citations omitted).

<sup>130</sup> See above Part II(C)(1).

<sup>131</sup> (1988) 169 CLR 41 (*‘Breavington’*).

<sup>132</sup> Cf *Judiciary Act* s 56(1)(b).

<sup>133</sup> *Breavington* (1988) 169 CLR 41, 68–9 (Mason CJ), 105–6 (Wilson and Gaudron JJ), 118 (Brennan J), 139–40 (Deane J), 152–3 (Dawson J), 169 (Toohey J). In waiving that defence, the Commonwealth was not purporting to confer subject matter jurisdiction on the court by consent, which would have been ineffective, but was rather overcoming a possible limit on the court’s jurisdiction over the person. It is well-settled that the parties cannot confer subject matter jurisdiction on a court by consent: see, eg, *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232, 244 (Spigelman CJ).

<sup>134</sup> *Mewett* (1997) 191 CLR 471, 551 (citations omitted).

<sup>135</sup> *Ibid* 536: ‘Section 56 also invests State and Territory courts with federal jurisdiction in respect of claims against the Commonwealth in contract and tort’. As noted, s 56 does operate as a conferral of jurisdiction for most territory courts, when read with *Acts Interpretation Act 1901* (Cth) s 15C: see above n 125.

## 2 *Reconciling Section 56 and the Guaranteed Right To Proceed*

It is not clear from these passages in Gummow and Kirby JJ's judgment in *Mewett* how s 56 of the *Judiciary Act* sits with the right to proceed said to be guaranteed by s 75(iii) of the *Australian Constitution*. On the one hand, the statement in *Mewett* that the Commonwealth 'may submit' to the jurisdiction of a court not specified in s 56 seems to suggest that the Commonwealth could choose *not* to submit. On the other hand, s 56 is described as 'facultative',<sup>136</sup> which might suggest that it does not detract from rights to proceed derived from elsewhere. But if that is so, then s 56 would seem to be wholly redundant.

### (a) *'Facultative' Interpretation Makes Section 56 Redundant*

Consider the consequences if s 56 of the *Judiciary Act* does not detract from the right to proceed that is said to inhere in the conferral of federal jurisdiction.

In state courts, s 56(1)(a) only refers to the courts of the state or territory where the claim arose. However, courts of the other states have general jurisdiction over matters involving the Commonwealth under s 39 of the *Judiciary Act*. The plurality in *Mewett* stated that the conferral of s 75(iii) jurisdiction on state courts, in itself, removed the Commonwealth's immunity from suit.<sup>137</sup> If the conferral of s 75(iii) jurisdiction already gives the plaintiff a right to proceed, what further role is there for s 56?

In the Federal Court, that Court does not have a general conferral of s 75(iii) jurisdiction, but it does have a general conferral of jurisdiction over constitutional cases.<sup>138</sup> In *British American Tobacco*, the joint judgment held that the conferral of s 76(i) jurisdiction removed, by necessary implication, a state's immunity from suit.<sup>139</sup> In principle, it seems that the same conclusion could apply equally to the Commonwealth's immunity from suit. A claim against the Commonwealth in contract or tort will arise under the *Australian Constitution* if the claim owes its existence to the *Constitution*.<sup>140</sup> Again, if a plaintiff already has a right to proceed, what room is there for s 56 to confer that right?

### (b) *'Reading Together' Section 56 and the Conferral of Jurisdiction*

A possible explanation is that s 56 of the *Judiciary Act* limits the extent to which the statutory conferral of federal jurisdiction is taken, by itself, to remove a government's immunity from suit. On this approach, the conferral of federal jurisdiction by Commonwealth legislation would not necessarily have the additional effect of removing a government's immunity from suit, if other Commonwealth provisions indicated a contrary intention.<sup>141</sup> Section 56 would provide that contrary intention, by removing the Commonwealth's immunity from suit only in the courts specified, and for the claims specified.

<sup>136</sup> *Mewett* (1997) 191 CLR 471, 551 (Gummow and Kirby JJ).

<sup>137</sup> *Ibid.*

<sup>138</sup> *Judiciary Act* s 39B(1A)(b).

<sup>139</sup> (2003) 217 CLR 30, 60 (McHugh, Gummow and Hayne JJ).

<sup>140</sup> *Ibid* 52 (McHugh, Gummow and Hayne JJ).

<sup>141</sup> On the 'reading together' of different provisions in the *Judiciary Act*, see above n 73 and accompanying text.

Of course, this approach to s 56 of the *Judiciary Act* is not easy to reconcile with broad statements in cases such as *Blunden* that ‘s 75(iii) of the *Constitution* denies any operation to doctrines of Crown or Executive immunity’.<sup>142</sup> (That is particularly so, given that the claim in *Blunden* was brought in the Supreme Court of the Australian Capital Territory, where s 56 does operate as a conferral of jurisdiction.)<sup>143</sup> However, *Mewett* seems to indicate that s 56 of the *Judiciary Act* has *some* continuing role, despite the right to proceed against the Commonwealth that is said to derive from s 75(iii).

(c) ‘Whether in Contract or in Tort’

In assessing the continuing role of ss 56 and 58 of the *Judiciary Act*, it should be noted that both provisions are limited to claims ‘whether in contract or in tort’. In *Commissioner for Railways (Qld) v Peters*, the New South Wales Court of Appeal held by majority that these words indicated that s 58 applies to all causes of action.<sup>144</sup> In *Mewett*, however, Gummow and Kirby JJ stated that s 56 of the *Judiciary Act* ‘deals solely with contract and tort’.<sup>145</sup>

The narrower interpretation of ‘whether in contract or in tort’ tends to run against ss 56 and 58 of the *Judiciary Act* limiting the right to proceed that otherwise inheres in the grant of federal jurisdiction. On the one hand, it would seem odd if a plaintiff’s right to proceed were more limited for contract and tort claims than for other claims (remembering that ss 56 and 58 specify the courts in which the relevant claims can be brought). On the other hand, the alternative approach is that ss 56 and 58, in granting a right to proceed for contract and tort claims, impliedly deny a plaintiff a statutory right to proceed for other claims. Perhaps this result could be ameliorated, by recognising an implied right to proceed in cases in the High Court’s s 75 jurisdiction,<sup>146</sup> and in constitutional cases.<sup>147</sup> Even as ameliorated, however, the resultant right to proceed would still seem to be narrower than what was intended by the plurality in *Mewett*.<sup>148</sup>

By contrast, the *Peters* interpretation of the phrase ‘whether in contract or in tort’ would mean that ss 56 and 58 of the *Judiciary Act* merely direct plaintiffs to

<sup>142</sup> (2003) 218 CLR 330, 336 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>143</sup> See above n 125 and accompanying text.

<sup>144</sup> (1991) 24 NSWLR 407, 443–4 (Priestley JA), 449 (Waddell AJA); *contra* at 428–9 (Kirby P) (*‘Peters’*).

<sup>145</sup> (1997) 191 CLR 471, 551. Consistently with this interpretation, *Judiciary Act* s 59 — which deals with suits between states — refers to ‘any claim’, whereas ss 56–8 refer to a claim ‘whether in contract or in tort’.

<sup>146</sup> The analysis set out earlier — that *Judiciary Act* s 56 limits the extent to which the conferral of federal jurisdiction is taken, by itself, to remove a government’s immunity from suit — can only operate when jurisdiction is conferred by Commonwealth legislation. Accordingly, it would seem, following *Mewett*, that *Judiciary Act* s 56(1)(a) — which refers to the High Court — merely declares what is already required by *Australian Constitution* s 75(iii).

<sup>147</sup> *British American Tobacco* (2003) 217 CLR 30, 58–9 (McHugh, Gummow and Hayne JJ), might suggest that constitutional cases are in a special category, and that the conferral of s 76(i) jurisdiction would, in itself, be taken to remove government immunity from suit.

<sup>148</sup> Admittedly, *Mewett* and later cases describe the constitutional right to proceed as applying to common law claims in contract or tort: see above n 68 and accompanying text. *Evans Deakin* (1986) 161 CLR 254 suggests that *Judiciary Act* s 64 will confer a right to proceed even with novel statutory causes of action. However, this interpretation of s 64 can be criticised: see above nn 127–30 and accompanying text.

particular courts (because these provisions would be taken to confer a right to proceed in all causes of action). This ‘forum selection’ role is more easily reconciled with the result in *Mewett*; however, as noted, it is directly contrary to statements by Gummow and Kirby JJ in that case.

### 3 *Summary of the Effect of Sections 56 and 58*

The effect of ss 56 and 58 of the *Judiciary Act* can therefore be summarised as follows. First, it is clear that these provisions do not prevent the Commonwealth or a state from submitting to the jurisdiction of a court other than those mentioned in ss 56 or 58 (assuming that the court has subject matter jurisdiction). Second, the right to proceed created by ss 56 and 58 may merely duplicate the right to proceed that is already created by the conferral of federal jurisdiction on a court (although there is an argument to the contrary). If the conferral of jurisdiction itself provides a right to proceed, then ss 56 and 58 would not prevent a plaintiff from bringing a contract or tort claim against the Commonwealth or a state in any court with subject matter jurisdiction over the claim.

## IV CONCLUSION

This article has discussed the source of the right to proceed against the Commonwealth and the states in federal cases. That right is an essential requirement for bringing a ‘private’ law action against a government. The High Court’s decisions in *Mewett* and *British American Tobacco* tie the removal of government immunity from suit to the conferral of federal jurisdiction. I have argued, however, that there is much to be said for the view that the right to proceed against the Commonwealth derives from legislation enacted under s 78 of the *Australian Constitution*, at least in non-constitutional cases.

Of course, government immunity from suit is not the only immunity that governments enjoy. For one thing, there is still a presumption that legislation does not apply to governments (although that presumption has been diluted somewhat by *Bropho v Western Australia*).<sup>149</sup> Moreover, governments have traditionally had special privileges and immunities as litigants, such as an immunity from discovery.<sup>150</sup> Both of these immunities are subject to s 64 of the *Judiciary Act* in federal cases. As noted earlier, s 64 may apply state or territory legislation to the Commonwealth or a state where that legislation does not apply of its own force (as in *Evans Deakin*).<sup>151</sup> Moreover, s 64 will often remove any special government privilege or immunity conferred by the common law or by state or territory legislation (as in *British American Tobacco*). There are two longstanding questions about s 64 which were averted to, but not resolved, in

<sup>149</sup> (1990) 171 CLR 1. Note that this presumption extends to the executive government of any other Australian polity: see above n 41 and accompanying text.

<sup>150</sup> On the procedural immunities of governments, 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) 464–6.

<sup>151</sup> Section 64 will not, however, apply *Commonwealth* legislation that does not apply of its own force to the Commonwealth or to the states: see *Bass* (1999) 198 CLR 334, 351–2 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

*British American Tobacco*.<sup>152</sup> The first is whether there is an exception to the equalising effect of s 64 when the Commonwealth or a state is performing a function peculiar to government.<sup>153</sup> The second question is whether the broad scope of s 64 is valid in its application to the states, particularly when the states are plaintiffs.<sup>154</sup>

Finally, it should be remembered that some private law claims against governments have a broader significance beyond the immediate legal issues in the case. Consequently, the subject matter of private law proceedings against a government may sometimes be a matter of ‘government or politics’ for the purposes of the implied freedom of political communication.<sup>155</sup> (On the other hand, the High Court’s decision in *APLA*<sup>156</sup> suggests that the proceedings themselves, as opposed to their subject matter, may not be.) Indeed, the availability of private law actions against governments reflects an underlying political theory, often associated with A V Dicey, that governments should be subject to the same law that governs everyone else.<sup>157</sup> Accordingly, like the analysis of privative clauses in *Plaintiff S157/2002*, the source of the right to proceed is ‘not merely [an] issu[e] of a technical kind’,<sup>158</sup> but concerns a fundamental commitment to the rule of law.

<sup>152</sup> See Graeme Hill, ‘Private Law Actions against the Government (Part 2) — Two Unresolved Issues about Section 64 of the *Judiciary Act*’ (2006) 29 *University of New South Wales Law Journal* 1.

<sup>153</sup> The joint judgment rejected an argument that the phrase ‘as nearly as possible’ in s 64 took account of the peculiar government interest in the protection of public revenue when it is sought to recover amounts paid on account of an invalid tax: *British American Tobacco* (2003) 217 CLR 30, 64–6 (McHugh, Gummow and Hayne JJ), 90 (Callinan J). For a recent discussion of this possible exception, see *Victorian WorkCover Authority v Commonwealth* (2004) 187 FLR 296.

<sup>154</sup> This issue is noted in *Evans Deakin* (1986) 161 CLR 254, 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). In *British American Tobacco*, the joint judgment rejected an argument by the Attorney-General of South Australia, as an intervener, that s 64 was wholly invalid in its application to the states, but their Honours did not need to resolve finally the scope of s 64 in its application to the states: (2003) 217 CLR 30, 66 (McHugh, Gummow and Hayne JJ); see also at 90 (Callinan J).

<sup>155</sup> *APLA* (2005) 219 ALR 403, 496–7 (Hayne J). See, eg, *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1; *Cubillo v Commonwealth* (2001) 112 FCR 455, considering a claim in tort against the Commonwealth brought by members of the stolen generation.

<sup>156</sup> (2005) 219 ALR 403. The High Court, with McHugh and Kirby JJ dissenting, rejected an argument that the implied freedom of political communication (or corresponding implication from *Australian Constitution* ch III) required that personal injury lawyers be able to advertise. On whether the implied freedom should apply to the discussion of courts and judges, see Zoë Guest, ‘The Judiciary and the Freedom of Political Communication: The Protection of Judgment on Australia’s Judges’ (2006) 17 *Public Law Review* 5.

<sup>157</sup> Hogg and Monahan, above n 10, 1–4.

<sup>158</sup> (2003) 211 CLR 476, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).