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The Legal Personality of the Commonwealth of Australia

Sebastian Howard Hartford Davis*

Abstract

The article analyses legal materials concerning the legal personality of the Commonwealth of Australia under domestic law. It argues that the Commonwealth as legal person has an existence, as a unit of the legal system, which is conceptually distinct from the Commonwealth of Australia as a nation, and the Commonwealth as federal government of that nation. Current idioms (eg 'polity' and 'body politic') have a tendency to confuse these distinctions. The article suggests, as a more appropriate way to denote the Commonwealth as legal person, the term 'constitutional person'.

> [I]t depends on the legal institutions and forms of every commonwealth whether and how far the State or its titular head is officially treated as an artificial person.[1]

Introduction

While there can be no doubt that the Commonwealth is a legal person,[2] the nature and extent of its personality have not previously been the subject of sustained analysis. This article explores cases and literature bearing upon that question and suggests a number of conclusions.

A fundamental difficulty obscuring analysis of this topic is the absence of a settled vocabulary. The Commonwealth of Australia is the name of a legal person operating within the domestic legal system. Amongst other meanings, the Commonwealth of Australia is also the name of a nation and the central government of that nation. Is it sensible to speak of the 'nation', or the 'government', as a legal person? As Dixon J said (in a related context) in the *Melbourne Corporation Case*:

> So far I have stated my opinion in an abstract and general form and in this there is no little danger. For the subject has no vocabulary of technical terms possessing a precise and settled connotation and the use of expressions of indefinite and variable meaning is unavoidable.[3]

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Analysis of the legal personality of the Commonwealth is hindered by terms like 'Crown', 'state', 'polity', 'body politic' and other cognates, which are of impressive cadence but obscure meaning. Frederic Maitland once said of the term 'Crown' that it was a 'convenient cover for ignorance', which 'saves us from asking difficult questions'.[4] That observation is also true of terms like 'polity' and 'body politic'. The article demonstrates that such terms are used inconsistently as between different judges and often in a way that elides concepts that it is important to distinguish. To avoid such terms, and the associated risk of eliding the concepts of nation and government, this article uses the term 'constitutional person' to describe the Commonwealth as legal person.

The Commonwealth of Australia, as legal person, is conceptually distinct from the 'nation' and the 'government'. The Commonwealth is a separate legal entity, one of the 'basic units' of the legal system that 'possess the capacity of being parties to the claim-duty and power-liability relationships'.[5] The source of the Commonwealth's legal personality is the *Constitution*. That has important doctrinal and conceptual consequences (discussed further below), and this article uses the term 'constitutional person' as a shorthand to denote the Commonwealth of Australia as a legal person operating within the domestic legal system, which is conceptually distinct from the nation and the government.

The constitutional person achieves an important function, which is to have an entity (able to be controlled or directed by the Executive Government, operating within its constitutional boundaries) that *represents* the people of Australia — ie holds lands, funds, liabilities and capacities of various kinds *on behalf of* the people of Australia. But it is a mistake to infer from this that the Commonwealth's legal personality must be arrogated, or attributed in some way, to the 'nation' or the 'government'. The established legal attributes of the 'nation' and 'government' make it inappropriate that they be ascribed legal personality *within* the domestic legal system. In short, it is inappropriate to elide these distinct concepts (constitutional person, nation and government). Neither the 'nation' nor the 'government' has legal personality. The constitutional person is not equivalent to the 'state' in the broad sense, which is not and never has been treated as a legal person.

The proper theorisation of the Commonwealth's legal personality is of practical and doctrinal importance. Practically, the constitutional person is a very significant property owner, employer and contractor. An appreciation of the scope and extent of its legal personality can assist (for example) in determining which entity to sue and for the actions or mental states of which individuals or 'groups' it will be liable. The Commonwealth as legal person also plays an important role in the design of the constitutional system. As Gageler J explained in *M68*,[6] behind Chapter II of the *Constitution*, and embedded in Chapter III, is a personalised and 'peculiarly functionalised Australian conception of "the Government"'.[7] That conception is under-theorised, to date, but is an important element of the architecture of constitutional government in Australia. It has and will continue to have important doctrinal consequences. Three examples illustrate this. The first is *Williams (No 1)*, where there was debate about the extent to which the legal personality of the Commonwealth informs the executive power conferred by s 61 of the *Constitution*. The second is the *Plain Packaging Case*, where there was debate about what it means to say that the 'Commonwealth' must have received a 'benefit' for the purpose of the guarantee of just terms in s 51(xxxi) of the *Constitution*.[8] The third is the enactment of s 10(2) of the *Workplace Health and Safety Act 2011* (Cth), which contemplates criminal charges being laid against the Commonwealth[9] — something that Sir Owen Dixon once described as being 'opposed to all our conceptions, constitutional, legal and historical'.[10]

After defining the concept of 'legal personality', this article will examine the uses and judicial treatment of the term 'Commonwealth' in the *Constitution*, with particular emphasis on contexts showing that something called the 'Commonwealth' has capacity to be in legal relationships and on contexts exposing the conceptual distinctions between the constitutional person, nation and government ('The "Commonwealth" in the *Constitution*' and 'Legal personality and the *Constitution*' sections). These sections also explore the reasons for the demise of the 'Crown' as the organising concept for governmental legal personality. The '*Williams v Commonwealth*' section then examines the judgments in *Williams (No 1)*, which is both the most recent and the most detailed consideration by the High Court of the Commonwealth's legal personality. The article then explores the current notions that the Commonwealth is a 'body politic' or 'polity' that has legal personality or is a legal person ('Competing theories'section). These terms are highly ambiguous in meaning, and are being used inconsistently, in a way that masks what may be a profound divergence in the way that that the Commonwealth as legal person is conceptualised. It is suggested that, if a need be felt to describe the Commonwealth as legal person in an abstract or compendious way, a more appropriate term is 'constitutional person'.

Legal Personality

Under Australian law, a legal person is an entity with 'capacity' to be in a legal relationship.[11] 'Capacity' assumes the ability to have legal relations with other legal persons and describes the ability to create, modify or terminate legal relations.[12] Human beings are legal persons from birth until death[13] but have diminished capacities during the age of minority.[14] Adult human beings have relevantly unlimited capacity to form legal relations, whereas corporations have the benefit of s 124(1) of the *Corporations Act 2001* (Cth), which gives them 'the legal capacity and powers of an individual'.

'Capacity' is an important concept in relation to governmental legal personality. It denotes the ability of the constitutional person (acting by or through officers of the Executive Government) to do things, or exercise faculties, common to all legal persons, taking effect under the condition of the general law, and which do not (at least directly) alter or change the legal rights or juridical relations of others.[15] The Commonwealth has been held to have capacity, for example, to exercise a right of payment,[16] to hold a right in respect of real property,[17] to accept a gift[18] and to contract.[19] As will be shown below, the *Constitution* itself assumes that the Commonwealth has 'capacity'.

Historically, legal persons were either human beings or corporations.[20] It has long been established that the legislature is free to create any legal person that it desires, with any capacities that it thinks fit.[21] A statute that assumes that an entity or group has 'capacity' will have created a separate legal person, independent of the human beings comprising it.[22] That is so regardless of what the legislature may choose to call, or declare about, the group it has so created. An interesting illustration of this is the recent decision in *Queensland Rail*. By the *Queensland Rail Transit Authority Act 2013* (Qld), the legislature endowed the Queensland Rail Transit Authority with capacities and thus made it a legal person. In an effort *inter alia* to avoid the application of industrial relations legislation, the Act declared that the Authority was 'not a body corporate' (s 6(2)). The High Court held, despite this statutory declaration, that the Authority had the 'full character of a corporation' and 'must be found to be a trading corporation'.[23] As Gageler J put it, the Authority answers the constitutional description of a corporation 'because it is an entity established by law with capacity to own property, to contract and to sue'; and the statutory declaration was 'ineffective' to displace that conclusion.[24]

Queensland Rail also reinforces the traditional understanding that legal personality is unitary.[25] In other words, an entity either is or is not a legal person — the status is binary. In *Williams v Hursey*, Fullagar J rejected a submission that a statute conferring legal personality upon a trade union 'for the purposes of the Act'[26] had, to that extent, qualified the trade union's legal personality — ie made it a legal person for 'the purposes of the Act' but not for other purposes. In a frequently cited passage,[27] Fullagar J said that the 'notion of qualified legal capacity is intelligible, but the notion of qualified legal personality is not'.[28] This again reflects the essentially *functional* definition of legal personality: the concept is defined by reference to what it achieves, namely an anchor for rights/duties/liabilities etc, not by reference to any inherent qualities that might be said to be uniform to legal persons. Thus, Maitland described legal persons as 'right-and-duty-bearing units'.[29] If the legal system is to be understood as a web of mutual and correlative legal relationships, then the system is predicated upon the existence of 'units' that are able to own rights, attract liabilities, owe duties etc.

The functional, binary quality of legal personality is fundamentally important for theories of governmental legal personality, because of the tendency to correlate the legal person with other concepts (ie the 'nation' or 'government') operating at much higher levels of intellectual abstraction. As will emerge below, the only way to reconcile such notions with other doctrines operating upon the 'nation' or 'government' is to postulate that the Commonwealth is a legal person for some purposes but not for others. That, however, is contrary to the functional, binary character of legal personality. It is legally more coherent, and historically more consonant, to accept that the proposition, that the Commonwealth is a legal person, establishes *only* the existence of a unit within the legal system (called the 'Commonwealth'), in respect of which capacities have been constitutionally conferred and legally recognised.[30]

The Commonwealth is, of course, a non-human legal person — a *persona ficta*. To adapt a memorable phrase, it cannot 'eat or drink, or wear clothing, or live in houses'.[31] Like a company, its 'existence, capacities and activities are only such as the law attributes to it'.[32] The acts, omissions and states of mind attributed to the Commonwealth will inevitably be the acts and omissions of human beings,[33] usually the human beings comprising the Executive Government of the Commonwealth.[34] In this sense, to adopt Professor Sawer's phrase, the Executive provides 'most of the "*substratum*" for government as person'.[35] If the Commonwealth has sworn an affidavit, it will have done so through an authorised officer forming part of the Executive Government.[36] If it has decided to issue a notice to quit,[37] or to erect a fence,[38] or to build a telecommunications tower[39] on or in respect of land that it owns, that will be because officers forming part of the Executive Government have made these decisions.[40] If individuals forming part of the Executive Government act unlawfully, then it is the Commonwealth (not the Executive Government of the Commonwealth as a separate legal person) that is held liable. These examples illustrate what Sawer meant by 'sub-stratum': whenever the process of government throws up a need for a constitutional person, it is through the human beings comprising the Executive Government that the constitutional person acts.

Rules of attribution have proceeded, in the case of governments, by analogy with corporate agency theory. The principles governing the authority of human beings comprising the Executive Government to bind the Commonwealth to contracts, ably treated in the leading textbooks,[41] can be understood as requiring the existence of a relationship of 'constitutional agency' between the individuals and the Commonwealth. As it was put in *Attorney-General v Lindegren*:

> The Government itself cannot make such contracts as these but through the medium of the Navy Board, and they are for such purposes a competent ministerial body — the constitutional agents of the public; and they are capable as such of binding the Government.[42]

This usage was followed by McTiernan J in *Bardolph*,[43] holding that the Premier of New South Wales was a 'competent ministerial authority and a constitutional agent to make this agreement for the Crown'.[44] The notion proceeds by an admittedly imperfect analogy[45] with the contracts of a company made otherwise than under seal.[46] *Bardolph* was regarded by the New South Wales Court of Appeal in *Coogee Surf Motel v Commonwealth* as governing the question of authority to bind the Commonwealth to contracts.[47] In that case, Mr Timbs, the Under Secretary of the Department of Services and Property, was held to be competent to bind the Commonwealth to a contract for the sale of land. Mr Timbs was treated as a 'Crown agent' for the Commonwealth, who was in turn treated as his principal.[48]

Likewise, the attribution of mental states to the government has proceeded by analogy with corporate agency theory. An early example is *HMS Truculent*, where Willmer J thought that there was an analogy between the Board of Admiralty and the Board of Directors of a limited company: '[j]ust as a limited company acts and transacts its business through its board of directors, so His Majesty, in relation to His Majesty's ships, acts through the Board of Admiralty'.[49] In *Western Australia v Watson*,[50] the Full Court of the Supreme Court of Western Australia applied that analogy to the Cabinet or the Executive Council of the State for the purposes of attributing knowledge of one government department to the State. Their Honours said:

> If one applies the corporate analogy to the Government or the State, it follows that the knowledge of any Minister of the Crown acquired by him in that capacity will be regarded as knowledge of the Government as a whole and, therefore, of the State.[51]

The principle in *Western Australia v Watson* has been applied to cases involving the Commonwealth.[52] It requires a plaintiff to identify an officer or person of sufficient standing to constitute, for a given purpose, the 'very ego and centre of the personality'[53] of the Commonwealth. The knowledge of the identified individual will then be knowledge of the 'Commonwealth as a legal entity separate from its employees and officers'.[54]

The 'Commonwealth' in the *Constitution*

This section shows that the 'Commonwealth' means different things in the *Constitution*.[55] So much is uncontroversial: the High Court has acknowledged that the term 'Commonwealth' is used in different ways in the text.[56] The *Constitution* uses the term to denote, at least, the nation known as the Commonwealth of Australia (hereafter 'Commonwealth (nation)') and the central government of the Federation (hereafter 'Commonwealth (government)'). This section explores the case law on those concepts so that, in subsequent sections, their significance for the correct theorisation of the legal personality of the Commonwealth can be exposed.

The Commonwealth (nation) is 'the community united as a nation',[57] which has international legal personality.[58] This is a composite conception, comprising the territorial land mass, a 'government' (recognised internationally), the people, and the component States and Territories. All are bound together or united, in an 'indissoluble Federal Commonwealth',[59] by core rules established by the *Constitution*, such as responsible government,[60] federalism and the separation of powers.[61]

The term 'nation' has a fluidity and ambiguity of meaning.[62] In *Davis v Commonwealth*, Brennan J said that the 'reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition'.[63] There may be different ways of understanding the Commonwealth (nation), but what is important for present purposes is that a (perhaps *the*) prominent view conceives of the Commonwealth (nation) as subsuming or embracing the people, the government and the States. Thus, in *Thomas v Mowbray*, Gummow and Crennan JJ said that 'governments' and 'the public' were 'elements of the body politic' and held (rejecting a submission to the contrary) that the 'notion of a "body politic" cannot sensibly be treated apart from those who are bound together by that body politic'.[64]

The Commonwealth (government) is the central government of the Federation (which is a component of the Commonwealth (nation)). The word 'government', which is not a term of art,[65] ordinarily signifies: first, the 'totality of continuing institutional machinery, incorporating all the varying offices and roles' of government;[66] and, second, more narrowly, the 'executive as distinct from the legislative branch of government, represented by the Ministry and the administrative bureaucracy'.[67] Government in the first sense captures all of the branches: legislative, executive and judicial. It means the 'organized form of government which the fundamental rules of law have established'.[68] To avoid confusion, the expression 'Executive Government' should be used to denote government in the second sense. The term 'governmental power' corresponds to the first sense of the word and signifies the 'whole power of a community'.[69] For present purposes, the vital characteristic of the Commonwealth (government), which distinguishes it from the Commonwealth (nation), is that government is distinct from the people who are governed, and the Commonwealth (government) does not embrace the States (who have separate governments).

These definitions and concepts are of great significance to the proper theoretical understanding of the Commonwealth as legal person. Before developing this further, it is first necessary to examine how and in what ways the *Constitution* itself treats the Commonwealth as a legal person and to identify how those provisions of the *Constitution* have historically been understood.

Legal Personality and the *Constitution*

The 'Commonwealth' is not defined in the text of the *Constitution*, which takes as its central concern the governing organisation of the government of Australia.[70] The traditional language of incorporation was not deployed by the framers.[71] Nevertheless, a number of provisions of the *Constitution* imply that the 'Commonwealth' has capacity. For example, the Commonwealth is treated as having capacity to owe a debt and be indemnified (s 105), to receive transfers of and own property (ss 85 and 114) and to be a party to litigation in its own name (s 75(iii)). These provisions assume that the Commonwealth is a legal person.

There have been significant changes, in the history of the High Court, in the way that this legal person has been understood. At the time the *Constitution* was drafted, governmental legal personality was thought to be expressed through the personality of the Sovereign, which came to be symbolised in the expression 'the Crown'. Professor Frederic Maitland explored this concept in a series of highly influential articles, published after 1900.[72] Maitland pilloried Coke's idea that the King was a 'corporation sole',[73] arguing instead that English law had come to treat the Sovereign as the 'head of a complex and highly organised "corporation aggregate of many"'.[74] In Australia, Maitland's writings were taken up by Professor W Harrison Moore, who wrote four articles on the topic between 1904 and 1907.[75] Harrison Moore pointed out the difficulties of deriving legal personality from the 'Crown' in a federal system, focussing on the doctrine of Crown unity and

indivisibility. The difficulty, as Harrison Moore and others[76] pointed out, was that multiple governments would, of necessity, simultaneously engage the legal personality of the Sovereign. The High Court had initially held that the 'Crown' was 'to be regarded not as one but as several' legal persons, 'representing' the Commonwealth and States as 'distinct and separate sovereign bodies'[77] (the theory was later mocked as 'the heresy of Crown schizophrenia').[78]

In 1920, however, a differently constituted Court held in the *Engineers' Case* that distinctions between the 'Commonwealth King' and the 'State King' (as those juristic persons came to be called) overlooked the 'elementary' proposition that the 'Crown' was unified and indivisible throughout the Empire.[79] The Court emphasised that the term 'Commonwealth' comprehended '*both* the strictly legal conception of the King in right of a designated territory, *and* the people of that territory considered as a political organism'.[80] Thereafter, until the 1990s, the expression 'Commonwealth' (when applied to a legal person) was understood as a compendious expression for 'the Crown' or the 'Crown in right of the Commonwealth'.

Confidence in the doctrine of Crown unity and indivisibility gradually eroded in the decades following the *Engineers' Case*. In 1928, Sir John Latham wrote that the King 'should *not* be regarded as having several juristic existences' and cited the *Engineers' Case* as authority for the proposition that it was a 'primary *legal* axiom that the Crown is ubiquitous and indivisible in the King's dominions'.[81] In 1944, however, Latham CJ described the notion as 'verbally impressive mysticism' when 'stated as a *legal* principle'.[82] It is difficult to speculate at the causes of the shift, though scholars have pointed (in related contexts) to the Balfour Declaration, resulting from the Imperial Conference of 1926, and the enactment of the *Statute of Westminster 1931* (UK).[83] By 1988, at least, the High Court had completely dispensed with the notion of Crown unity and indivisibility.[84]

In modern times, the High Court of Australia has rejected the device of 'Crown in right of the Commonwealth' to designate the Commonwealth's legal personhood. That has been done in reliance on certain cases interpreting the use of the word 'Commonwealth' in the *Constitution*, in particular ss 75 and 114,[85] as well as in connection with aspects of the royal prerogative.[86] These decisions provide a source of guidance as to the nature of the Commonwealth's legal personality.

Section 75(iii) grants the High Court original jurisdiction in 'all matters' in which 'the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'. There was argument in the *Bank Nationalisation Case* as to the ambit of this expression. Recently, judgments dealing with or touching upon the legal personality of government have seen fit to rely upon a passage in the judgment of Dixon J in the *Bank Nationalisation Case*,[87] which is regarded as having propounded a 'constitutional conception'[88] of the Commonwealth. Dixon J said:

> The 'Commonwealth' means the central Government of the country. It is perhaps strictly correct to say that it means the Crown in right of the Commonwealth. But it must be borne in mind that the dual system of government, which is of the essence of federation, involves a legal recognition of the distinct existence of the component polities. It would be difficult otherwise to accomplish a distribution among them of defined powers and authorities by means of a supreme law enforceable by the courts.
>
> The Constitution sweeps aside the difficulties which might be thought to arise in a federation from the traditional distinction between, on the one hand the position of the Sovereign as the representative of the State in a monarchy, and the other hand the State as a legal person in other forms of government . . . and goes directly to the conceptions of ordinary life. From beginning to end it treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they

> may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests. It is from this point of view that the interpretation of s. 75 must be approached. Moreover, the nature of the instrument in which the provision is found is not to be ignored. It is devoted, even in the judiciary chapter, to broad propositions in the field of government and it is hardly likely to concern itself with peculiarities of procedure. The purpose of s. 75 (iii.) obviously was to ensure that the political organization called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction in which it could be impleaded and which it could invoke.[89]

This is an important passage, but its significance for the theorisation of constitutional personality is liable to be overstated. First, the Court was interpreting a provision conferring jurisdiction, and it ultimately adopted a broad interpretation in preference to a narrow interpretation. Second, Dixon J said that it was 'perhaps strictly correct' to say that 'the Commonwealth' means 'the Crown in right of the Commonwealth'.[90] Third, '[f]ormally', Dixon J said, the governments as 'individualities' are *not* 'juristic persons'. They are instead 'politically organised bodies', or 'individualities', or 'organisations or institutions of government'.[91] These three facets of the decision are significant and suggest that Dixon J was neither rejecting the concept of the 'Crown' nor articulating a new, broad concept of the 'government' (or 'state') as legal person.

It is obvious that 'government', in the broad sense, is comprised of a multitude of distinct legal persons. Statutory corporations, for example, are often constituted for the very purpose of performing, in the public interest, public or governmental functions and to that extent are indisputably part of the 'government'. Yet, as separate legal persons, governmental statutory corporations can sue each other,[92] and at the federal level will have a legal existence distinct from the Commonwealth (legal person). In *Launceston Corporation v The Hydro-Electric Commission*, the High Court had held that the occupation of land by a statutory corporation was not 'occupation on behalf of Her Majesty or for the purposes of Her Majesty'.[93] As Allsop P said in a recent case, the status of statutory corporations, as 'representing' the 'Crown', does not deny their 'separateness as a corporate personality'.[94] In a 2003 case,[95] the New South Wales Court of Appeal held that the knowledge of a responsible Minister could not be attributed to the Electricity Commission, a body corporate established by statute to perform public services.[96] Merely because the Electricity Commission might *represent* the 'Crown', for some purposes, 'did not render the Electricity Commission the representative of the Crown for all purposes and did not deem it to be the Crown'.[97] Thus, the Commonwealth 'government' in the broad sense is comprised of a multitude of legal persons, including the constitutional person. All are within the jurisdiction of the High Court under s 75(iii). But self-evidently they have different legal personalities. The Commonwealth (constitutional person) is not to be treated as having incorporated every dimension of the government or the Executive Government. Section 75(iii) (and s 114) are in fact premised upon a distinction between the Commonwealth (constitutional person) and the Commonwealth (government).

Section 114 of the *Constitution* prohibits the States and the Commonwealth from imposing any tax on one another's property. 'There can be no doubt', said the Court in *Deputy Commissioner of Taxation v State Bank of New South Wales*,[98] that s 114 refers 'to the polity which is a State within the Australian federation'.[99] Their Honours said:

> Once it is accepted that the Constitution refers to the Commonwealth and the States as organisations or institutions of government in accordance with the conceptions of ordinary life, it must follow that these references are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or a State as the case may be.[100]

Here, their Honours contemplate a conglomerate of governmental entities with distinct legal personality, wide enough to denote the State (constitutional person) *and* an instrumentality with legal personality distinct from the State. That broader conception of 'polity', at that level of abstraction, is not usefully or coherently described as a legal person.

Section 114 was then considered in the *State Superannuation Case*,[101] which concerned the liability of the State Authorities Superannuation Board to pay stamp duty on an agreement to purchase real property in Perth. In a separate judgment, McHugh and Gummow JJ said that the meaning of the term 'State', as it appeared in ss 75 and 114 of the *Constitution*, was not governed by equivalence with the 'Crown' nor by entitlement to the privileges, immunities or the 'shield of the Crown'.[102] Their Honours said that the 'mysticism'[103] of the doctrine of Crown unity could not assist 'today in dealing with the mutual legal relationships between the Australian States'.[104] The doctrine was now politically unimportant and insignificant. Moreover, it was inconsistent with the text of the *Constitution*: 'to speak of the Crown in right of the Commonwealth is to give inadequate recognition to the structure of the Constitution'.[105]

These ideas were then developed in the joint judgment of Gummow and Kirby JJ in *Mewett*,[106] which raised for decision the legal basis of the Commonwealth's liability in tort. The Commonwealth argued that the plaintiffs' rights to proceed, against what was called 'the Commonwealth Crown', were based upon the *Judiciary Act 1903* (Cth).[107] The causes of action could not have been based upon general law, because at common law the 'Crown in right of the Commonwealth' had the benefit of the Sovereign's immunity from liability in tort. The respondents argued that the Commonwealth's common law immunity from suit in contract and tort had been removed by s 75(iii) of the *Constitution*,[108] so that the right to proceed against 'the Commonwealth Crown' was derived from general law. The latter submission was accepted by a majority of the Court.[109] Echoing what was said by Gummow and McHugh JJ in the *State Superannuation Case*, Gummow and Kirby JJ concentrated on the vocabulary and syntactical structure of the *Constitution* (especially s 75), which did not identify 'the Crown in any particular capacity'.[110] The textual use of the noun 'the Commonwealth' is thus given great significance. The 'Commonwealth' is made to be the subject and object of constitutional sentences dealing with rights and duties. It is textually conceived as a 'politically organised body'.[111] This 'new state of affairs', their Honours said after paraphrasing Dixon J in the *Bank Nationalisation Case*, 'required adjustment to habits of thought formed in a common law system with a unitary structure of government'.[112] Further, the concept of a 'matter' in Chapter III, read with other sections of the *Constitution*, encompasses species of justiciable controversy unknowable in the UK.[113] These classes of controversy meant that the immunity doctrine, as it had been developed in the UK,[114] was inconsistent with Chapter III of the *Constitution*.

The textual basis for rejecting the 'Crown' was further elaborated by Gummow J in the *Mining Act Case*.[115] His Honour observed that the term 'Crown' had come to be used in various senses,[116] but most of those senses were not deployed in the *Constitution*. The *Constitution* contemplated dealings between or involving 'the Commonwealth' and the 'Parliament of a State', for example in s 111 in Chapter V and ss 123 and 124 in Chapter VI. It distinguished those dealings from others between or involving 'the Commonwealth' and the 'Executive Government' of a State, for

example, in s 119. Other provisions, such as ss 85 and 51(xxxi), spoke of the vesting in or acquisition by 'the Commonwealth' of the property of 'a State' or 'any State'. These provisions did not operate by reference to distinctions drawn between the 'Crown' in various capacities.[117]

The next case in the sequence was *Sue v Hill*.[118] Section 44 of the *Constitution*, which has recently generated much litigation and political controversy, renders ineligible for election to the Commonwealth Parliament any person who (inter alia) is a citizen of a 'foreign power'. The question in *Sue v Hill* was whether the United Kingdom was a 'foreign power'. The joint judgment of Gleeson CJ, Gummow and Hayne JJ, following the judgment of Gummow J in the *Mining Act Case*,[119] took the opportunity to re-emphasise that the *Constitution* did not use the term the 'Crown' to describe the Commonwealth.[120] In the past, lawyers had pressed the 'Crown' into service to distinguish between the 'newly created and evolving political units'.[121] That had been done by use of the expression 'the Crown in right of . . . '[122] However, the 'Crown' was inapt to describe 'complex political structures' that exist in a federation.[123] It was 'of no assistance in determining today' whether the UK was a 'foreign power' in s 44(i) of the *Constitution*.[124] Gaudron J said that the *Constitution* implied that the 'Crown' was divisible. The States were 'separate bodies politic with separate legal personality'. These bodies politic were separate from each other and separate from the Commonwealth, which was termed a 'body politic . . . with its own legal personality'. That these bodies politic were separate was 'recognised throughout the Constitution', particularly in ss 75(iii), 75(iv) and 78 in Chapter III.[125]

Kirby J developed these concepts in *Baxter Healthcare*[126] in the context of the doctrine of 'Crown' immunity. To hold the Commonwealth immune from the application of statutes was to assume that the Commonwealth was legally equivalent to the 'Crown', an assumption 'inconsistent with the text, purpose and character of the *Australian Constitution* and of its constituent polities'.[127] The *Constitution* had created new constitutional entities, called 'polities' or 'governmental polities', which derived their existence and character from the text.[128] Kirby J referred to the judgment of Dixon J in the *Bank Nationalisation Case* and said that the 'starting point for the enlightenment'[129] should be the decision of the Supreme Court of Ireland in *Byrne v Ireland*.[130] There, a majority of the Irish Supreme Court held that the royal prerogative was based upon the notion that 'the Crown personified the State',[131] and that this notion was inconsistent with Article 2 of the *Constitution of Saorstát Éireann* of 1922, which declared that the powers of government and all authority were derived from the people of Ireland. Walsh J held that the 'sovereign people' had thereby created a 'state'-like entity called 'Saorstát Éireann'.[132]

These judgments show an evolution in the High Court's thinking about governmental legal personality. Previously, the relevant constitutional provisions were assumed to reflect a theory according to which the Sovereign or the 'Crown' (as corporation sole or aggregate) was a legal person, holding public lands, funds and other rights/duties on behalf of the government or the people. This theory was unworkable in a federal system and has been abandoned. The judgments in which this occurred emphasised the text and structure of the *Constitution* as providing the anchor for understanding the juridical nature of the Commonwealth. But this can only take matters so far. The vagueness of the usages of the term 'Commonwealth' in the *Constitution*, which may even have been deliberate,[133] means that different theories are available, depending upon the way that the senses of the term 'Commonwealth' are understood to relate to each other. Provisions referring to the Commonwealth (legal person) might be grouped together with provisions referring to the nation, in effect so as to render the nation a legal person. Alternatively, provisions referring to the legal person might be grouped with those referring to the government, in effect so as to render the

whole of the government a legal person. This article suggests that the better view is that the provisions referring to the legal person are a free-standing category: neither the nation, nor the government, is sensibly treated as a legal person; while the constitutional person should not be elided with the nation or the government.

Williams v Commonwealth

It is convenient next to consider the decision of the High Court in *Williams (No 1)*, which is both the most recent consideration of the legal personality of the Commonwealth and a useful illustration of apparently competing approaches to its theorisation. *Williams (No 1)* involved a challenge to the provision of funding to the Darling Heights State School through the Department of Education, Employment and Workplace Relations, under the National School Chaplaincy Program. The funding was provided through an agreement between the Commonwealth and a company incorporated under the *Corporations Act 2001* (Cth). The validity of the expenditure was challenged.

The Commonwealth's 'broad submission' in *Williams (No 1)* was that the Commonwealth had an ability to contract and pay money that was relevantly unlimited by reference to considerations about the 'breadth' of executive power. The basis for the submission was that to contract and spend (appropriated) money were activities taking effect under the 'general law', for which no specific source of executive power was required. The submission was understood by their Honours to involve the proposition that, because it was a legal person, the Commonwealth has a 'relevantly unlimited power to pay and to contract to pay money', analogous to that of a natural person.[134] The rejection of this 'broad submission' in six separate majority judgments presents a number of seemingly competing approaches to the relationship between executive power and the legal personality of the Commonwealth.[135]

French CJ accepted that the executive power 'extends to . . . powers defined by the capacities of the Commonwealth common to legal persons'.[136] Moreover, his Honour accepted that the executive power would occasionally support the making of contracts without legislation.[137] French CJ described the executive power as 'that power exercised by the Commonwealth as a polity through the executive branch of its government'[138] (a usage of 'polity' as meaning 'government'). French CJ went on to say:

> It is, as the plaintiff submitted, an error to treat the Commonwealth executive as a separate juristic person. The character of the Executive Government as a branch of the national polity is relevant to the relationship between the power of that branch and the powers and functions of the legislative branch and, particularly the Senate.[139]

The Solicitor-General's 'broad submission' was rejected, essentially on two grounds. The first was that the authorities showed that this 'aspect' of executive power was 'not open-ended'.[140] The second ground for rejecting the broad submission can be understood as an attack on its tendency towards anthropomorphism. At one point in his judgment, his Honour said that the Commonwealth 'is not just another legal person like a private corporation or a natural person with contractual capacity'.[141] There was potential for regulatory outcomes to be achieved through a Commonwealth contract. There was also the 'impact of the Commonwealth executive power on the executive power of the States'.[142] Relevantly to legal personality, the passage may conceive of the

Commonwealth as a legal person, acting through *its* 'executive branch' which, in turn, has a relationship with 'the legislative branch'.

It is convenient next to consider the judgment of Crennan J, since her Honour was the only other judge explicitly to state that the executive power included 'the powers which derive from the capacities of the Commonwealth as a juristic person'.[143] Her Honour rejected the Commonwealth's 'broad submission' essentially for three reasons. The first was the principle of parliamentary control by which the executive is made accountable to Parliament for expenditure.[144] The second was the potential for Commonwealth contracts to be used 'to regulate activity in the community'.[145] The third was the possibility that 'citizens would be unable to avail themselves of the constitutional protection in s 109 against inconsistent legislation' in cases where Commonwealth executive acts collided with State legislative acts.[146] These reasons required rejection of the submission that legal personality could itself furnish the executive with power to bind the Commonwealth to contracts and expenditure.

The joint judgment of Gummow and Bell JJ accepted that the Commonwealth was a legal person.[147] Their Honours also accepted that the executive power would, within its appropriate sphere, support the making of a contract. For what may be reduced to two reasons, their Honours rejected the Commonwealth's 'broad submission'. The first was that it conflated the capacities of the 'Commonwealth' to contract and spend with the 'distinct and special financial privileges associated with the prerogative'.[148] The second denied the analogy to a human being, similarly to the passage of French CJ quoted above, on the basis that executive power must be understood in the federal setting of the Constitution:

> [T]he Commonwealth parties' [broad submission] appears to proceed from the assumption that the executive branch has a legal personality distinct from the legislative branch, with the result that the Executive is endowed with the capacities of an individual. The legal personality, however, is that of the Commonwealth of Australia, which is the body politic established under the Commonwealth of Australia Constitution Act 1900 (Imp), and identified in covering cl 6.[149]

This passage is subtly different from the passage extracted above from the reasons of French CJ. It does not speak of the Executive Government as a 'branch' of the 'polity', which may be conceived as a legal person. Instead, it seems to conceive of the nation as a legal person, capable of being affected in discrete instances by the Executive Government of the Commonwealth. Their Honours later said that questions of the contractual and spending capacities of the Commonwealth must take into account the fact that the law of contract was 'fashioned primarily to deal with the interests of private parties, not those of the Executive Government'.[150] Where 'public moneys are involved', their Honours said, questions about the Commonwealth's 'contractual capacity' are 'to be resolved "through different spectacles"'.[151]

Hayne J saw the concentration on the Commonwealth's 'capacity' to contract as a distraction. 'As a polity', Hayne J said, 'the Commonwealth is not under any disability preventing it from making a contract or a disposition of property'.[152] The language of 'capacity' distracted from the question whether the Executive had any 'power' to make the payments.[153] His Honour said:

> There is no basis in law for attributing human attitudes, form, or personality either to the federal polity that was created by the Constitution or, as the Commonwealth parties sought to do, one branch of the government of that polity — the Executive. The argument asserting that the Executive Government of the Commonwealth should be assumed to have the same capacities to spend and make contracts as a

> natural person was no more than a particular form of anthropomorphism writ large. It was an argument that sought to endow an artificial legal person with human characteristics. The dangers of doing that are self-evident.[154]

His Honour later said that the Executive Government of the Commonwealth was the 'executive government of an artificial legal entity — a polity'.[155] This 'polity' was later said to be what is described in the preamble as the 'indissoluble Federal Commonwealth under the Crown'[156] (probably meaning the 'nation'). The proposition that the executive power could authorise unlimited spending was inconsistent with the 'carefully crafted checks' ensuring parliamentary control over the raising and expenditure of 'public moneys'.[157] Emphasis is placed in his Honour's reasons, and in the subsequent joint judgment in *Williams (No 2)*,[158] on the adjective '*public*' in the phrase 'public moneys'.

Heydon J accepted the submission that, subject to immaterial exceptions, s 61 of the *Constitution* has a 'breadth' that is coterminous with the areas of Parliament's legislative competence, whether or not that competence had been exercised.[159] His Honour therefore did not need to consider the Commonwealth as legal person, beyond observing that, prima facie, the statements of Brennan J in *Davis v Commonwealth*[160] and French CJ and the plurality in *Pape*[161] supported the proposition that the executive power includes within its appropriate 'breadth' the 'capacities' that may be possessed by persons other than the Executive. A prime example was the 'capacity to contract'.[162]

Similarly to Hayne J, Kiefel J also saw the language of 'capacity' as a distraction. Her Honour said that 'capacity of the Commonwealth Executive to contract' was irrelevant to the question whether the Executive had a 'power to spend'.[163] The question was 'not one of the Executive's juristic capacity to contract, but its power to act'.[164] A difference between the contracts of the 'Commonwealth executive' and those of a 'natural person' was that, when the 'Commonwealth contracts, it may be committing to the expenditure of public moneys'.[165] The primary consideration, however, was that the power of the executive to spend was limited to 'the confines of some power derived from the *Constitution*'.[166] Examples of the extent of the executive power were the prerogative, the subject matters of express legislative powers and 'matters which are peculiarly adapted to the government of a nation'.[167] Because the payments and the contract in this case did not fall within any of those aspects of 'breadth', they were invalid.

The conclusion relevantly deducible from *Williams (No 1)* is that the Commonwealth's legal personality neither broadens nor trumps the 'breadth' dimension of executive power. The majority judgments advanced diverse reasons justifying this conclusion. The 'broad submission' was treated as a syllogism, because it sought to infer the existence of the necessary 'power' from the premises: (a) that the Commonwealth is a legal person, with capacities no less extensive than those of human beings; and (b) that human beings have full suite of capacities. Each judgment accepted that the 'Commonwealth' had capacity to contract, and therefore each judgment accepted, whether overtly or implicitly, that the Commonwealth is a legal person. A subsequent challenge to the authority of *Williams (No 1)* was rejected in *Williams (No 2)*.[168]

Common to the majority judgments is the acceptance of three propositions or premises. First, a power to spend, and to contract to spend, appropriated moneys must be found in the *Constitution* or in otherwise valid statutes.[169] In this connection, a number of the judgments suggest that the Executive Government is not, itself, a legal person. Second, s 61 of the *Constitution* might authorise a contract or expenditure if the 'breadth' dimension were otherwise satisfied.[170] In other words, and perhaps uncontroversially, the executive power of the Commonwealth does support

expenditure and contracts, where it is otherwise found to exist. Third, the agreement and payments in question were invalid, as being beyond the executive power.[171] Beyond that, different reasons are advanced for rejecting the 'broad submission', each containing interesting but occasionally competing insights about legal personality.

The effect of the *Williams* cases is to place the Commonwealth in a position materially different from other non-human legal persons. The rules of attribution applicable to companies, for example, do not require the identification of a 'power' vested in an authorised officer before the behaviour of that officer will count as the acts of the company.[172] Across all majority judgments, it emerges clearly that the Commonwealth is not to be treated as any other legal person, capable without more of voluntarily committing itself to pay money lawfully in its possession and control. That is not because of some deficiency in the Commonwealth's 'capacity' — to the contrary, all judgments affirmed the Commonwealth's capacity to enter into the contract in question. Instead, it is because of the limitations upon the exercise of executive power by the individuals through whom the Commonwealth (legal person) acts from time to time.

Competing Theories

The judgments in *Williams (No 1)* used the terms 'body politic' or 'polity' to describe two distinct concepts: nation and government. Those concepts were ascribed or attributed legal personality. This appears to underscore a theoretical divergence, though it is possible that the putative divergence actually reflects only an underlying ambiguity about what the terms 'body politic' or 'polity' actually mean.

The terms 'body politic' and 'polity' originate (respectively) in late medieval and ancient times. The term 'body politic' (*corps politique*) was introduced in the Year Books in 1478,[173] whereas 'polity' (from the Greek πολιτεία) was the title of one of Plato's works (which Cicero rendered in Latin as *politia*). There are a number of cognate expressions, including 'political entity',[174] 'political unit',[175] 'political organism'[176] and 'politically organised body'.[177] Interestingly, all share the adjective 'political',[178] or some derivation thereof, and in many cases feature the metaphor of a living organism.[179] A survey of their usage in Australian cases reveals that these terms lack a settled connotation.

In their first usage, the terms 'polity' and 'body politic' describe a composite of 'government' and the people who are governed, united by rules embodied in the *Constitution*. For example, a person born in Australia to an Australian citizen is said to be a 'member of the Australian *body politic*',[180] whereas the status of 'alien' is given to a person who is not a member of the '*body politic*'.[181] The cases suggest that the Commonwealth as '*body politic'* or '*polity'* is made up of at least the territory,[182] the people[183] and the organs and institutions of government at both federal and state level.[184] It is created and underpinned by the *Constitution*[185] and, at least according to some judges, sustained by popular compact.[186] Reference was given above to the judgment of Gummow and Crennan JJ in *Thomas v Mowbray*,[187] holding that the 'notion of a "*body politic*" cannot sensibly be treated apart from those who are bound together by that body politic'.[188] Likewise, it is sometimes said that the Commonwealth is a 'single *polity*',[189] which has the character of a 'dualist federal *polity*'[190] in that it is 'made up of'[191] or 'divided into federal, state and territory governments'.[192] Or, as Kirby J said in *Mobil Oil Australia v Victoria*,[193] the 'Commonwealth of Australia is a polity in which governmental powers are shared'.

There are judgments that appear to treat the 'body politic'/'polity' in this broader usage (ie as nation) as a legal person. The joint judgment of Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill*[194] indicated that the first use of the expression 'the Crown' was as a 'device to dispense

with'[195] the recognition of the 'State as a juristic person'.[196] The 'State as juristic person' was in turn called the 'body politic'.[197] In *Lam*,[198] McHugh and Gummow JJ said that, whereas there had been a lack of understanding in the UK of the 'state' as a 'body politic', the 'federal system of government' in Australia required 'such an understanding'.[199] The thread of these judgments is picked up in *Eastman's Case*,[200] where Gummow and Hayne JJ referred with approval to Barwick CJ's observations in *Spratt v Hermes*[201] that the *Constitution* 'brought into existence but one Commonwealth, which was, in turn, destined to become the nation'.[202] Gummow and Hayne JJ said: 'The term 'the Commonwealth' in ss 1, 61 and 71 is used consistently to identify the body politic identified in the covering clauses to the Constitution'.[203] Then, in *Williams (No 1)*, Gummow and Bell JJ said that '[t]he legal personality' was 'that of the Commonwealth of Australia', rather than the executive branch, and that the Commonwealth was the 'body politic established under the [*Constitution*], and identified in covering cl 6'.[204] If it be legitimate to read these judgments (which share a common author) in sequence, then this appears to be a conception of the Commonwealth as a nation, which is a legal person under domestic law.

One expression of this conception, suggested by Professor Walker in relation to the 'British State', comprehends it as 'a corporation aggregate consisting of all those persons connected with-Great Britain and Northern Ireland by ties of nationality and domicile', with a 'managerial body called the government'.[205] The key elements of the theory are that the Commonwealth is a legal person that *consists of* or *comprises* the people and is controlled or affected by the government, operating in effect as a Board of Directors. The coherence of this theory depends on how the 'nation' or 'political community' is defined. As noted above, a prominent definition treats the Commonwealth (nation) as *indissolubly* 'comprising' the people, the federal and State governments, and the whole territory. If it be correct that the Commonwealth (nation) 'cannot sensibly be treated apart from those who are bound together by [it]',[206] then the theory would appear to fail, because it cannot accommodate the logical necessity for legal antagonism between the constitutional person and individuals, and State constitutional persons, who together constitute the Commonwealth (nation). Furthermore, the very point of artificial legal personality is to distinguish the entity from the natural persons by which it is constituted.[207] In what sense, then, is the nation 'comprised' of its members? *Ex hypothesi*, the Commonwealth (constitutional person) must be a distinct legal person from the people and the States. Once that distinction is admitted, ie between the legal person and the people (as its 'members'), then the theory that the nation is a legal person seems not to advance matters very far. It seems to reduce to the proposition that the constitutional person simply *represents* the people of Australia, perhaps analogously to the way that a company can be said to represent, and yet conduct litigation against, its shareholders. Representation, in this sense, is something that could be claimed for any theory.

The second usage of 'polity' and 'body politic' is to describe a component government (in the broad sense, encompassing all branches) of the nation. In the *Engineers' Case*, Gavan Duffy J said that the 'existence of the State as a polity is as essential to the *Constitution* as the existence of the Commonwealth'.[208] These words were picked up and quoted in *West*.[209] In *Burns v Ransley*,[210] Dixon J gave the following definitions for the statutory phrase 'the Government or Constitution of the Commonwealth':

> I take the word 'Government' to signify the established system of political rule, the governing power of the country consisting of the executive and the legislature considered as an organised entity and independently of the persons of whom it consists from time to time ....

> The word 'Constitution' . . . probably has the same meaning, and, if so, it does not refer to a document or instrument of government but to the polity or organized form of government which the fundamental rules of law have established whether they are expressed in a written constitution or not.[211]

In 1958, in *Lamshed v Lake*, Dixon CJ said that the expressions 'accepted by the Commonwealth' and 'placed under the authority of the Commonwealth' in s 122 of the *Constitution* described the Commonwealth as the 'polity established by the Constitution'.[212] In this sense of the term, 'polity' seems to be a personification of the whole of the government, separate from the people. The personified entity ('polity') comprises the legislative, executive and judicial branches of government;[213] as Dixon J said in *Burns*, 'the governing power of the country . . . considered as an organised entity'.

The term 'body politic' is also used in this sense, although perhaps less frequently. In the *Second Territory Senators Case*,[214] in the context of an issue estoppel, Aickin J said:

> Generally speaking when an Attorney-General sues to enforce a public right or liberty he does so as representing Her Majesty's subjects, and not the body politic of the government unit in which he holds office. The presence of the State of Queensland as a plaintiff adds emphasis to the Attorney's separate role, even though he appears by the same counsel as the State.[215]

This conception, of the 'body politic of the government unit', is something distinct from the people and from the nation.[216] Similarly, in *Thomas v Mowbray*, Kirby J treated the terms 'body politic' and 'polities' as describing 'Australian units of government'[217] and held that those concepts did not, per se, extend to 'individual persons or their property or other interests'.[218] The most recent example is *Queensland Rail*, where the plurality said that the Authority, which had a separate legal personality, 'is not, and is not a part of, the body politic which is the State of Queensland'.[219]

There are judgments that can be read as supporting a theory that the 'body politic'/'polity' in this second usage (ie as government) is a legal person. French CJ emphasised that the executive power of the Commonwealth was the power '*exercised* by the Commonwealth as a polity *through* the executive branch of its government'.[220] This suggests that the polity incorporates the branches of government and acts through them. It would be an error, French CJ said, to 'treat the Commonwealth Executive as a *separate* juristic person'.[221] It seems to be implicit that the Executive Government *shares* the 'juristic personality' of the Commonwealth (legal person), which is in turn the 'polity'. What his Honour seems to postulate is that the government as a whole (the 'polity') is a legal person, comprising various branches. The separate judgment of Hayne J in *Williams (No 1)* is replete with such language. His Honour said that the expenditures in issue in the case were 'expenditures made by the executive government *of a polity* — an artificial legal person',[222] that the Executive Government of the Commonwealth was 'the executive government *of* an artificial legal entity — a polity',[223] and that the Commonwealth makes contracts and can outlay public money '*as* a polity'.[224]

The core notion seems to be that governmental powers are vested *in* the Commonwealth and exercised by and through its governmental 'branches' or 'organs', over or in respect of people as 'members'. The concept is similar to a Local Government Authority,[225] which is a legal person invested with governmental powers exercisable over persons within its jurisdiction. But this theory is textually insupportable. Governmental powers are not vested by the *Constitution* in the 'Commonwealth'. Instead, the legislative power 'of the Commonwealth' is vested in 'a Federal

Parliament'. Moreover, certain provisions (ss 75(iii) and 114) are premised upon a distinction between the Commonwealth (legal person) and the Commonwealth (government). The theory cannot accommodate the functional reality, that government is comprised of a multitude of persons, institutions and entities, many of which are acknowledged for legal purposes as having personality distinct from that of the Commonwealth.

It is not clear whether any difference in theory is intended between those who adopt these two different usages. Nevertheless, it does seem clear that both views are broader than what was comprehended during the currency of the 'Crown'. It is an axiom of British constitutionalism that there is no conception of the 'state' as a legal person.[226] Turpin and Tompkins, for example, declare that 'there is no legal entity called "the state" in which powers are vested or to which allegiance or other duties are owed'.[227] The 'Crown' is said to be the nearest equivalent concept, but the 'Crown' has never corresponded to the 'state' in this sense. As Mason CJ, Deane and Dawson JJ said, the 'Crown' is only 'a limited aspect of "the State" in the broad sense'.[228] British constitutionalism does have a legal conception of the state. Professor Janet McLean detected a sophisticated state-tradition in British legal thought, which she describes as 'contested, adaptable and complex'.[229] What is admittedly missing is a conception of the *whole* of the 'state' as a legal person. The 'Crown' as corporation has never been equivalent to the 'state'; and the 'state', in this broader sense, has never been treated as a legal person.

The third usage of the terms 'body politic' (and, to a lesser extent, 'polity') is simply to describe a public body (that may or may not be an artificial legal person) created for a public purpose. It has been a common feature of English parliamentary drafting that the term 'person' should be defined so as to include a 'body politic', and this device has been adopted in Australia.[230] In a 1925 case, Isaacs J said of the *Real Property Act 1915* (Vic):

> The Act is quite general. It includes by sec. 16, under the expression 'person', *a body politic* and 'classes of persons'. 'Body politic' is found in the *Magdalen College Case.*[231] . . . *The expression* '*body politic*', *as distinguished from* '*body corporate*', *indicates to my mind a body created for some public purpose*. For instance, the Hudson's Bay Company and the East India Company, invested with public functions, were bodies politic. The Sovereign is a body politic (see *Magdalen College Case*). In *Attorney-General for Ontario v Attorney-General for the Dominion*,[232] Lord Watson used the expression 'body politic' to denote the Dominion of Canada.[233] (emphasis added)

There is a line of authority to the effect that a 'body politic' *must* be a legal person, at least for statutory purposes.[234] Outside the statutory purpose, however, it is clear that a 'body politic' is not *necessarily* a legal person. Basten JA, having conducted a survey of some of the usages, concluded that the term could describe a 'social group, which may or may not have legal personality but has constitutional significance, in the broadest sense of that term'.[235]

The first reported application of the term 'body politic' to the Commonwealth was in 1905, in *The Commonwealth v Baume*.[236] In that case, Griffith CJ said that the 'Commonwealth' as mentioned in the *Judiciary Act 1903* (Cth) 'means the body politic called by that name . . . [which] stands for the Crown as representing the whole community'.[237] In the same case, O'Connor J said that 'Commonwealth representing the Executive power of the community, or the Crown as it is sometimes called' was 'constituted a juristic person'.[238] Here, 'body politic' is a synonym for the 'Crown', which 'represents' (but perhaps does not incorporate) either 'the whole community' or the 'executive power'. Later, it was held by reference to the *Acts Interpretation Act 1901* (Cth) that, because the word 'person' includes 'body politic', it 'therefore includes the Commonwealth'.[239] In

Queensland Rail, the plurality said that the Authority had a separate legal personality, and 'is not, and is not a part of, the body politic which is the State of Queensland'.[240]

Conclusion

The cases and materials reviewed in this article suggest that there may be a theoretical divergence in the way that governmental legal personality is understood in Australia: all agree that the Commonwealth is a legal person, but some appear to conceive that legal personality as an attribute of the 'nation', whereas others appear to conceive it as an attribute of the 'government'. The article has suggested that the preferable view is that the constitutional person is not to be conflated with the people, the federal government or the nation. In the words of Professor Sawer, there is 'in fact no juristic entity corresponding to the Commonwealth as a whole'.[241] The constitutional person should be understood as having a legal existence separate and distinct from other manifestations of the 'Commonwealth' — it is simply a unit of the legal system, in respect of which legal personality has been constitutionally conferred, which acts by or through the Executive Government, and holds its lands, funds etc on behalf of the people of Australia. In that sense, it resembles the 'Crown', which never corresponded to the whole 'state',[242] but was only seen as 'a limited aspect of "the State" in the broad sense'.[243] Though it may act by or through members of the Executive Government, the constitutional person is not an incorporation of the Executive Government[244] nor of the government more broadly. Though it may hold its lands, funds etc on behalf of the people of Australia, the constitutional person is not an incorporation of the nation or the people comprising the nation.

Notes

1. Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (Macmillan, 6th ed, 1929) 121.
2. See, eg, *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 231 (Griffith CJ) ('*Municipal Council Case*'); *Commonwealth v Baume* (1905) 2 CLR 405, 418 (O'Connor J); *R v Sutton* (1908) 5 CLR 789, 797 (Griffith CJ), 805 (O'Connor J), 813 (Isaacs J) ('*Wire Netting Case*'); *Commonwealth v Bogle* (1953) 89 CLR 229, 259 (Fullagar J); *South Australia v Commonwealth* (1962) 108 CLR 130, 154 (Windeyer J) ('*Railway Standardisation Case*'); *Williams v Commonwealth* (2012) 248 CLR 156, 184 [21] (French CJ), 237 [154] (Gummow and Bell JJ), 253–4 [204]–[205] (Hayne J) ('*Williams (No 1)*').
3. *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 83 (Dixon J).
4. Frederic W Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 418.
5. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171, 181–2 [16] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ) ('*Queensland Rail*'), quoting George Whitecross Paton, *A Text-Book of Jurisprudence* (Clarendon Press, 3rd ed, 1964) 351–2.
6. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 90–2 [115]–[119] ('*M68*').
7. Ibid 91 [118].
8. *JT International SA v Commonwealth* (2012) 250 CLR 1, 33–4 [42] (French CJ), 72 [185] (Hayne and Bell JJ: Gummow J agreeing at 63 [150]), 99–100 [279] (Crennan J), 132 [369] (Kiefel J), cf 82–6 [217]–[231] (Heydon J dissenting) ('*Plain Packaging Case*').
9. See Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth) 12 [49], citing Workplace Relations Ministers Council, 'First Report of the National Review into Model Occupational Health and

Safety Laws' (Report, Workplace Relations Ministers Council, October 2008) 159–60 [15.4]–[15.7], which acknowledges that 'government' is different from 'ordinary persons' but concludes that it is 'now widely accepted that the Crown should not be exempt from the operation of the offence provisions of OHS legislation'. Cf Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Report No 92, (2001) [22.46].

10. *Cain v Doyle* (1946) 72 CLR 409, 424, see also 418 (Latham CJ), 420 (Starke J), 431 (Williams J); Wolfgang Friedmann, 'Public Welfare Offences, Statutory Duties, and the Legal Status of the Crown' (1950) 13 *Modern Law Review* 24, 35, saying that *Cain v Doyle* underlined 'the necessity of a more articulate theory of State in modern British law'. See generally, Malcolm Barrett, 'Prosecuting the Crown' (2002) 4 *University of Notre Dame Australia Law Review* 39.
11. See *Queensland Rail* (2015) 256 CLR 171, 181–2 [16] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ), 192–3 [53] (Gageler J).
12. See *Re KL Tractors Ltd* (1961) 106 CLR 318, 334–5 (Dixon CJ, McTiernan and Kitto JJ), rejecting the language of 'power' used by Aicken QC during argument: at 328; *Re Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte the Defence Housing Authority* (1997) 190 CLR 410, 454 (McHugh J) ('*Ex parte Henderson'*), defining 'capacity' as the 'legal right or power to do or refrain to do something'.
13. See, eg, *R v King* (2003) 59 NSWLR 472, 486 [73] (Spigelman CJ).
14. Cf *Minors (Property and Contracts) Act 1970* (NSW).
15. *M68* (2016) 257 CLR 42, 98 [134]–[136] (Gageler J); see also *Ex parte Henderson* (1997) 190 CLR 410, 456 (McHugh J).
16. *Re KL Tractors Ltd* (1961) 106 CLR 318, 334–5 (Dixon CJ, McTiernan and Kitto JJ).
17. See, eg, *Commonwealth v Anderson* (1960) 105 CLR 303, 313 (Dixon CJ); *A-G (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262, 288 (Walsh J); *Sydney Training Depot Snapper Island Ltd v Brown* (1987) 14 ALD 464, 465 (Wilcox J), saying that issuing a notice to quit was the 'exercise by the Commonwealth of a property right vested in it'; *Clamback v Coombes* (1986) 13 FCR 55, 64 (Evatt J), holding that the decision of an officer of the Department of Civil Aviation to erect a fence on land comprising the Bankstown Airport in Sydney was a decision 'on behalf of the Commonwealth of Australia to exercise its common law rights to fence its own land'.
18. *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89, 127 (Windeyer J), saying that the Commonwealth could 'accept a gift from a landowner by his deed or will of land' and 'could become by gift possessed of pictures or books for public use and enjoyment'.
19. See *Williams (No 1)* (2012) 248 CLR 156, 252 [201] (Hayne J).
20. *Queensland Rail* (2015) 256 CLR 171, 182 [17] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ). By 2007, Professor Armour was able to record 17forms of legal person currently recognised by English law: John Armour, 'Companies and Other Associations' in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 2nd ed, 2007) 152 [3.07].
21. *National Union of General and Municipal Workers v Gillian* [1946] 1 KB 81, 85 (Scott LJ); cited with approval in *Chaff and Hay Acquisition Committee v JA Hemphill and Sons Pty Ltd* (1947) 74 CLR 375, 391 (McTiernan J) ('*Chaff and Hay Acquisition Committee Case*'). See also P J Fitzgerald, *Salmond on Jurisprudence* (Sweet & Maxwell, 12th ed, 1966) 308. The 12th edition reproduces with very few changes Sir John's Salmond's original text and was described as 'illuminating' by the Court of Appeal in *Bumper Development Corporation v Commissioner of Police of Metropolis* [1991] 1 WLR 1362, 1371 [H] (Purchas LJ) (CA).
22. See *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 ('*Taff Vale Case'*); *Chaff and Hay Acquisition Committee Case* (1947) 74 CLR 375, 384–6 (Latham CJ), 390 (Starke J), 396–7 (Williams J); *Church of Scientology v Woodward* (1982) 154 CLR 25, 56 (Mason J).

23. *Queensland Rail* (2015) 256 CLR 171, 188 [38], 189 [40] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ).
24. Ibid 192 [49].
25. Ibid 192–3 [53] (Gageler J).
26. *Conciliation and Arbitration Act 1904* (Cth) s 136, cited in *Williams v Hursey* (1959) 103 CLR 30, 52.
27. See, eg, *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620, 660–1 (Toohey, McHugh and Gummow JJ) ('*McJannet*'); *Queensland Rail* (2015) 256 CLR 171, 187–8 [36] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ), 192–3 [53] (Gageler J). See also *Frizziero v Rice* (1992) 110 ALR 549, 562 (Gray J).
28. *Williams v Hursey* (1959) 103 CLR 30, 52 (Fullagar J: Dixon CJ agreeing at 45, Kitto J at 86, Taylor J at 108).
29. The language of 'units' was explained by Harold A J Ford, *Unincorporated Non-Profit Associations* (Clarendon Press, 1959) xx–xxi, quoted in *McJannet* (1995) 184 CLR 620, 659–60 (Toohey, McHugh and Gummow JJ). See also Frederic W Maitland, 'Moral Personality and Legal Personality' in David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (Cambridge University Press, 2003) 63.
30. Cf *Queensland Rail* (2015) 256 CLR 171, 192–3 [53] (Gageler J).
31. *Darling v Mayor, etc of New York* (1865) 31 NY 164, 197 (NYCA), quoted in Harold J Laski, 'The Personality of Associations' (1916) 29 *Harvard Law Review* 404, 406.
32. *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 171 (Brennan J).
33. Cf *Williams (No 1)* (2012) 248 CLR 156, 257–8 [214] (Hayne J), quoting *Clough v Leahy* (1904) 2 CLR 139, 157, 161 (Griffith CJ).
34. See *Ex parte Henderson* (1997) 190 CLR 410, 502 (Kirby J), acknowledging the 'reality' that 'for practical reasons' the Commonwealth must 'operate through . . . servants, agents and emanations'.
35. Geoffrey Sawer, 'Government as Personalized Legal Entity' in Leicester C Webb (ed), *Legal Personality and Political Pluralism* (Melbourne University Press, 1958) 158, 168.
36. *Commonwealth v Miller* (1910) 10 CLR 742, 753 (O'Connor J), 758 (Higgins J).
37. *Sydney Training Depot Snapper Island Ltd v Brown* (1987) 14 ALD 464 (FCA).
38. See, eg, *Clamback v Coombes* (1986) 13 FCR 55, 64 (Evatt J). See above n 17.
39. See, eg, *Johnson v Kent* (1975) 132 CLR 164.
40. See, eg, *Kidman v Commonwealth* (1925) 37 CLR 233, 240 (Knox CJ), regarding the ability of the Attorney-General to bind the Commonwealth to arbitration agreements; *Commonwealth v Mewett* (1997) 191 CLR 471, 498 (Dawson J) ('*Mewett*'), saying that suits against the Commonwealth in negligence or for breach of contract will have been brought in respect of things done 'by executive act'.
41. See, eg, Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (LexisNexis, 4th ed, 2015) 998–1000.
42. *Attorney-General v Lindegren* (1819) 6 Price 287, 308; 146 ER 811, 818 (Richards LCB).
43. *New South Wales v Bardolph* (1934) 52 CLR 455, 495 (Rich J), 503 (Starke J), 508 (Dixon J), 517–18 (McTiernan J) ('*Bardolph*').
44. Ibid 518.
45. Cf *Western Australia v Watson* [1990] WAR 248, 266 (Malcolm CJ, Brinsden and Seaman JJ), quoting P W Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Lawbook Co, 1972) 9, and saying that the application of the analogy in any particular case must be treated with caution.
46. Cf *Companies Act 2006* (UK), ss 43, 44, distinguishing between contracts made by a company and contracts made on behalf of a company by a person acting under authority. These provisions replaced the *Companies Act 1985* (UK), s 36(a).

47. *Coogee Esplanade Surf Motel Pty Ltd v Commonwealth* (1976) 50 ALR 363, 379 (Hutley JA), 364 (Moffitt P: Glass JA agreeing at 382) ('*Coogee Surf Motel v The Commonwealth'*).
48. Ibid 383 (Glass JA).
49. *HMS Truculent. The Admiralty v The Divina (Owners)* [1951] 2 All ER 968, 979 (Willmer J).
50. *Western Australia* [1990] WAR 248.
51. Ibid 270 (Malcolm CJ, Brinsden and Seaman JJ).
52. *Zentai v O'Connor (No 3)* (2010) 187 FCR 495, 587 [353] (McKerracher J); *Danthanarayana v Commonwealth of Australia* [2014] FCA 552 (28 May 2014) [111]–[112] (Foster J) ('*Danthanarayana*').
53. *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Viscount Haldane LC).
54. *Danthanarayana* [2014] FCA 552 (28 May 2014) [112] (Foster J).
55. See generally R D Lumb, '"The Commonwealth of Australia" — Constitutional Implications' (1979) 10 *Federal Law Review* 287.
56. See, eg, *Plain Packaging Case* (2012) 250 CLR 1, 72 [185] (Hayne and Bell JJ: French CJ agreeing at 33–4 [42], Gummow J at 63 [150]); *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (2004) 217 CLR 264, 271 [23] (Gummow J); *Kruger v Commonwealth* (1997) 190 CLR 1, 56 (Dawson J); *Mewett* (1997) 191 CLR 471, 498 (Dawson J). See also Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 123–4; William Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet and Maxwell, 2nd ed, 1910) 73.
57. *R v Sharkey* (1949) 79 CLR 121, 153 (Dixon J).
58. *New South Wales v Commonwealth* (1975) 135 CLR 337, 373 (Barwick CJ). There is academic and judicial debate as to when Australia obtained international legal personality. This article assumes that it is valid to distinguish international legal personality from domestic legal personality, as to which see W W Willoughby, 'The Juristic Conception of the State' (1918) 12 *American Political Science Review* 192, 208, explaining why what is there called the 'constitutional state' must be different from the 'state' in international law.
59. *Constitution* preamble.
60. *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413 (Isaacs J).
61. See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 69–70 (Deane and Toohey JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 224 [106] (Gageler J).
62. See Andrew Vincent, *Theories of the State* (Basil Blackwell, 1987) 26–9.
63. *Davis v Commonwealth* (1988) 166 CLR 79, 110.
64. *Thomas v Mowbray* (2007) 233 CLR 307, 338 [45], 362 [142].
65. *Ryder v Foley* (1906) 4 CLR 422, 433 (Griffith CJ).
66. Vincent, above n 62, 30.
67. *Sue v Hill* (1999) 199 CLR 462, 499 [87] (Gleeson CJ, Gummow and Hayne JJ), quoted in *Plain Packaging Case* (2012) 250 CLR 1, 72 [186] (Hayne and Bell JJ).
68. *Burns v Ransley* (1949) 79 CLR 101, 115 (Dixon J).
69. See *Enever v The King* (1906) 3 CLR 969, 989 (O'Connor J).
70. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 366, saying: 'The Commonwealth is not in any way defined or explained by the *Constitution* itself; that deals only with the governing organization of the Commonwealth'. See also *James v Commonwealth* (1939) 62 CLR 339, 362 (Dixon J), where it was said that the *Constitution* is 'concerned with the powers and functions of government and the restraints upon their exercise', quoted in *Kruger v Commonwealth* (1997) 190 CLR 1, 46 (Brennan CJ).

71. For chartered companies, eg: 'one body corporate and politic by the name of — and by that name shall and may sue or be sued plead and be impleaded in all courts whether of law or equity . . . and shall have perpetual succession and a common seal': see Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 8th ed, 2008) 80.
72. See especially Frederic W Maitland, 'The Corporation Sole' (1900) 16 *Law Quarterly Review* 335; Frederic W Maitland, 'The Crown as Corporation' (1901) 17 *Law Quarterly Review* 131. The publishing history is given in David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (Cambridge University Press, 2003) from xxxiv.
73. Frederic W Maitland, 'The Corporation Sole' in David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (Cambridge University Press, 2003) 30.
74. Frederic W Maitland, 'The Crown as Corporation' in David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (Cambridge University Press, 2003) 41. In English law, the question whether the 'Crown' is a corporation sole or aggregate remains unresolved: see *Halsbury's Laws* (4th ed reissue, 1996) vol 8(2), [15]; *M v Home Office* [1994] 1 AC 377, 424 [F] (Lord Woolf).
75. See W Harrison Moore, 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 351; W Harrison Moore, 'Law and Government' (1906) 3 *Commonwealth Law Review* 205; W Harrison Moore, 'Law and Government' (1906) 4 *Commonwealth Law Review* 49; W Harrison Moore, 'Liability for Acts of Public Servants' (1907) 23 *Law Quarterly Review* 12.
76. See also Pitt Cobbett, '"The Crown" as Representing "the State"' (1904) 1 *Commonwealth Law Review* 23; Pitt Cobbett 'The Crown as Representing the State' (1904) 1 *Commonwealth Law Review* 145.
77. *Municipal Council Case* (1904) 1 CLR 208, 231 (Griffith CJ).
78. *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 357 (Rich J).
79. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers' Case*'). Cf *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 185–6 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ), pointing to factors that would subsequently undermine the validity of this conclusion. The development of the Commonwealth as an association of independent nations involved an implicit acceptance of the divisibility of the 'Crown'. See also *Halsbury's Laws* (5th ed, 2009) vol 13 [717], saying: '[i]n fundamental respects, there are as many Crowns as there are independent realms'; also *Sue v Hill* (1999) 199 CLR 462, 490 [59] (Gleeson CJ, Gummow and Hayne JJ) referring to the impact in this connection of the *Australia Act 1986* (Cth).
80. *Engineers' Case* (1920) 28 CLR 129, 146–7 (Knox CJ, Isaacs, Rich and Starke JJ) (emphasis added).
81. J G Latham, *Australia and the British Commonwealth* (Macmillan, 1929) 28 (emphasis added).
82. *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350 (Latham CJ) (emphasis added).
83. Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966) 85. For background to the Balfour Declaration, see H Duncan Hall, 'The Genesis of the Balfour Declaration of 1926' (1962) 1 *Journal of Political Studies* 169. See generally, George Winterton, 'The Evolution of a Separate Australian Crown' (1993) 19 *Monash University Law Review* 1.
84. See, eg, *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 184–6.
85. Namely, *Crouch v Commissioner of Railways (Qld)* (1985) 159 CLR 22 ('*Crouch*'); *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219 ('*State Bank of New South Wales Case*'); *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 ('*State Superannuation Case*').
86. See especially the immunity from suit: *Mewett* (1997) 191 CLR 471.
87. See *Crouch* (1985) 159 CLR 22, 28–9 (Gibbs CJ), 39 (Mason, Wilson, Brennan, Deane and Dawson JJ); *State Bank of New South Wales Case* (1992) 174 CLR 219, 230 (Mason CJ, Brennan, Deane, Dawson,

Toohey, Gaudron and McHugh JJ); *State Superannuation Case* (1996) 189 CLR 253, 282–3 (McHugh and Gummow JJ); *Mewett* (1997) 191 CLR 471, 497 (Dawson J), 546 (Gummow and Kirby JJ).

88. Cf *State Bank of New South Wales Case* (1992) 174 CLR 219, 230 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
89. *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 362–3 ('*Bank Nationalisation Case*') (emphasis added). It may be convenient, since older judgments of the *Commonwealth Law Reports* do not contain paragraph numbers or alphabetically ordered margins, to note that passage commonly extracted begins with the words 'The Constitution sweeps aside', and ends with the words 'responsibility of enforcing the Constitution rests' (emphasis added).
90. Ibid 362.
91. Ibid 363.
92. *Commonwealth v Silverton Ltd* (1997) 130 ACTR 1 (ACTSC) 13–18 (Higgins J); *Ex parte Workers' Compensation Board of Queensland* [1983] 1 Qd R 450 (QSC).
93. *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654, 660 (Dixon CJ, Fullagar, Menzies and Windeyer JJ).
94. *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 (23 March 2011) [30].
95. *Babcock International Ltd v Babcock Australia Ltd* (2003) 56 NSWLR 51.
96. *Electricity Commission Act 1950* (NSW), s 6(1): The Commission 'shall be a body corporate'.
97. *Babcock International Ltd v Babcock Australia Ltd* (2003) 56 NSWLR 51, 61 [107] (Ipp JA: Heydon and Sheller JA agreeing).
98. *State Bank of New South Wales Case* (1992) 174 CLR 219. The question was whether an assessment of sales tax on printed material, manufactured by the Bank of New South Wales, amounted to a tax on the State of New South Wales.
99. Ibid 229 (emphasis added).
100. Ibid 230.
101. *State Superannuation Case* (1996) 189 CLR 253.
102. Ibid 282.
103. An allusion to *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350 (Latham CJ).
104. *State Superannuation Case* (1996) 189 CLR 253, 289–90.
105. Ibid 291.
106. *Mewett* (1997) 191 CLR 471.
107. Ibid 476–7 (Griffith QC) (during argument).
108. Ibid 486 (Gyles QC) (during argument).
109. Ibid 491 (Brennan CJ), 531 (Gaudron J), 546 (Gummow and Kirby JJ).
110. Ibid 546.
111. Ibid.
112. Ibid.
113. Ibid 547–9 (Gummow and Kirby JJ).
114. Ibid 548–9 (Gummow and Kirby JJ).
115. *Commonwealth v Western Australia* (1999) 196 CLR 392 ('*Mining Act Case*').
116. Ibid 429–30 [105]–[106].
117. Ibid 431 [109] (Gummow J).
118. *Sue v Hill* (1999) 199 CLR 462.
119. Cf *Mining Act Case* (1999) 196 CLR 392, 429–30 [105]–[106].
120. *Sue v Hill* (1999) 199 CLR 462, 498 [84].

121. Ibid 501 [90] (Gleeson CJ, Gummow and Hayne JJ).
122. Ibid.
123. Ibid.
124. Ibid 502 [91].
125. Ibid 525–6 [165].
126. *Australian Consumer and Competition Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 ('*Baxter Healthcare*').
127. Ibid 43 [88].
128. Ibid 46 [95] (Kirby J).
129. Ibid 56 [134].
130. *Byrne v Ireland* [1972] 1 IR 241 (IESC).
131. Ibid 272 (Walsh J).
132. Ibid 274.
133. Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 123, saying that the 'Founders were so uncertain about, or rather uninterested in, such questions that they even left their usage of the words "Commonwealth" and "States" in an ambiguous position'.
134. *Williams (No 1)* (2012) 248 CLR 156, 191–2 [35] (French CJ), 236 [150] (Gummow and Bell JJ), 244 [180] (Hayne J), 344–5 [489] (Crennan J), 368 [576] (Kiefel J).
135. Ibid 186–7 [26]–[27], 191–3 [35]–[38] (French CJ), 236–9 [150]–[159] (Gummow and Bell JJ), 270–1 [251]–[253] (Hayne J), 343–4 [488], 355 [534] (Crennan J), 373–4 [595] (Kiefel J).
136. Ibid 184–5 [22].
137. Ibid 216–17 [83].
138. Ibid 184 [21] (emphasis added).
139. Ibid 184 [21].
140. Ibid 193 [38] (French CJ).
141. Ibid.
142. Ibid.
143. Ibid 342 [484].
144. Ibid 349–52 [508]–[520]. The same point was made in two different ways: first, the CRF is distinguishable from the funds of 'non-governmental juristic persons'; and second, unlike 'private parties', the CRF may not be appropriated otherwise than for 'purposes of the Commonwealth'.
145. Ibid 352 [521].
146. Ibid 353 [522].
147. Ibid 237 [154].
148. Ibid 237 [156], citing Gummow and Bell JJ: 227–8 [122]–[124], in which may be found a reference at footnote 270 to *Ling v Commonwealth* (1994) 51 FCR 88 (FCAFC) 92–4 (Gummow, Lee and Hill JJ), where the prerogative right to grant or receive a chose in action by assignment was discussed.
149. *Williams (No 1)* (2012) 248 CLR 156, 237 [154] (citation omitted).
150. Ibid 236 [151], citing *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 461 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).
151. *Williams (No 1)* (2012) 248 CLR 156, 236 [151], quoting *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51 (Mason J), the discussion of the considerations governing the protection by equitable injunction of the information of government. One example of what is to be seen through these 'spectacles' is the debate about the extent to which a Commonwealth contract could 'fetter executive action in a matter of public interest'. Their Honours referred to the other examples given in the judgment of Crennan J.

152. *Williams (No 1)* (2012) 248 CLR 156, 252 [201].
153. Ibid 253 [203], 259 [217].
154. Ibid 253–4 [204].
155. Ibid 254 [205].
156. Ibid 254 [206] (Hayne J).
157. Ibid 258–9 [216] (Hayne J).
158. *Williams v Commonwealth (No 2)* (2014) 252 CLR 416, 456 [35] (French CJ, Hayne, Kiefel, Bell and Keane JJ) ('*Williams (No 2)*').
159. *Williams (No 1)* (2012) 248 CLR 156, 295 [340], 319 [403].
160. *Davis v Commonwealth* (1988) 166 CLR 79, 108.
161. *Pape* (2009) 238 CLR 1, 60 [126] (French CJ), 83 [214] (Gummow, Crennan and Bell JJ).
162. *Williams (No 1)* (2012) 248 CLR 156, 320 [405] (Heydon J).
163. Ibid 368–9 [577].
164. Ibid 373–4 [595].
165. Ibid 368–9 [577].
166. Ibid 373–4 [595].
167. Ibid 373 [594].
168. *Williams (No 2)* (2014) 252 CLR 416.
169. Cf *Williams (No 2)* (2014) 252 CLR 416, 455 [25] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
170. Examples of contracts falling within the 'depth' dimension of s 61 are: the wartime contract for the construction of cargo barquentines in *Kidman v Commonwealth* (1925) 37 CLR 233 (appealed in *Kidman v Commonwealth* (1925) 32 ALR 1) and the contracts made in the administration of departments under s 64, as to which see *Williams (No 1)* (2012) 248 CLR 156, 211–12 [74] (French CJ), citing *Bardolph* (1934) 52 CLR 455, 496 (Rich J), 502–3 (Starke J), 508 (Dixon J).
171. *Williams (No 1)* (2012) 248 CLR 156, 210 [71] (French CJ), 222 [103] (Gummow and Bell JJ), 273 [260] (Hayne J), 358–9 [545]–[547] (Crennan J), 374 [596] (Kiefel J). See also, *Williams (No 2)* (2014) 252 CLR 416, 454 [24] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
172. Cf *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC), 506 (Lord Hoffmann).
173. David J Seipp 'Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge University Press, 2012) 39.
174. See, eg, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 83 [143] (Kirby J). This term was also used, with different inflections, in *Spratt v Hermes* (1965) 114 CLR 226, 246–7 (Barwick CJ); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346 (Murphy J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 643–4 (Latham CJ); *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 363 (Dixon J) ('*Bank Nationalisation Case*').
175. See, eg, *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 49 [100] (Kirby J).
176. *A-G (Vic) v The Commonwealth* (1945) 71 CLR 237, 256 (Latham CJ) ('*Pharmaceutical Benefits Case*').
177. *White v South Australia* (2007) 96 SASR 581, 589 [26] (Doyle CJ).
178. Maitland said of the King's 'body politic' that 'we can say little; but it is "politic," whatever "politic" may mean': Maitland above n 29, 36.
179. This tendency to personalise or bodify the nation or the government, to speak of as an abstract but organic entity, is thought by political scientists and intellectual historians to reach back to the 16th century: see, eg, Vincent, above n 62, 75; Quentin Skinner, 'From the state of princes to the person of the

state' in Quentin Skinner, *Visions of Politics Volume II Renaissance Values* (Cambridge University Press, 2002) 368.

180. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 409–10 [41] (Gaudron J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 212 CLR 162, 179 [54]–[55], 180–1 [58]–[59] (Gaudron J), 187 [86], 188–9 [89]–[90] (McHugh J), 211 [181] (Kirby J), 227 [223] (Callinan J).
181. *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 189 (Gaudron J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Meng Kok Te* (2002) 212 CLR 162, 175 [38]–[39] (Gleeson CJ).
182. Geographical area was described as an 'aspect' of the body politic in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 448 (Dawson J).
183. The franchise reflects 'membership' of the body politic: *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198–9 [83] (Gummow, Kirby and Crennan JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 47–8 [120] (Gummow and Bell JJ).
184. *New South Wales v Commonwealth* (2006) 229 CLR 1, 119–20 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').
185. *Brown v The Queen* (1986) 160 CLR 171, 190 (Wilson J).
186. *Thomas* (2007) 233 CLR 307, 362 [142].
187. Ibid 338 [45], 362 [142].
188. Ibid 362 [142] (emphasis added).
189. *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 232 ALR 209, 219 [35] (Spigelman CJ) (emphasis added).
190. *O'Donoghue v Ireland* (2008) 234 CLR 599, 631 [87] (Kirby J) (emphasis added).
191. *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 73–4 [113] (Kirby J).
192. *XYZ v Commonwealth* (2006) 227 CLR 532, 574 n 218 (Kirby J).
193. *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 49–50 [102].
194. *Sue v Hill* (1999) 199 CLR 462, 498 [84].
195. *Williams (No 1)* (2012) 248 CLR 156, 237 [154] (Gummow and Bell JJ).
196. *Sue v Hill* (1999) 199 CLR 462, 498 [84].
197. Ibid 498 [84] (Gleeson CJ, Gummow and Hayne JJ); see also *Mining Act Case* (1999) 196 CLR 392, 428–9 [102] (Gummow J).
198. *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*').
199. Ibid 24–5 [74]–[76].
200. *Re Governor Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 344 [50]–[51] ('*Eastman's Case*').
201. *Spratt v Hermes* (1965) 114 CLR 226.
202. Ibid 247.
203. *Eastman's Case* (1999) 200 CLR 322, 344 [50].
204. *Williams (No 1)* (2012) 248 CLR 156, 237 [154].
205. David M Walker, 'The Legal Theory of the State' (1953) 65 *Juridical Review* 255, 288.
206. Ibid 362 [142] (emphasis added).
207. See, eg, *Salomon v Salomon & Co Ltd* [1897] AC 22, 42 (Lord Herschell); *Chaff and Hay Acquisition Committee Case* (1947) 74 CLR 375, 385 (Latham CJ); *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 256 [126] (Gummow and Hayne JJ).
208. *Engineers' Case* (1920) 28 CLR 129, 174.
209. *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 698 (Evatt J) ('*West*').

210. *Burns v Ransley* (1949) 79 CLR 101 (‘*Burns*’).
211. Ibid 115.
212. *Lamshed v Lake* (1958) 99 CLR 132, 141–2.
213. *Austin v Commonwealth* (2003) 215 CLR 185, 302 [284] (Kirby J).
214. *Queensland v Commonwealth* (1977) 139 CLR 585 (‘*Second Territory Senators Case*’).
215. Ibid 615 (emphasis added).
216. Cf *Thomas v Mowbray* (2007) 233 CLR 307, 338 [45], 362 [142] (Gummow and Crennan JJ).
217. Ibid 395–6 [252] referring to protection of ‘the bodies politic of the Commonwealth and the States’, 400 [262] referring to the protection of ‘Australian units of government, as such’ and 411 [296] referring to the defence of the ‘Commonwealth and State polities’.
218. Ibid 393 [245].
219. *Queensland Rail* (2015) 256 CLR 171, 178 [2].
220. *Williams (No 1)* (2012) 248 CLR 156, 184 [21] (emphasis added).
221. Ibid (emphasis added).
222. Ibid 241 [173] (emphasis added).
223. Ibid 254 [205] (emphasis added).
224. Ibid 259 [217] (emphasis added), see also 254 [207].
225. Local Government Authorities are legal persons invested directly with statutory powers, including, eg, the power to order a person to demolish a building: *Local Government Act 1993* (NSW), s 220(1) (Council is a ‘body politic’ with the capacities of an individual), and s 124 (Council may make various ‘orders’).
226. Sir William Holdsworth, *A History of English Law* (Sweet and Maxwell, 5th impression, 2003) vol IX, 6–7; G L Haggen ‘The Function of the Crown’ (1925) 41 *Law Quarterly Review* 182; *A v Head Teacher and Governors of Lord Grey School* [2004] 4 All ER 628 (CA) 631 [3] (Sedley LJ) ‘the law of England and Wales does not know the state as a legal entity’; Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press, 2013) 82.
227. Colin Turpin and Adam Tompkins, *British Government and the Constitution: Texts and Materials* (Cambridge University Press, 7th ed, 2011) 10–11.
228. *John L Proprietary Ltd v A-G (NSW)* (1987) 163 CLR 508, 518 .
229. Janet McLean, *Searching for the State in British Legal Thought* (Cambridge University Press, 2012) 310.
230. A number of the Australian *Interpretation Acts* contain a general definition of the word ‘person’ as including a ‘body corporate or politic’: *Interpretation Act 1987* (NSW) s 21; *Acts Interpretation Act 1901* (Cth) s 2C; *Interpretation of Legislation Act 1984* (Vic) s 38; *Acts Interpretation Act 1954* (Qld) s 36 and schedule 1 (‘person’ and ‘corporation’); *Interpretation Act 1978* (NT) s 24AA.
231. *The Case of the Master and Fellows of Magdalen College in Cambridge* (1615) 77 ER 1235, 1240 (‘*Magdalen College Case*’).
232. *A-G (Ontario) v A-G (Dominion)* (1896) AC 348, 361 (Lord Watson).
233. *Melbourne Harbour Trust Commissioners v Colonial Sugar Refining Co Ltd* (1925) 36 CLR 230, 279.
234. *R v Inhabitants of Barton* (1840) 113 ER 446; *Clarke v Tweed District Ambulance Committee* [1965] AR (NSW) 8; *Bristol v Water Conservation and Irrigation Commission* [1975] 2 NSWLR 643, 648D (Waddell J).
235. *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2016) 310 FLR 193, 206 [50].
236. *Commonwealth v Baume* (1905) 2 CLR 405.
237. Ibid 413.
238. Ibid 418.

239. *R v Brewer* (1942) 66 CLR 535, 550 (Latham CJ and McTiernan J).
240. *Queensland Rail* (2015) 256 CLR 171, 178 [2].
241. Geoffrey Sawer, 'State Statutes and the Commonwealth' (1963) 1 *Tasmania University Law Review* 580, 585.
242. Cf Loughlin, above n 226, 37.
243. *John L Proprietary Ltd v A-G (NSW)* (1987) 163 CLR 508, 518 (Mason CJ, Deane and Dawson JJ).
244. Cf *Sloman v The Governor and Government of New Zealand* (1876) 1 CPD 563, 565–6 (James LJ); *Williams (No 1)* (2012) 248 CLR 156, 184 [21] (French CJ), 237 [154] (Gummow and Bell JJ); Geoffrey Sawer, above n 35, 166; Geoffrey Sawer, above n 56, 123–4.