-IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

NO. C7 OF 2018

BETWEEN:

THE COMMONWEALTH OF AUSTRALIA
First Plaintiff

THE MURRAY-DARLING BASIN AUTHORITY
Second Plaintiff

and

COMMISSIONER BRET WALKER SC
First Defendant

THE STATE OF SOUTH AUSTRALIA
Second Defendant

PLAINTIFFS' SUBMISSIONS

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PART I INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II ISSUES

2. As a matter of construction, are ss 10 and 11 of the *Royal Commissions Act 1917* (SA) (**RC Act**), which provide for a royal commission to summons persons to attend to give evidence or produce documents under pain of punishment, inapplicable to: (a) the Commonwealth; (b) the Murray-Darling Basin Authority (**Authority**) established by the *Water Act 2007* (Cth) (**Commonwealth Water Act**); (c) current or former officers or employees of the Commonwealth or the Authority; and (d) interstate residents?

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3. If ss 10 and 11 of the RC Act apply as a matter of construction to any of the persons identified in (a)-(c) above, are those provisions invalid by reason of State legislative incapacity to restrict or modify the executive capacities of the Commonwealth?

PART III NOTICE OF CONSTITUTIONAL MATTER

4. Notice under s 78B of the *Judiciary Act 1903* (Cth) has been given by the plaintiffs on 13 June 2018 (SCB 17-22) and by the second defendant on 4 July 2018 (SCB 54-58).

PART IV FACTS

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5. The facts are set out in the Special Case (SCB 62-86). In summary, the Executive Government of South Australia has established a Royal Commission to inquire into Commonwealth regulation of the Murray-Darling Basin (**Commission**). The impetus for the Commission was said to be a concern at 'recent reports as to alleged non-compliance with the Basin Plan, the current state of implementation of the Basin Plan, and whether the Basin Plan will achieve its objects and purposes and those of the [Commonwealth Water Act]' (SCB 255, Recital F).

6. Part 2 of the Commonwealth Water Act provides for the preparation and making of the Basin Plan. Part 2 was not enacted in reliance on any reference of power from the States. The functions of the Authority in relation to the Basin Plan (s 172) likewise pre-date, and

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do not depend upon, a reference of power from the States. The purpose of the Basin Plan is to 'provide for the integrated management of the Basin water resources in a way that

promotes the objects of [the] Act'.[1] Its central function is to set limits on the quantity of water that may be taken from the Basin's water resources as a whole, and from particular water resource plan areas.[2] In accordance with Part 2, the Basin Plan was prepared by the Authority (in consultation with others) and, subsequently, adopted by the Commonwealth Minister (SCB, 73).[3] Once adopted, it became a legislative instrument.[4] It has been amended since it was made (SCB 73-75).

7. Given the Commission's focus on the content and implementation of the Basin Plan (SCB 256.8-10, 255.1-4, 264-267, 272, 300-301), it is plain that South Australia has purported to authorise a coercive inquiry into the execution and maintenance of Commonwealth law by the Executive Government of the Commonwealth. To that end, the Commission has purported to issue summonses under s 10 of the RC Act to produce documents or to attend and give evidence to the Secretary of the Commonwealth Department of Agriculture and Water Resources, the Proper Officer of the Authority, and current and former members and staff of the Authority (the **summonses**).

PART V ARGUMENT

A THE RC ACT DOES NOT BIND THE COMMONWEALTH

The RC Act

8. The RC Act makes 'further and better provision for facilitating inquiries by royal commissions': Long Title. Its practical operation from time to time in relation to a 'commission', as defined, is predicated on an anterior exercise of the executive power of South Australia to establish a commission of inquiry: s 3 ('commission'). The RC Act establishes a scheme to facilitate inquiries the subject-matter of which is specified not by the RC Act, but in letters patent issued by the Governor of South Australia in the exercise of the executive power of the State of South Australia.

9. The scheme established by the Act deals with the constitution of a commission (s 4) and its powers as to procedure and evidence and sittings (ss 7 and 8). It empowers a

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1 Commonwealth Water Act, s 20.

2 Commonwealth, House of Representatives, *Parliamentary Debates*, 8 August 2007 at 5; Commonwealth Water Act, s 22, item 6.

3 Commonwealth Water Act, ss 41-44.

4 Commonwealth Water Act, s 33(1).

commission to publish such information it obtains in the exercise of its functions 'as they think fit' (s 5) and to take evidence in public or in private (s 6).

10. Section 10 of the Act confers coercive powers on the commission including powers of entry and inspection (para (a)), power to compel the attendance of persons to give evidence on oath (paras (b) and (e)), and power to compel the production of documents and to inspect and make copies of those documents (paras (c) and (d)). The powers are coercive because, by s 11(1) of the Act, the commission is empowered to gaol a person for up to three months, or to fine the person, if, among other things, the person neglects to attend in answer to a summons or refuses to be sworn, or to affirm or declare, or refuses or neglects to produce documents as required by a summons, or prevaricates in his evidence or refuses to answer any lawful question. Acts or omissions amounting to an offence against s 11(1) are separate offences each day they occur and are punishable accordingly (s 11(4)). Further, a person duly summonsed to attend before the commission is obliged to appear and report from day to day unless excused or released by the chairman and failure to report shall be deemed to be neglect to attend (s 12).

The presumption that statutes do not bind the Executive Government

11. There is a well-established presumption that legislation does not bind the Crown, in the sense not only of the Sovereign but also 'the executive government, its employees and agents'.[5] Prior to this Court's decision in *Bropho*, that presumption could be displaced only by express words, or by implication where that was necessary to avoid 'wholly frustrating' the legislative purpose.[6]

12. Since *Bropho*, the presumption can be displaced by implication if a sufficient indication of a legislative intention to bind the Executive appears from the relevant legislative provision construed in context. The relevant context includes the text, 'subject-matter and disclosed purpose and policy' of the statute,[7] and takes account of 'the nature of the

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5 *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 26-27 [39] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Bropho v Western Australia* (1990) 171 CLR 1 at 21-22 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

6 See *Bropho* (1990) 171 CLR 1 at 16-17 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ) and the cases there cited.

7 *Bropho* (1990) 171 CLR 1 at 21-22 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ); *Jacobsen v Rogers* (1995) 182 CLR 572 at 586 (Mason CJ, Brennand, Deane, Dawson, Toohey and Gaudron JJ).

statutory provisions in question and the activities of government to which they might apply'.[8] Importantly, it also 'includes the presumption against the Crown and its instrumentalities or agents being so bound'.[9] On this 'more flexible approach', the strength of the presumption may vary, being stronger in cases such as where legislation purports to impose criminal liability, and weaker in cases that would merely subject the employees of a governmental corporation to 'general requirements enacted for the public benefit'.[10] In all cases, however, the starting point is that the Executive Government is *not* bound, and the question is whether a sufficient basis to rebut the presumption is shown by the statute in question.[11]

13. The presumption that the Executive is not bound applies not just to the Executive of the enacting legislature, but also to the Executive in other polities.[12] Legislation that expresses a sufficient intention to bind the Executive of the polity that enacted the law may nonetheless not express a sufficient intention to bind the Executive of any other polity.[13] In considering whether such an intention appears, it is relevant that 'in a dual political system you do not expect to find either government legislating for the other'.[14] That structural feature of the federal system suggests that the presumption that the Executive Government of *another polity* is not bound is even stronger than the presumption that the Executive of the enacting polity is not bound.

14. It may therefore be 'inappropriate and potentially misleading' to ask whether legislation binds the Crown 'when the issue is whether the legislation of one polity in a federation

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8 *Baxter* (2007) 232 CLR 1 at 27 [41] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

9 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 346 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

10 *Baxter* (2007) 232 CLR 1 at 27 [41] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

11 *Bropho* (1990) 171 CLR 1 at 23-24 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

12 That point being decided in *Bradken Consolidated ltd v Broken Hill Pty Ltd Co* (1979) 145 CLR 107 at 122-123 (Gibbs ACJ), 128-129 (Stephen J), 135-136 (Mason and Jacobs JJ); *Bass* (1999) 198 CLR 334 at 346 [15] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

13 See, eg, *Commonwealth v Western Australia* (1999) 196 CLR 392 at 471 [228] (Hayne J, McHugh J agreeing); *AGU v Commonwealth (No 2)* (2013) 86 NSWLR 348 at 356 [29] (Basten JA, Bathurst CJ, Beazley P, Leeming JA and Sackville AJA agreeing).

14 *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 (***Uther***) at 529 (Dixon J). See also *Austin v Commonwealth* (2003) 215 CLR 185 at 246 [114] (Gaudron, Gummow and Hayne JJ); *O'Donoghue v Ireland* (2008) 234 CLR 599 at 624 [51] (Gummow, Hayne, Heydon, Crennand and Kiefel JJ).

applies to another'.[15] In that context, where legislative provisions are concerned with the regulation of the conduct of persons or individuals 'it will often be more appropriate to ask whether it was intended that they should regulate the conduct of the members, servants and agents *of the executive government of the polity concerned*, rather than whether they bind the Crown in one or other of its capacities'.[16] It is implicit in that formulation that, to rebut the presumption, it is necessary to identify an intention not just to bind the Executive, but to bind the Executive of another polity.[17]

15. In South Australia, the presumption that legislation does not bind the Executive is confirmed by s 20 of the *Acts Interpretation Act 1915* (SA) (**SA Interpretation Act**). With respect to legislation passed *after* 20 June 1990 (the date of judgment in *Bropho*), s 20(1) creates a presumption that legislation *does* bind the Executive. Importantly, however, s 20 leaves legislation passed *before* that date (which includes the RC Act) subject to the common law presumption (as is implicit in s 20(2)).

Application of the presumption

16. The RC Act contains nothing to displace the presumption that, in empowering a Commissioner to make inquiries or gather information, the South Australian Parliament did not intend to authorise the compulsory demand for information from the Executive generally, let alone the Commonwealth Executive.

17. There is nothing in the text of the RC Act to indicate that even the South Australian Executive is bound. Plainly there is no express language to that effect.

18. Nor is there anything in the subject-matter or purpose of the RC Act to indicate an intention to bind the Commonwealth Executive. The RC Act is not, for example, a statute that regulates the conduct of persons or individuals in their ordinary behaviour, such as a traffic law or a law regulating commercial transactions, such that it might be inferred that it was intended to regulate the Executive and private individuals alike. To the contrary, the powers conferred by the RC Act are enlivened only by a decision by the

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[15] *Bass* (1999) 198 CLR 334 at 346-347 [17] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[16] *Bass* (1999) 198 CLR 334 at 347 [18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (emphasis added).

[17] See, eg, *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 at 127 [188] (Kenny J), noting that a power that it may be appropriate to confer with respect to the executive of the enacting polity may be quite inappropriate when applied to another polity.

Governor of South Australia to establish a commission, on terms of reference specified by the Governor. Further, even once such a decision is made, any norms applicable to persons or individuals under the RC Act become applicable only upon a royal commission choosing to exercise its coercive powers in a particular way.

19. Even if the South Australian Executive were bound by the RC Act because, for example, the Parliament may have wished to authorise inquiries into the manner in which the South Australian government administers South Australian legislation (there being a question that need not be decided in this case as to whether this would displace the presumption, given the capacity of the Executive to facilitate such an inquiry through voluntary co-operation), the same reasoning would have no application to the Commonwealth Executive. Given the starting point that 'you do not expect to find either government legislating for the other',[18] there is nothing to displace the presumption that the RC Act does not apply to the Executive of another polity.

The relationship between ss 10 and 11 of the RC Act

20. The above conclusion is re-inforced by a second presumption, being 'the strongest presumption' that a statute does not impose a liability of a criminal nature on the Executive. Only 'the clearest indication of legislative purpose' will be sufficient to displace that presumption.[19] It is therefore clear that s 11(1) of the RC Act does not impose criminal liability[20] on the Executive for failure to comply with a summons issued under s 10 of the RC Act.[21] In those circumstances, a question squarely arises whether s 10 authorises a summons to be issued in cases where s 11(1) does not apply to impose criminal sanctions for non-compliance with the summons. There are two reasons why it does not.

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18 *Uther* (1947) 74 CLR 508 at 529 (Dixon J). See also authorities cited in n 14 above.

19 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 75 [22] (The Court); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 380-381 [164] (Gummow and Hayne JJ); *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ), 277 (McHugh and Gummow JJ); *Cain v Doyle* (1946) 72 CLR 409 at 424 (Dixon J).

20 That the liability is criminal is confirmed by the provision for penalty by way of imprisonment, and by the repeated description in s 11(4) of contravening conduct as conduct that amounts to an 'offence' against s 11(1).

21 See *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at 636 [14] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ), referring to this presumption in the context of the criminal offence created by s 6M of the *Royal Commissions Act 1902* (Cth).

21. ***No duty of imperfect obligation***: South Australia apparently contends that s 10 authorises the Commission to issue summonses to the Commonwealth Executive even if no sanction attaches to failure to comply with them. That submission, which invites the Court to interpret s 10 as imposing a duty of imperfect obligation,[22] should be rejected. Despite the use of the word 'summons' in the RC Act to describe the process of the commission, a person is required to answer questions or produce documents to a Royal Commission *only* to the extent that the RC Act itself creates that requirement. That follows because an executive commission of inquiry does not have any coercive powers sourced in the common law or in the exercise of executive power establishing it.[23] Further, a court will not make a mandatory order to require a person to comply with a summons on pain of contempt if the person fails to comply, because to do so would substitute a different and greater sanction for non-compliance with the summons than that selected by the Parliament.[24] For a court to make an order requiring compliance with a summons under s 10 in a case where s 11(1) does not apply would be to impose a sanction for non-compliance in circumstances where Parliament had not imposed any sanction at all. It would also be to make a civil order in aid of the criminal law, outside of the limited circumstances in which that has been recognised as appropriate.[25] Accordingly, a duty to obey a summons under the RC Act is enforceable *only* by punishment under s 11(1).

22. In those circumstances, there is no basis for attributing to the legislature an intention to separate the operation of s 10 from that of s 11. The liability to punishment under s 11(1) for disobedience of a summons is the only source of the obligation to obey a summons. It is so central to the scheme of the RC Act that ss 10 and 11 cannot bear a construction

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22 A 'rule of positive morality', offered as a norm without any legal or political sanction: Austin, John, *The Province of Jurisprudence Determined (1832); The Uses of the Study of Jurisprudence (1863)* (1998), Lecture 5 at 183.

23 *McGuinness v A-G (Vic)* (1940) 63 CLR 73 at 98-99 (Dixon J); see also at 83 (Latham CJ); *Egan v Willis* (1998) 195 CLR 424 at 472 [92] (McHugh J); *A-G (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644 at 655 (PC).

24 *Graziers' Association of New South Wales v Durkin* (1930) 44 CLR 29 at 36 (The Court), referring to the 'old and well known rule of construing statutes, that when a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be supposed to exist'. See also *Josephson v Walker* (1914) 18 CLR 691at 695 (Griffith CJ), 701-702 (Isaacs J); *A-G (SA) v Kernahan* (1981) 28 SASR 313 at 314-315, 319-320, 320.

25 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-50 (Mason J); *A-G (Qld) (Ex rel Kerr) v T* (1983) 46 ALR 275 at 277 (Gibbs CJ); *Gouriet v Union of Post Office Workers* [1978] AC 435 at 481 (Lord Wilberforce), 490-491 (Viscount Dilhorne), 497-500 (Lord Diplock), 519-521 (Lord Fraser). See also *Inglis v Moore* (1979) 24 ALR 411 at 415, 421.

upon which the power to issue a summons might reach a person even though the power to punish for disobedience of the summons does not: '[t]he right to ask questions ... is of little value unless it has behind it the authority to enforce answers and to compel the discovery and production of documents'.[26]

23. The specification of the norm of required conduct (in a summons under s 10) and the sanction for non-compliance with that norm (s 11) together form a single 'law'. To separate the norm from the sanction and to 'consider these as discrete matters and to treat the first as conceptually distinct from the second may engender confusion'.[27] That is why, where 'penal provisions are central to the structure upon which the regulatory scheme established by the State legislation rests', the conclusion that those penal provisions do not apply to the Commonwealth Executive 'means that' the legislation must be construed as not binding the Commonwealth Executive.[28]

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24. In an attempt to avoid the problems with s 11(1), South Australia appears to contend that s 11(3) of the RC Act is an alternative, non-judicial, enforcement mechanism.[29] However, the character of the power conferred by s 11(3) is immaterial, for that subsection does nothing more than provide a mechanism to bring a person who has failed to attend in obedience to a summons before the commission. It may achieve a witness's *attendance*, but that is all. It assumes that a person brought before the Commission is obliged to give evidence. That assumption holds only if s 11(1) applies. For that reason, s 11(3) does not involve an alternative enforcement mechanism.

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25. ***No bifurcation of the scheme***: An additional reason for rejecting South Australia's submission is that it would require the Court to accept that, in enacting the RC Act, Parliament intended to authorise two different kinds of summons: one to which criminal sanctions attach in the event of non-compliance, and the other which is effectively no more than an invitation (despite the use of the word 'requires' in s 10). An intention to bring about that result should not be imputed to the legislature. The position is analogous to that considered in *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*, where the relevant statute provided for orders of a tribunal to be enforced, yet the Court

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26 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 377 (O'Connor J), cited in *Williams v Commonwealth* (2012) 248 CLR 156 at 206 [63] (French CJ).

27 *Momcilovic v The Queen* (2011) 245 CLR 1 at 107 [233]-[234] (Gummow J).

28 *Telstra v Worthing* (1999) 197 CLR 61 at 75 [22]-[23] (The Court).

29 Second Defendant's Defence at [26(b)] (SCB, 48).

considered that the provisions concerning enforcement did not bind the Commonwealth. In that context, in rejecting an argument that the statute should be construed as authorising orders to be *made* against the Commonwealth, even though they could not be *enforced* against it, Kenny J explained that, to construe the statute in that way, would mean that the Tribunal orders 'would be fundamentally different depending on whether they were made against the Commonwealth or some other person'.[30] While the issue arose in that case in the context of reading down, the reasoning applies with equal force to the construction urged by South Australia (which bears more resemblance to reading down than to construction).

B THE RC ACT DOES NOT BIND THE AUTHORITY

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Principles

26. The Executive Government carries out its functions though servants and agents, who may be persons or organisations.[31] Indeed, the presumption that legislation does not bind the Executive Government is more fully expressed as a 'presumption that a statute which regulates the conduct or rights of individuals does not apply to members of the Executive Government of any of the polities in the federation, *government instrumentalities and authorities intended to have the same legal status as the executive government, their servants or agents.*'[32] It follows that the RC Act will not bind the Authority if the Commonwealth Parliament, in creating the Authority, intended it to have the same legal status as the Executive Government or its servants or agents.

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27. Absent express provision, the question whether a statutory authority was intended to have the same legal status as the Executive Government depends on the capacity of the Executive Government to control the authority, which indicates 'the nexus between the corporation and executive', and is a matter of degree.[33] In determining where a particular

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30 (2008) 169 FCR 85 at 147 [254].

31 See, eg, *Bass* (1999) 198 CLR 334 at 346-347 [17]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 149 [163] (McHugh ACJ, Gummow, Callinan and Heydon JJ).

30 32 *Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 [33] (Gleeson CJ and Gaudron J) (emphasis added).

33 *Superannuation Fund Investment Trust v Commissioner of Stamps (SA) (SFIT)* (1979) 145 CLR 330 at 348 (Stephen J), see also at 354 (Mason J), 371 (Aickin J). See also *Queanbeyan City Council v ACTEW Corporation Limited* (2011) 244 CLR 530 at 546 [37], and at 543-544 [26] (French CJ,

body sits on the spectrum, and therefore whether it was intended to have the same status as the Executive Government, this Court has applied the particular indicia discussed in at [36] to [41] below.[34]

Application to the Authority

Commonwealth agency

28. The Commonwealth Water Act defines the term 'agency of the Commonwealth' to include 'a body ... established ... for a public purpose by or under a law of the Commonwealth' (s 4(1)). That definition encompasses the Authority (ss 171, 172). Numerous provisions in the Commonwealth Water Act refer to the Authority as an 'agency of the Commonwealth'.[35] Further, when the South Australian Parliament enacted the *Water (Commonwealth Powers) Act 2008* (SA) to refer legislative power to the Commonwealth (including to confer additional functions on the Authority), it too described the Authority as a 'Commonwealth agency' (SCB 65 [12(b)]).[36]

29. In characterising the Authority as part of the Commonwealth Executive Government, it is critical to appreciate that the Authority's functions fall into two distinct categories. The division reflects the fact that the Authority had certain (Commonwealth) functions when it was created. When, in 2008, additional ('intergovernmental') functions were conferred on the Authority, that involved the conferral of functions on an agency that was already part of the Commonwealth Executive Government.

30. ***First***, the Authority has the functions that were conferred upon it when it was created, which are set out in s 172 of the Commonwealth Water Act. Those functions pre-date the reference of power from the States.[37] The Authority's functions under s 172 also include its functions under Part 2 with respect to the preparation and implementation of the Basin Plan[38]. Those functions are closely connected to those of the Commonwealth Minister.[39]

Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *McNamara Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 656 [26]-[27], 665 [53] (McHugh, Gummow and Heydon JJ).

34 See generally *Queanbeyan City Council* (2011) 244 CLR 530 at 542-546 [23]-[37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

35 See, eg, Commonwealth Water Act, ss 34(1), 58(1), 79(3), 85(3), 86G(1), 108(3)(d), 255.

36 *Water (Commonwealth Powers) Act 2008* (SA) s 3.

37 See also Commonwealth Water Act, s 3

38 Commonwealth Water Act, s 172(1)(a)(i).

39 Commonwealth Water Act, ss 44 and 48.

It is the Commonwealth Minister who must ultimately adopt the Basin Plan, and who is accountable to the people of Australia for it. Unsurprisingly, the Minister therefore has the power, subject to exceptions relating to matters of a scientific or factual nature, to direct the Authority to modify the Basin Plan before its adoption,[40] and to direct the Authority to modify proposed amendments to the Plan.[41] Further, the Authority is required to review the Plan if requested to do so by the Minister.[42] Those matters emphasise the connection between the Authority and the Commonwealth Executive at the highest levels. As was said in the second reading speech to the bill that became the *Water Amendment Act 2008* (Cth) (**the 2008 Act**):[43]

> While it is important that the States have a seat at the table, final approval of the Basin Plan will rest with one government, acting in the national interest. ...
>
> The Commonwealth minister, in approving the Basin Plan including the new sustainable cap on water diversions, will be accountable to the people of Australia through this parliament.

31. The functions of the Authority pursuant to s 172 are conferred by Commonwealth law supported by Commonwealth heads of power unrelated to any reference of power from the States. Further, the policy and strategic direction with respect to these functions are set by the Authority itself (subject to the Act and the role of the Commonwealth Minister under s 175), not by the Ministerial Council or Basin Officials Committee (SCB 71 [33]), and those functions are funded exclusively by the Commonwealth, by appropriation to the Department of Agriculture and Water Resources (SCB 71-72 [33]). All those matters point strongly to the conclusion that the Authority is an emanation of the Commonwealth Executive.

32. ***Secondly***, quite separately from the first category of functions identified above, the Authority has additional functions pursuant to s 18E of the Commonwealth Water Act (**MDB Agreement functions**) (SCB 72 [34]). Those functions were conferred on the Authority following the passage of the 2008 Act, which was based in part on the reference of power from the States (SCB 64-66 [11]-[13]). The MDB Agreement functions concern the implementation of various aspects of the Murray-Darling Basin Agreement between the Commonwealth and Basin States (which is set out in Sch 1 to the Commonwealth Water Act). In general terms, those functions involve the conduct of River Murray

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40 Commonwealth Water Act, s 44(3)(b)(ii), subject to s 44(5).
41 Commonwealth Water Act, s 48(3)(b)(ii), subject to s 48(5).
42 Commonwealth Water Act, s 50(2)(a).
43 Commonwealth of Australia, House of Representatives, *Hansard*, 25 September 2008, at 39-40.

Operations and Natural Resource Management activities on behalf of all the Basin Governments, including by funding the asset base required to manage the River Murray (such as dams, locks and weirs) and deliver state water shares under the Agreement (consistently with the autonomy of basin states to manage water within their catchments, as is reflected in the fact that the issue of water shares, the allocation of water against those shares, water trading etc are governed by State law) (SCB 72 [34]).[44]

33. In the performance of the MDB Agreement functions (but not otherwise), the Authority is subject to a degree of control by the Ministerial Council and the Basin Officials Committee (SCB 72-73 [36]-[37]), and is funded in significant part by the States (SCB 72 [35]). However, even with respect to the MDB Agreement functions, the Authority cannot be required to perform its functions in a manner that is contrary to the Commonwealth Executive's wishes, because both the Ministerial Council and the Basin Officials Committee must (subject to immaterial exceptions) make their decisions unanimously, and both are chaired by representatives of the Commonwealth.[45]

34. The Authority took over the MDB Agreement functions from the Murray-Darling Basin Commission (**MDBC**), with which it co-existed until the passage of the 2008 Act (SCB 67-68 [21]). However, whereas the MDBC was constituted in a manner that reflected its intergovernmental character (including as to the appointment and removal of members) (SCB 67 [20]), the MDB Agreement functions are conferred on the Authority by Commonwealth law (s 18E). The enactment of s 18E was not accompanied by any change to the matters identified below concerning the constitution of the Authority, the engagement of its employees, or the performance of its pre-existing functions. Further, even if the MDB Agreement functions had been conferred on the Authority by State law, that would not have been inconsistent with the Authority forming part of the Commonwealth Executive.[46] There is therefore no basis upon which the conferral of the MDB Agreement functions could properly be treated as affecting the character of the Authority as part of the Commonwealth Executive.

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44 See also Commonwealth, House of Representatives, *Parliamentary Debates*, 25 Sept 2008, at 40.

45 MDB Agreement, cl 13(6) (with respect to the Council) and cl 27(8) (with respect to the Committee).

46 *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 131 (The Court).

Other particular indicia of nexus with the Executive Government of the Commonwealth

35. The other relevant indicia, addressed in turn below, also demonstrate that the Authority is 'intended to have the same legal status as the executive government, their servants or agents.'[47]

36. ***Whether the type of functions that the body performs is an ordinary or usual function of government.***[48] All of the Authority's functions are governmental in character. In addition to the obviously governmental functions arising under Pt 2, the governmental character of the Authority is evident, for example, from its regulatory functions. It has powers under Pt 10 to undertake investigations (including powers to enter land and other premises to monitor compliance and search for evidence, either by consent or under warrant, and powers to compel the provision of information). It also has power to take civil enforcement action (including seeking injunctions, declarations and civil penalties) under Part 8 with respect to contraventions of Pt 2, or Div 3 of Pt 10 (s 137(a)).

37. ***Whether the body is subject to ministerial direction.***[49] In addition to the matters discussed in at [30] to [33] above, the Commonwealth Minister has extensive power to give directions to the Authority about the performance of its functions, with which the Authority must comply (s 175(1) and (3)).[50] Such a direction is a legislative instrument, but is not subject to disallowance (s 175(4)). There are particular matters to which the power of direction does not apply, including enforcement action and the MDB Agreement functions (s 175(2); SCB 70 [31]). That does not, however, deny the significant level of Ministerial control over the Authority (particularly at the time that it was established, when the Parliament's intention as to whether the Authority was part of the Executive should be assessed).

38. ***The relationship between the funds of the entity and the consolidated revenue fund.***[51] The Authority must maintain the 'Murray-Darling Basin Special Account' (s 209(1)). It

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47 *Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 [33] (Gleeson CJ and Gaudron J).

48 *SFIT* (1979) 145 CLR 330 at 349 (Stephen J), 365, 371 (Aickin J).

49 *SFIT* (1979) 145 CLR 330 at 349 (Stephen J), 365-366, 371 (Aickin J). See also *Queanbeyan City Council* (2011) 244 CLR 530 at 544 [27] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *NT Power Generation* (2004) 219 CLR 90 at 150 [164] (McHugh ACJ, Gummow, Callinan and Heydon JJ).

50 See also *Public Governance, Performance and Accountability Act 2013* (Cth), s 22.

51 *SFIT* (1979) 145 CLR 330 at 349 (Stephen J), 354 (Mason J), 362-363 (Aickin J). See also *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 308 (Mason, Murphy

must ensure that money appropriated by the Parliament for the purposes of the Authority, and paid by the Commonwealth to the Authority for the purposes of the special account, are credited to the account (s 210(1)(a)). The Commonwealth Finance Minister may give directions about the amounts in which, and the times at which, such money is to be paid to the Authority (s 210(2)). The Commonwealth is not the only source of funds for the special account, but is the only source of funds for remuneration of members (SCB 69 [29]), and for the Authority's functions under s 172 (including all of its functions with respect to the Basin Plan) (SCB 71-72 [33]).

39. ***The repository and extent of powers relating to the appointment and removal of office holders.***[52] All of the members of the Authority are appointed by the Governor-General, on the advice of the Commonwealth government, for a period not exceeding 4 years (and not exceeding 8 years in the event of re-appointment for an additional period or periods).[53] They may be removed if, among other things, the 'Minister is satisfied that the performance of the member has been unsatisfactory' (s 189(2)(b)). The Minister's broad discretion to remove a member,[54] and the absence of parliamentary involvement in removal,[55] highlight the extent of the Minister's control.[56] Members' remuneration is fixed by the Commonwealth Remuneration Tribunal (s 181), and is paid out of monies appropriated by the Commonwealth Parliament (SCB 69 [29]).

40. Staff of the Authority 'must be persons engaged under the *Public Service Act 1999*', meaning that they must necessarily be persons engaged on behalf of the Commonwealth (SCB 68 [24])[57] and are officers of the Executive Government.[58] The Chief Executive and Authority staff together constitute a Statutory Agency for the purposes of the *Public*

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and Deane JJ); *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 651 (The Court).

52 *SFIT* (1979) 145 CLR 330 at 348 (Stephen J), 354 (Mason J), 366, 371 (Aickin J). See also *State Superannuation Board* (1982) 150 CLR 282 at 308 (Mason, Murphy and Deane JJ); *State Bank of NSW* (1986) 161 CLR 639 at 650 (The Court).

53 Commonwealth Water Act, ss 178 and 179.

54 Cf *SFIT* (1979) 145 CLR 330 at 341-342 (Stephen J), 366 (Aickin J).

55 Cf *State Superannuation Board* (1982) 150 CLR 282 at 300 (Mason, Murphy and Deane JJ).

56 Cf the position that applied with respect to the MDBC, where two Commissioners and two Deputy Commissioners were appointed by (and could be removed only by) each of the Governor-General, the Governor of New South Wales, the Governor of Victoria, the Governor of South Australia, and the Governor of Queensland: SCB 67 [20(b) and (d)].

57 Commonwealth Water Act, s 206; Public Service Act, s 22.

58 See s 67 of the Constitution, and *Williams* (2012) 248 CLR 156 at 350-351 [512] (Crennan J).

Service Act 1999 (Cth). As a result, responsibilities under the *Public Service Act 1999* are conferred on the Agency Head, being the Chief Executive, rather than the Secretary of a Department (SCB 68 [24]).

41. ***Whether the body is subject to auditing and reporting obligations***[59] – The Authority is a 'corporate Commonwealth entity' under the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) (ss 10(1)(d) and 11(a)). The Chief Executive of the Authority is subject to the duties imposed by the PGPA Act, including: preparing a corporate plan to give to the Minister and the Finance Minister (PGPA Act, s 35); preparing annual financial statements which must be provided to the Auditor-General, who is then obliged to prepare an audit report for the Minister (PGPA Act, ss 42 and 43); and preparing an annual report (which includes the financial statements and audit report) to give to the Minister for presentation to the Parliament (PGPA Act, s 46 and Commonwealth Water Act, s 214).

Instrumentality of the Crown

42. Further or alternatively, the Authority is an 'instrumentality of the Crown' for the purposes of s 20 of the SA Interpretation Act. Section 20(4) provides that the Crown's immunity 'extends' to 'an agent of the Crown', and s 20(5)(b) provides that 'a reference to an agent of the Crown extends to an *instrumentality*, officer or employee of the Crown or a contractor or other person who carries out functions on behalf of the Crown' (emphasis added). Accordingly, if the Authority is an 'instrumentality' of the Crown, it is not bound by the RC Act irrespective of the position that would have applied under the common law presumption discussed above.

43. The concept of 'instrumentality' is a wider concept than 'agent' or 'servant'.[60] A statutory entity, '[e]ven if given powers to be exercised independently of the Crown ... may nevertheless be an instrumentality of the Crown if it is legally empowered to perform and

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[59] *SFIT* (1979) 145 CLR 330 at 348 (Stephen J), 354 (Mason J), 371 (Aickin J). See also *State Superannuation Board* (1982) 150 CLR 282 at 308 (Mason, Murphy and Deane JJ); *State Bank of NSW* (1986) 161 CLR 639 at 650-651 (The Court).

[60] *Electricity Trust of South Australia v Linterns* [1950] SASR 133 at 142 (Ligertwood J), cited in *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654 at 662-663 (Dixon CJ, Fullagar, Menzies and Windeyer JJ).

does perform any function whatever for the Crown'.[61] A statutory entity that was 'set up for the express purpose of performing a function for the Crown' (ie, on 'behalf' of the Crown), has been held for that reason to be an 'instrumentality' of the Crown within the meaning of a South Australian statutory provision, even though the entity was 'not the servant or agent of the Crown because it has independent powers and [was] not subject to the control of the Governor in Council or any Minister of State'.[62] On that additional or alternative basis, the RC Act does not bind the Authority.

C THE RC ACT DOES NOT BIND OFFICERS OR EMPLOYEES OR FORMER OFFICERS AND EMPLOYEES

Officers or employees

44. If the RC Act does not bind the Executive Government of the Commonwealth, then it necessarily does not bind the 'administrative bureaucracy which attends to its business'.[63] Sections 20(4) of the SA Interpretation Act (see above at [42]) confirms that there is no basis to distinguish between the application of the RC Act to the Commonwealth (including the Authority), and its application to officers, employees, contractors or agents thereof.

45. Further, even if it were meaningful in this context to distinguish between the Crown and its officers, employees, contractors or agents, s 11(1) could not apply to such officers, employees, contractors or agents. That follows because, irrespective of the position at common law,[64] s 20(5) of the SA Interpretation Act extends the Crown's immunity from criminal liability to agents of the Crown including instrumentalities, officers or employees of the Crown or contractors or other persons who carry out functions on behalf of the Crown.

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61 *Linterns* [1950] SASR 133 at 139, cited in *Re Anti-Cancer Council* (1992) 175 CLR 442 at 448 (Mason CJ, Brennan and Gaudron JJ). See also *Corporation of the City of Unley v South Australia* (1997) 68 SASR 511; *Re Town Planning Appeal Tribunal; Ex Parte Environmental Protection Authority* (2003) 27 WAR 374 at [7] (Malcolm CJ), [28]-[41] (Steytler J), [86]-[99] (McKenchie J).

62 *Linterns* [1950] SASR 133 at 138-142 (Ligertwood J).

63 *Sue v Hill* (1999) 199 CLR 462 at 499 [87] (Gleeson CJ, Gummow and Hayne JJ). See also the other authorities cited in n 31 above.

64 *Jacobsen* (1995) 182 CLR 572 at 587 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

Former officers or employees

46. The Commission has issued summonses to one former member and to two former staff-members of the Authority: Dr Dickson and Messrs Burns and Bell. Each of those persons was summonsed in relation to what they did while working with the Authority, on the basis that they are anticipated to be able to give evidence 'in relation to how the Water Act was interpreted by the [Authority] in the drafting and implementation of the Basin Plan, including the determination of an 'environmentally sustainable level of take' (**ESLT**)...' (SCB 320 [11(d)]) For example, Mr Bell is of interest to the Commission because while employed by the Authority he 'worked on delivering the ESLT assessment and producing an environmental watering plan' and because he was 'employed during the key period between 2010 and 2011, when decisions were made by the [Authority] in relation to the interpretation of the Water Act'.[65] Therefore, under s 20(4) of the SA Interpretation Act, read with s 20(5)(b), the Crown's immunity from summonses under the RC Act extends to former officers and employees in the position of Dr Dickson and Messrs Burns and Bell: At the relevant time, they were agents of the Crown, and the summonses are 'in respect of [acts] within the scope of [their] obligations'.

47. Because the Executive Government necessarily acts through persons employed or appointed by it from time to time, any immunity from the application of a particular statute should not depend on whether, at the relevant time, the government was acting through a person who has, since that time, ceased to be employed by the government or whose term of appointment has come to an end. The language of ss 20(4) and 20(5)(b) support the proposition that s 20(4) is addressed to the relevant relationship of agency, whenever it may have subsisted.

48. Further or alternatively, former officers and employees of the Commonwealth Executive Government are covered by a form of derivative Crown immunity to the extent that 'the application of the statute to [them] would prejudice the Crown', at least in some legal effect.[66] In this case, there are two forms of prejudice to the legal position or legal rights

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65 SCB 321 (Affidavit of Sarah Louise Avey at [11(m)-(n)]), see also SCB 321-322 [11(h)-(j), (m)-(o), (q)-(s)].

66 Peter Hogg, *Liability of the Crown*, 4th ed, 2011 at 445. See also *Bradken* (1979) 145 CLR 107 at 123-124 (Gibbs ACJ), 129 (Stephen J), 137-138 (Mason and Jacobs JJ); *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 396 (Kitto J); *Baxter* (2007) 232 CLR

of the Commonwealth. First, as discussed in the previous paragraph, the immunity would be undermined if it depended on arbitrary distinctions based only on the date on which an officer or employee ceased in the relevant role. The second is the prejudice to the Commonwealth's right to seek the enforcement of duties of confidence owed to it by its former employees.[67] The termination of the employment relationship does not bring to an end all of the mutual rights, duties and liabilities of the employer and employee. An ex-employee will be bound, for example, by a duty of confidence, even in the absence of an express contractual term. Precisely because an equitable or contractual duty of confidence may yield to a statutory obligation of disclosure, the Commonwealth Executive, as the obligee of the relevant duty of confidence, is affected in its legal interests by a law that purports to require disclosure by the obligor (the former officer or employee) of information that is subject to the duty.

D CHAPTER III

49. The second question of law stated in the Special Case asks whether any part of sections 10 and 11 of the RC Act is invalid by reason of being contrary to Chapter III of the Constitution. South Australia has admitted that s 11(1) of the RC Act could not validly apply to any of the persons named in s 75(iii) or 75(iv) of the Constitution and, it seems, says that the RC Act ought be read down accordingly.[68] The remaining questions are, first, whether any of the persons in respect of whom the Plaintiffs seek relief are within s 75(iii) or 75(iv) of the Constitution and, secondly, whether the RC Act can be read down so that s 10 of the RC Act applies to them, but s 11(1) does not.

50. ***As to the first question***, South Australia's admission must be understood as extending to all of the persons to whom the Commission has issued summonses because, in interpreting s 75(iii), 'largeness rather than narrowness of approach is appropriate',[69] with the consequence that s 75(iii) covers 'officers and agencies in their official and

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1 at 35 [60]-[61] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *NT Power Generation* (2004) 219 CLR 90 at 152 [170] (McHugh ACJ, Gummow, Callinan and Heydon JJ).

67 See, eg, *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 136 (Kerr, Neill and Nourse LJJ); *Riteway Express Pty Ltd v Clayton* (1987) 10 NSWLR 238 at 240 (McLelland J).

68 Second Defendant's Defence at [24(b)] and [26(d)] (SCB 47-48), thereby accepting the Commonwealth's argument based on *Burns v Corbett* (2018) 92 ALJR 423 at [2] (Kiefel CJ, Bell and Keane JJ), [67]-[69] (Gageler J), see also at [145]-[146] (Nettle J), [148] (Gordon J), and [208] (Edelman J).

69 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 336 (Barwick CJ).

governmental capacity, when in substance they formed part of or represented the Commonwealth'.[70] Applying that approach, most of the summonses have been issued to 'the Commonwealth' itself (which, for the reasons given above, includes the Secretary of the Department, the Authority, and their current officers or employees[71]). The remainder of the summonses have been issued to one former member and to two former staff-members of the Authority: Dr Dickson and Messrs Burns and Bell. Each of those three persons is a resident of a State other than South Australia (SCB 82-83 [77], [80], [84]) and a 'person ... being sued on behalf of the Commonwealth' (because, as explained at [46] above, the assistance they are to provide the Commission concerns their former employment so that 'in substance' it is the Commonwealth being summonsed).

10 51. ***As to the second question***, the Plaintiffs rely on their submissions above at [20] to [25]: s 10 can have no operation independently of s 11(1).

E INTERGOVERNMENTAL IMMUNITY

52. Further or alternatively, ss 10 and 11 of the RC Act cannot validly apply to the Commonwealth, the Authority, or their current or former officers or employees summonsed in that capacity.

53. In *Commonwealth v Cigamatic Pty Ltd (in liq)* (***Cigamatic***),[72] a majority of the Court rejected the proposition that State legislative power may directly derogate from (destroy, modify or qualify) the rights of the Commonwealth with respect to its people.[73] Specifically, it held that the Constitution did not permit a State Parliament to deprive the Crown in right of the Commonwealth of a prerogative right or privilege (there, the prerogative right to priority of payment of debts). While the decision applied on its facts

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70 *Bank Nationalisation Case* (1948) 76 CLR 1 at 367 (Dixon J), quoted in *Inglis* (1969) 119 CLR 334 at 337 (Kitto J) as embodying 'the conclusion of all four Justices' who examined the point in the *Bank Nationalisation Case* (namely, Rich and Williams JJ, Starke J, and Dixon J).

71 See *ASIC v Edensor* (2001) 204 CLR 559 at 580-581 [39]-[40] (Gleeson CJ, Gaudron and Gummow JJ), holding that 'the Commonwealth' for s 75(iii) purposes included ASIC. By parity of reasoning, it also includes the Authority. See also *Re Residential Tenancies Tribunal (NSW); ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458 (McHugh J), 463 (Gummow J).

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72 (1962) 108 CLR 372.

73 *Cigamatic* (1962) 108 CLR 372 at 377 (Dixon CJ, with whom Kitto and Windeyer JJ agreed), see also 389 (Menzies J), 390 (Windeyer J).

to a State law that purported to interfere with Crown prerogatives, the intergovernmental immunity that it recognised was not limited to that situation.[74]

54. A majority of the Court affirmed *Cigamatic* in *Re Residential Tenancies Tribunal (NSW); ex parte Defence Housing Authority* (***Henderson***).[75] Justices Dawson, Toohey and Gaudron, with whom Brennan CJ relevantly agreed,[76] explained the principle in terms of the lack of State legislative power to 'restrict or modify the executive capacities of the Commonwealth'.[77] The immunised 'capacities' were said 'clearly [to] extend beyond those rights, powers, privileges or immunities which might be described as having their origin in the prerogative', so as to include all the powers and privileges of the Commonwealth under s 61 of the Constitution.[78] The limits of State legislative power in respect of the capacities of the Commonwealth may be marked by the 'impact [of a law] upon any relationship of equality' between the Commonwealth and its subjects. Where the relevant 'legal rights of the Commonwealth in relation to its subjects' exhibit a relationship of privilege or immunity on the part of the Crown alone, then 'any diminution of the privilege or immunity will alter the relationship of the Crown with its subjects'; by contrast, where the relevant relationship is one of equality, a State law which 'discriminates against the Commonwealth government and imposes a disability upon it will constitute an interference with its executive capacities'.[79]

55. In both *Cigamatic* and *Henderson*, the Court distinguished between the situation where the Commonwealth Executive chooses to enter into a transaction having certain consequences under State law [where the relationship is of equality], and the situation where a State law restricts or modifies the capacities of Executive.[80] The facts in *Henderson* were of the former kind. The result in that case demonstrates that State laws may affix legal consequences to particular types of transaction and that the Commonwealth, if it chooses to enter into such a transaction, may be bound by the rule

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74 *Uther* (1947) 74 CLR 508 at 528 (Dixon J).

75 (1997) 190 CLR 410.

76 *Henderson* (1997) 190 CLR 410 at 424, 426.

77 *Henderson* (1997) 190 CLR 410 at 440.

78 *Henderson* (1997) 190 CLR 410 at 442.

79 *Henderson* (1997) 190 CLR 410 at 442-443 (Dawson, Toohey and Gaudron JJ).

80 *Cigamatic* (1962) 108 CLR 372 at 384; *Henderson* (1997) 190 CLR 410 at 427 (Brennan CJ), 439 (Dawson, Toohey and Gaudron JJ), referring to transactions into which the Commonwealth 'may choose to enter'.

laid down.[81] By contrast, the facts of this case are, emphatically, of the latter kind. The RC Act purports to modify or restrict at least two relevant capacities of the Commonwealth Executive: ***first***, its power under s 61 of the Constitution to 'execut[e] and maintain … the laws of the Commonwealth' and to administer departments of State (s 64); and ***second***, its prerogative against being compelled to submit to discovery.

56. ***Capacity to execute and maintain Commonwealth laws***: Executive action to execute or maintain Commonwealth law 'is within the exclusive field of Commonwealth power and outside the constitutional domain of the States'.[82] South Australia asserts a power to compel the Commonwealth Executive to face coercive questioning directed to requiring it to justify the manner in which it has formulated and administered Commonwealth law. The Commission intends to require the Commonwealth Executive to produce confidential (albeit not privileged) documents, and to require senior officers to appear as witnesses to explain or justify its decisions, legal conclusions, and even the validity of Commonwealth laws (see, eg, SCB 256.8-10, 264-267 [28(a)], [28(b)], [28(e)], 272 [1], 300-201). The Court should hold that a State has no power to impose obligations of that kind on the Commonwealth Executive. It would make the public revelation of Commonwealth information, whether for political or other reasons, susceptible to control by the States.

57. The national status[83] of the Commonwealth Executive under the Constitution carries with it a capacity to execute and maintain Commonwealth law on the same basis throughout Australia, unimpeded by the political preferences or desires of particular localities. The placing of the executive power of the Commonwealth 'outside the legislative power of another body politic, namely a State',[84] is one incident of the principle of responsible government, which 'can be discerned in numerous constitutional requirements'[85] including, for example, in ss 49 and 64 of the Constitution. Section 49 provides 'the

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81 *Henderson* (1997) 190 CLR 410 at 439-442 (Dawson, Toohey and Gaudron JJ); *Uther* (1947) 74 CLR 508 at 528 (Dixon J).

82 *Henderson* (1997) 190 CLR 410 at 464 (Gummow J), see also at 424-425 (Brennan CJ); *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421 at 440 (Isaacs J). See also *Williams* (2012) 248 CLR 156 at 369 [578] (Kiefel J).

83 *Williams* (2012) 248 CLR 156 at 189 [30] (French CJ).

84 *Henderson* (1997) 190 CLR 410 at 440 (Dawson, Toohey and Gaudron JJ).

85 *Williams* (2012) 248 CLR 156 at 349-350 [509]-[511] (Crennan J). See also *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 413 (Isaacs J); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 147 (Knox CJ, Isaacs, Rich and Starke JJ).

source of coercive authority for each chamber of the Parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt' and thereby provides 'the means for enforcing the responsibility of the Executive to the organs of representative government'.[86] Section 64 renders the Commonwealth Executive accountable to Commonwealth Ministers,[87] who are in turn responsible to the Commonwealth Parliament, in which State interests are represented in the Senate.[88] The capacity for the *Commonwealth* Parliament to act as a check on *Commonwealth* executive action 'is essential to responsible government'.[89] Those entrenched structures of accountability would be undermined if a State was free to exercise its own, sectional oversight, because it would subject Commonwealth Ministers, and their subordinates, to a competing form of accountability, not reflective of the underlying political sovereignty of the people of *the Commonwealth as a whole*. Those accountability structures would also be undermined if a State was free to impose obligations on the Commonwealth Executive that were inconsistent with the instructions or directions of Commonwealth Ministers (including, for example, as to the confidentiality of particular information).

58. ***Prerogative against discovery:*** Further or alternatively, for the RC Act to apply to the Commonwealth Executive would derogate from the Commonwealth Executive's prerogative against discovery. That was the basis upon which the Supreme Court of Canada dealt with a situation closely analogous to the present in *Attorney General of Quebec v Attorney General of Canada* (***Keable***).[90] That case concerned an attempt by a provincial legislature (Quebec) to empower a commissioner appointed under a Quebec statute to compel federal officials and departments to give evidence into the methods and practices of the Royal Canadian Mounted Police. The Supreme Court pointed out that the coercive power of the commissioner depended on statute, and that 'it seems clear that provincial legislation cannot be effective by itself to confer such jurisdiction as against

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86 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 558-559 (The Court).

87 See also PGPA Act, s 19.

88 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 87 (Murphy J); *Egan v Willis* (1998) 195 CLR 424 at 451 [42] (Gaudron, Gummow and Hayne JJ); *Re Patterson* (2001) 207 CLR 391 at 415 [64] (Gaudron J); *Williams* (2012) 248 CLR 156 at 232 [136] (Gummow and Bell JJ), 349-351 [508]-[515] (Crennan J).

89 *Re Lambie* (2017) 92 ALJR 285 at [23] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

90 [1979] 1 SCR 218 (Pigeon J, delivering judgment for Martland, Ritchie, Pigeon, Dickson and Beetz JJ).

the Crown in right of Canada'.[91] The reasoning supporting that conclusion had two (albeit related) limbs. ***First***, the Court held that, as a matter of intergovernmental immunity, a provincial legislature may not authorise a coercive inquiry into the administration or management of a federal agency.[92] ***Secondly***, it held (analogously with *Cigamatic*) that an aspect of that immunity was that 'provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion'.[93] On that basis, the Court held that a provincial legislature could not compel the provision of information from the federal government because 'the Crown enjoys a prerogative against being compelled to submit to discovery'.[94]

59. Consistently with *Keable*, if the RC Act applies to the Commonwealth Executive, it would override the Crown's prerogative against being compelled to submit to discovery.[95] While the *Commonwealth* Parliament has overridden that prerogative so that discovery can be required of the Commonwealth in the circumstances it specifies,[96] State Parliaments have no power to do the same. The result is that, even if the RC Act was *intended* to bind the Commonwealth Executive, it cannot validly do so, because by purporting to abrogate an aspect of the prerogative power of the Commonwealth Executive the RC Act infringes the intergovernmental immunity identified in *Cigamatic* and *Henderson.*

60. Both the prerogative against discovery and the capacity to execute and maintain Commonwealth laws are 'capacities' that would be restricted by the RC Act applying to the Commonwealth, regardless of whether the officers or employees through whom the Commonwealth acted at the relevant time have since ceased to be employed for – or

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91 *Keable* [1979] 1 SCR 218 at 244 (Pigeon J).

92 *Keable* [1979] 1 SCR 218 at 242-243 (Pigeon J). See also *MacKeigan v Hickman* [1989] 2 SCR 796 at 835 (McLachlin J, with whom L'Heureux-Dube and Gonthier JJ agreed); *AG (Canada) v Commissioner of Milgaard Inquiry* [2006] SKQB 385 at [24]-[27] (Laing CJ); *AG (Canada) v Commissioner of Inquiry on the Awarding and Management of Public Contracts* [2012] QCCA 1701 at [25]-[26] (Beaugé J).

93 *Keable* [1979] 1 SCR 218 at 245 (Pigeon J), quoting *Gauthier v The King* (1917) 56 SCR 176 at 194 (Anglin J).

94 *Keable* [1979] 1 SCR 218 at 245-246 (Pigeon J), and the authorities there cited.

95 *Commonwealth v Northern Land Council* (1991) 30 FCR 1 at 22 (Black CJ, Gummow and French JJ); *Duncan v Cammell* [1942] AC 624 at 632 (Viscount Simon LC); *In re la Societe les Affreteurs Reunis* [1921] 3 KB 1 at 15-16 (Darling J), 18 (Avory J), 20 (Greer J); *Heimann v Commonwealth* (1935) 54 CLR 126 at 132-133 (Evatt J). See also HV Evatt, *The Royal Prerogative* (1987) at 31, 123.

96 *Heimann v Commonwealth* (1935) 54 CLR 126 at 131-132 (Evatt J).

appointed by – the Commonwealth. For example, the prospect of an employee or officer being summonsed in that capacity by a State commission would inhibit the frank and free communication that is necessary for the maintenance and execution of the laws of the Commonwealth,[97] whether the summons is issued while they work for the Commonwealth or when they no longer do so.

61. If States can authorise coercive inquiries of the kind in issue in this proceeding, the potential consequences for the functioning of the Commonwealth Executive would be profound. That is particularly true because common law doctrines such as legal professional privilege and public interest immunity, which generally entitle the Executive to withhold at least some highly confidential information, are subject to statutory modification.[98] While the RC Act does not currently abrogate either doctrine, the South Australian Parliament could amend the RC Act to do so at any time. Absent a constitutional immunity, the result would be that a State could choose, at any time and for any reason, to require the Commonwealth Executive to make public legal advice, cabinet submissions, commercially sensitive information[99] or high-level policy documents.[100] That would not be because the Commonwealth had *chosen* to enter into a transaction regulated by a State law of general application,[101] but simply because the State Executive decided that it wished to contest the manner in which the Commonwealth administers its own laws.

62. A further consequence is that a State could impose requirements the inevitable effect of which would be to require of the Commonwealth to divert resources to respond to such summonses as the State Executive chooses to issue, with all that that entails: searches; taking of steps to evaluate documents located against the summons; determining whether

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97 *Sankey v Whitlam* (1978) 142 CLR 1 at 40 (Gibbs ACJ), 49 (Stephen J, with whom Aickin JJ generally agreed), 97-99 (Mason J). See also *Conway v Rimmer* [1968] AC 910 at 952 (Lord Reid); *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 614-615 (Mason CJ, Brennan, Deane, Dawson Gaudron and McHugh JJ).

98 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Jacobsen* (1995) 182 CLR 572.

99 See, eg, *Jacobsen* (1995) 182 CLR 575 at 590 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ), referring to 'confidential information of a business character required to be given [to the State] by a statute which prohibits the disclosure of information'.

100 Cf *Commissioner of Police of NSW v Guo* (2016) 332 ALR 236 at 255 [77] (Robertson and Griffiths JJ).

101 *Henderson* (1997) 190 CLR 410 at 427 (Brennan CJ), 439 (Dawson, Toohey and Gaudron JJ).

claims need to be made to resist production on privilege grounds, or to seek confidentiality orders; to produce the evidence required to support those claims; and to make and defend those claims in court (SCB 83-84). It is beyond the legislative power of a State[102] to authorise the imposition of such burdens on the Commonwealth, which could be very extensive depending on the terms of the summons. That is all the more so if – as here – the object of doing so is to inquire into the Commonwealth's execution of Commonwealth law or administration of departments of State. The same point was recognised in the United States of America when a Pennsylvanian legislative committee attempted to subpoena officials of a federal agency:[103]

> The attempt by the respondents ... to investigate a purely federal agency is an invasion of the sovereign power of the United States of America .... The state having the power to subpoena may abuse that power by constantly and for long period requiring federal employees and necessary federal records to be before an investigating committee.

PART VI ORDERS SOUGHT

63. The reserved questions of law should be answered as follows:

Question 1: No.

Question 2: Does not arise.

Question 3: The plaintiffs should be granted the relief sought in the Amended Summons.

Question 4: The second defendant.

PART VII ORAL ARGUMENT

64. The plaintiffs estimate that they require 3½ hours for oral argument (including reply).

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[102] As opposed to the Commonwealth: *Freedom of Information Act 1982* (Cth).

[103] *United States v Owlett* 15 F Supp 736 (1936) at 742 [5] (District Court of Pennsylvania). See also *United States v McLeod* 385 F 2d 734 (1967) at 751-752 [22]-[23] (Wisdom J).