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RESEARCH ARTICLE

An Australian future for the anti-commandeering doctrine: Might it command operation?

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Abstract
Within the Australian Federation to what extent is the Commonwealth Parliament prevented from 'conscripting' or 'commandeering' State officers for its own purposes? Drawing on the history of commandeering both in the United States and in Australia, this article explores the constraints on the formulation of any Australian-based doctrine in light of recent High Court jurisprudence. This article argues that while the practical scope of any Australian-derived doctrine has been curtailed by the High Court, there is a role for it to play as a 'per se' breach of the *Melbourne Corporation* principle. But to have that effect, its ambit must be confined to situations where there is (i) an administrative duty imposed on (ii) a state statutory office holder or statutory body, where (iii) this has not been acquiesced to by the relevant state legislature or contemplated by the Constitution.

I. Introduction

> It is at least arguable that the Constitution does not permit either the Commonwealth or the State parliaments to confer powers coupled with duties on the officers, agents or tribunals of the other, without the authority of the other.[1]

It has been said that it is an incident of the federal nature of the *Commonwealth Constitution* that 'a State by its laws cannot unilaterally invest functions under that law in officers of the Commonwealth'.[2] But what of the converse proposition: is

[1]Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads – Essays in Constitutional Law* (Federation Press, 2000) 224, 236.

[2]*R v Hughes* (2000) 202 CLR 535, 553 [31] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ). See also *O'Donoghue v Ireland* (2008) 234 CLR 599, 619 [32] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) ('*O'Donoghue*').

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the Commonwealth Parliament prohibited from unilaterally imposing functions, or conferring powers, on state officers? The Supreme Court of the United States has recognised a similar principle, which has been labelled the 'anti-commandeering' doctrine.[3] Beginning with *New York v United States* ('*New York*')[4] in 1992, the US Supreme Court held that a federal law could not order State legislatures to regulate in accordance with federal standards, and in *Printz v United States* ('*Printz*') in 1997, this doctrine was expanded so that federal law is prohibited from commandeering a State officer to enforce federal law.[5] The anti-commandeering doctrine, Alito J has noted, 'may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the [US] Constitution'.[6]

The High Court of Australia has not been as quick to delineate a similar doctrine emanating from the *Commonwealth Constitution*. The American anti-commandeering doctrine first came to the High Court's attention in *Austin v The Commonwealth* ('*Austin*') in 2003, where its existence was said to be 'a large proposition and best left for another day'.[7] Five years later in *O'Donoghue v Ireland* ('*O'Donoghue*'), six Justices again found it unnecessary to determine whether an anti-commandeering doctrine should be recognised.[8] The doctrine then lay dormant for some 15 years before being invoked once more in *Attorney-General (Cth) v Huynh* ('*Huynh*'), but, yet again, it was unnecessary for the Court to squarely face the issue.[9]

Just five months shy of the High Court's reasons in *O'Donoghue* being delivered, an article in this journal sought to answer whether an anti-commandeering doctrine should be accepted as an incident of Australia's federalist system.[10] Some 18 years later, this article seeks to explore the relevance of the doctrine in Australia's constitutional landscape. Part II begins by briefly tracing the constitutional and historical foundations of the anti-commandeering doctrine in both the US and Australia. Part III will then consider the current state of affairs in Australia, using *Austin, O'Donoghue* and *Huynh* as a lens through which to examine the doctrine's (potential) scope. As a result of this exegesis, this article argues that while the practical scope of any Australian-derived anti-commandeering doctrine has been curtailed by the High Court, there is a role for it to play at least as a 'per se' breach of the *Melbourne*

[3]The doctrine has also been couched in terms of 'conscription': see *Printz v United States*, 521 US 898, 925, 935 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ) (1997) ('*Printz*'). However, the term 'anti-commandeering' prevailed in the literature, and was expressly adopted in *Murphy v National Collegiate Athletic Association*, 584 US 453, 463 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ) (2018) ('*Murphy*'). See also *Haaland v Brackeen*, 599 US 255, 271, 280, 285–6 (Barrett J for Roberts CJ, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ) (2023) ('*Haaland*').

[4]505 US 144, 161 (O'Connor J for Rehnquist CJ, O'Connor, Scalia, Kennedy, Souter and ThomasJJ) (1992) ('*New York*').

[5]*Printz* (n 3) 935 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ).

[6]*Murphy* (n 3) 470 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ).

[7](2003) 215 CLR 185, 269 [181] (Gaudron, Gummow and Hayne JJ) ('*Austin*').

[8]*O'Donoghue* (n 2) 617 [20] (Gleeson CJ), 626 [57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[9](2023) 97 ALJR 298, 316 [82]–[83] (Kiefel CJ, Gageler and Gleeson JJ), 334 [176] (Gordon and Steward JJ). Cf at 338 [193]–[194] (Edelman J) ('*Huynh*').

[10]Matthew Moorhead, 'Prohibiting the Conscription of State Officers for Commonwealth Purposes: An American Future for the State Immunity Doctrine?' (2007) 35(3) *Federal Law Review* 399.

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Corporation principle. However, to have this effect, its ambit must be confined to situations where a law of the Commonwealth (i) imposes an administrative 'duty' on (ii) a state statutory office holder or statutory body, where (iii) this has not been acquiesced to by the relevant state legislature or contemplated by the *Commonwealth Constitution*.

Examples of commandeering are rare. As Dixon J famously remarked: 'In a dual political system you do not expect to find either government legislating for the other.'[11] One more readily sees state legislatures imposing duties on its own agents. Accordingly, Part IV of this article explores a further use of the anti-commandeering doctrine which *Huynh* has revealed: preventing state laws imposing such duties from being picked up and applied as laws of the Commonwealth.

II. Constitutional and historical foundations

A. United States Creation

Although the US Supreme Court has recently observed that the anti-commandeering doctrine is 'simple and basic',[12] it was not recognised until the 1992 decision of *New York*. The case concerned a federal law that required a state to either 'take title' to low-level radioactive waste or 'regulat[e] according to the instructions of Congress'.[13] Practically, the law required states to accept one of two options, both of which required law-making by them. This 'commandeering' of state legislatures was its constitutional flaw. As O'Connor J explained: 'Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"'.[14]

The effect of *New York* is that Congress is forbidden from commandeering the state legislative process. But what about commandeering members of the state executive? The US Supreme Court considered this extension five years later in *Printz*. The case concerned the '*Brady Act*' – the *Brady Handgun Violence Prevention Act* – which required state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licences.[15] For example, after a firearm dealer provided an enforcement officer with the required paperwork, the enforcement officer was required to make a reasonable effort to ascertain within five business days whether the proposed handgun sale would violate federal, state or local law. The Court held that the provisions were unconstitutional to the extent that they imposed an obligation on state officials to execute federal laws. Writing for the majority, Scalia J noted: 'The Federal Government' may not 'command the States' officers,

[11] *Re Richard Forman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529 (Dixon J) ('*Uther*').

[12] *Murphy* (n 3) 471 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ).

[13] *New York* (n 4) 175 (O'Connor J for Rehnquist CJ, O'Connor, Scalia, Kennedy, Souter and Thomas JJ). See *Low-Level Radioactive Waste Policy Amendments Act of 1985*, Pub L No 99-240, 99 Stat 1842.

[14] *New York* (n 4) 161, quoting *Hodel v Virginia Surface Mining & Reclamation Association Inc*, 452 US 264, 288 (Marshall J for Burger CJ, Brennan, Stewart, White, Marshall, Blackmun, Powell and Stevens JJ) (1981) ('*Hodel*').

[15] Pub L No 103-159, 107 Stat 1536 (1993).

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or those of their political subdivisions, to administer or enforce a federal regulatory program'.[16] Extending the doctrine to protect state officers was seen as logical and necessary so that Congress could not 'circumvent th[e] prohibition by conscripting States' officers directly'.[17]

The constitutional basis for the anti-commandeering doctrine stems from the concept of 'dual sovereignty' which is said to underpin the US Constitution. 'Although [in 1789] the States surrendered many of their powers to the New Federal Government, they retained "a residuary and inviolable sovereignty"'.[18] In justifying the constitutional basis of the doctrine, the Court has referred to provisions of the Constitution which surrendered aspects of sovereignty,[19] and others which have retained state sovereignty.[20] The most important of the latter being the Tenth Amendment, which states: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' Additionally, the Court has explained that this residual state sovereignty is reflected in the US Constitution's conferral upon Congress of 'not plenary legislative power but only certain enumerated powers'.[21] This means that:

> all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anti-commandeering doctrine simply represents the recognition of this limit on congressional authority.[22]

The doctrine is thus seen as necessary to protect the sovereignty of the states. As Professor Gold has explained: 'because states are sovereign over their own executive officers, any federal commandeering would violate state sovereignty'.[23] How, then, does the doctrine translate into the Australian federal context?

B. An Australian Adoption?

The journey of commandeering in Australia begins with *Austin*. The Commonwealth Parliament implemented a legislative scheme by which state judicial officers were required to pay a federal tax, described as a 'superannuation contributions surcharge'

[16] *Printz* (n 3) 935 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ).

[17] Ibid.

[18] Ibid 919 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ), quoting James Madison, 'Federalist No. 39' in Alexander Hamilton, James Madison and John Jay (ed), *The Federalist Papers* (New American Library, 1961 reprint), 245.

[19] Art I, § 8; Art I, § 10; Art VI, cl 2, cited in *Murphy* (n 3) 470–1 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ).

[20] Art III, § 2; Art IV, § 2; Art IV, § 3; Art IV, § 4; Art V, cited in *Printz* (n 3) 919 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ).

[21] *Murphy* (n 3) 471 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ). See also *Printz* (n 3) 919 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ).

[22] *Murphy* (n 3) 471 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ).

[23] Andrew S Gold, 'Formalism and State Sovereignty in *Printz v United States*: Cooperation by Consent' (1998) 22(1) *Harvard Journal of Law and Public Policy* 247, 260.

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in *Austin*.[24] Relevantly, s 12 of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) required the states to employ an actuary to calculate the amount of 'surchargeable contributions' required under the scheme. The South Australian Attorney-General, intervening, objected to the validity of s 12, relying on *Printz* for the proposition that '[t]he Commonwealth cannot validly legislate so as unilaterally to impose a duty upon the State or an officer of the State to perform an executive function under a Commonwealth Act'.[25] It was argued that this proposition operated within the ambit of the principle derived from *Melbourne Corporation v Commonwealth* ('*Melbourne Corporation*'),[26] as it was 'necessarily inconsistent with the independence of the States for the Commonwealth to have power unilaterally to direct the State or its employees to perform Commonwealth duties'.[27] *Printz* was therefore invoked as a 'bright-line' rule, but within the context of the *Melbourne Corporation* principle.[28] Yet the Court did not need to decide this issue because it invalidated the legislation on the basis of the *Melbourne Corporation* principle generally. Its existence was said to be 'a large proposition and best left for another day'.[29]

That day was thought to have arrived when the Court heard argument in *O'Donoghue*. The Republic of Ireland, Republic of Hungary and the US sought extradition of Messrs Thomas, Zentai and Williams respectively. In each case, the individual was brought before a state magistrate for the conduct of proceedings pursuant to s 19(1) of the *Extradition Act 1988* (Cth) ('*Extradition Act*') to determine if they were eligible for surrender by Australia to the relevant country in relation to the relevant extradition offence. Before the High Court, each of the men invoked *Printz*, again as a 'per se' breach of the *Melbourne Corporation* principle,[30] in aid of their contention that s 19(1) was invalid. But a majority of the Court found it unnecessary to consider the merits of the constitutional argument, for reasons to which this article will return.[31] Any potential relevance of the anti-commandeering doctrine laid dormant in Australia until *Huynh*, but the question as to its constitutional status was eschewed yet again.[32]

In each of *Austin, O'Donoghue* and *Huynh*, a doctrine similar to the *New York-Printz* anti-commandeering doctrine was sought to be invoked in Australia. Yet

[24]The scheme comprised of the *Superannuation Contribution Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth) and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth).

[25]*Austin* (n 7) 195–6 (BM Selway QC) (during argument).

[26](1947) 74 CLR 31 ('*Melbourne Corporation*').

[27]Ibid 196. It applies to the states rather than the territories when such an application to the latter would be out of step with the division of powers under the *Commonwealth Constitution*: see generally Leslie Zines, 'Laws for the Government of Any Territory: Section 122 of the Constitution' (1966) 2(1) *Federal Law Review* 72, 78.

[28]Moorhead (n 10) 412–13.

[29]*Austin* (n 7) 269 [181] (Gaudron, Gummow and Hayne JJ).

[30]*O'Donoghue* (n 2) 614 [12] (Gleeson CJ), 624 [52] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[31]Ibid 617 [20] (Gleeson CJ), 626 [57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). Cf Kirby J at 651 [167].

[32]*Huynh* (n 9) 316 [82]–[83] (Kiefel CJ, Gageler and Gleeson JJ), 334 [176] (Gordon and Steward JJ). Cf Edelman J at 338 [193]–[194].

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the status of the doctrine remains unclear. What is clearer, however, is that the anti-commandeering doctrine, if ever operable in Australia, would derive from the intergovernmental immunity doctrine as developed post-*Melbourne Corporation*. Indeed, this is how it was sought to be invoked before the High Court.[33] This is because it is hard to conceive as a stand-alone implication derived from the text and structure of the *Constitution*.[34] And, other potential constitutional bases, such as the Commonwealth Parliament generally lacking power to impair state functioning, are difficult to reconcile with post-*Engineers* constitutional interpretative approaches.[35]

In *Melbourne Corporation*, with considerable reference to US authority, there was a recognition that the Australian federation established by the *Commonwealth Constitution* requires an implied constitutional limitation ensuring that the states continue to exist as independent governing entities.[36] Subsequent cases saw this develop into a two-limbed doctrine proscribing discriminatory state treatment as well as general laws affecting the existence of states or their capacity to function as governments,[37] whether affecting 'legislative, executive or judicial'[38] operations. The more recent cases of *Austin* and *Clarke v Commissioner of Taxation* ('*Clarke*') replaced this with a singular inquiry into whether there was an impairment by the Commonwealth of the ability of the states to function as governments,[39] with discrimination being one such mechanism for this to occur.[40]

For *Melbourne Corporation,* as developed in later cases, to be the basis of an application of anti-commandeering seemingly requires establishing that imposing a duty on a state statutory office holder without state approval impairs the ability of a state to function as a government.[41] In *O'Donoghue* this was couched by the majority

[33] It is also the accepted basis in the literature: see Moorhead (n 10) 410–20; Geoffrey Lindell, 'Advancing the Federal Principle through the Intergovernmental Immunity Doctrine' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 23, 49–50; Kristen Walker, 'The *Melbourne Corporation* Doctrine – Some Unresolved Questions' in John Griffiths and James Stellios (eds), *Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2024) vol 2 185, 191–3; Graeme Hill, 'Commentary of Chapter 6' in Griffiths and Stellios 207, 210–12.

[34] An echo of the *US Constitution's* Tenth Amendment can be found in ss 106 and 107 of the *Commonwealth Constitution*: see Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 336. However, as Moorhead has explained, neither section provides an adequate basis for the anti-commandeering doctrine: see Moorhead (n 10) 409–10.

[35] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[36] *Melbourne Corporation* (n 26) 66 (Rich J), 74 (Starke J), 81–2 (Dixon J). See also *Spence v Queensland* (2019) 268 CLR 355, 493 [309] (Edelman J) ('*Spence*').

[37] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (Mason J) ('*Queensland Electricity*').

[38] Ibid 207 (Gibbs CJ).

[39] *Austin* (n 7) 249 [124] (Gaudron, Gummow and Hayne JJ); *Clarke v Commissioner of Taxation* (2009) 240 CLR 272, 298 [32] (French CJ), 306 [65] (Gummow, Heydon, Kiefel and Bell JJ) ('*Clarke*'). See also *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 609 [130] (Hayne, Bell and Keane JJ).

[40] *Austin* (n 7) 217 [24] (Gleeson CJ), 249 [123] (Gaudron, Gummow and Hayne JJ).

[41] Ibid 268 [181] (Gaudron, Gummow and Hayne JJ).

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as an argument based on a 'per se breach' of the principle of federalism enunciated in *Melbourne Corporation*[42] (arguably intersecting with case law finding that the Commonwealth could not encroach on a state's capacity to control its higher echelon appointments).[43]

In *Clarke*, French CJ posited a multifactorial approach as to whether a state's functioning was affected by a Commonwealth law.[44] For the Chief Justice:

> The 'significance' of a Commonwealth law affecting the States' functions is not solely to be determined by reference to its practical effects on those functions. This is not a return to any generalised concept of inter-governmental immunity. It simply recognises that there may be some species of Commonwealth laws which would represent such an intrusion upon the functions or powers of the States as to be inconsistent with the constitutional assumption about their status as independent entities.[45]

French CJ contended that a 'qualitativ[e]' assessment must be made as to the 'significan[ce]' of the impact on the state by the Commonwealth Act, such that a 'gubernatorial privileges tax', which might be quite trivial for the state in one sense, would represent such an 'intrusi[on]' as to be 'inconsistent with the status of the states as independent entities under the Constitution'.[46] In *Spence v Queensland*, Edelman J described the inquiry into the significance of the impact on the state as one involving both 'breadth and depth'.[47] His Honour concluded that 'a burden will be more deeply felt the more that it is targeted at the other polity and the more essential the governmental function that it curtails is to that other polity'[48] and it 'will be wider the more that it curtails the operation of the governmental functions of the other polity'.[49]

Take as an example the High Court case of *Commonwealth v New South Wales*.[50] This case concerned s 20 of the *Lands Acquisition Act 1906* (Cth) which required the State Registrar-General to grant title registration to the Commonwealth and effectively 'in the performance of his State functions to disregard the conditions of his statutory authority and to act in accordance with Commonwealth directions'.[51] While pre-dating the constitutional intergovernmental immunity jurisprudence discussed above, it was found by a majority that this attempt by the Commonwealth was constitutionally

[42] *O'Donoghue* (n 2) 614 [12] (Gleeson CJ), 624 [52] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[43] Ibid 625 [52] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Re Australian Education Union; ex Parte Victoria* (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*AEU*').

[44] *Clarke* (n 39) 299 [34].

[45] Ibid 298 [32].

[46] Ibid 298 [33].

[47] *Spence* (n 36) 496 [314].

[48] Ibid.

[49] Ibid 497 [315].

[50] (1923) 33 CLR 1. See also Lindell (n 33) 46.

[51] (1923) 33 CLR 1, 54 (Isaacs J).

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invalid.[52] Based on the later jurisprudence, the argument could be that this interfered with state constitutional independence in controlling the actions of a statutory office holder without state legislative acquiescence.

What is evident is that the Australian formulation of any form of state anti-commandeering would likely vary from that which has developed in the US. The *Printz* line of authority is based on the concept of 'dual sovereignty' and the absence of express constitutional power to control state officers in the US Constitution.[53] But as canvassed in *O'Donoghue*, any notion of dual sovereignty does not carry quite the same connotations in the Australian context. The High Court has increasingly in the years following federation tended towards a more expansive notion of Commonwealth constitutional power, including to regulate the states. Accordingly, the jurisprudential basis of intergovernmental immunity, including any aspect of anti-commandeering, is less focused on residual state legislative sovereignty than on an implied limit on Commonwealth power based on retaining the 'status of the States as independent entities'[54] as essential to the workings of the Australian Federation. Further, in *Printz,* one sees an intentionally and marked deviation from the American 'authorities which march with the *Melbourne Corporation* doctrine'.[55] Crucially for Australia, it is this *Melbourne Corporation* jurisprudence, as revised in *Austin* and *Clarke*, from which any Australian anti-commandeering doctrine would be derived.

The distinct nature of Australia's constitutional structure brings about another consequence. As with the *Melbourne Corporation* principle,[56] the *Commonwealth Constitution* may foreclose the application of the anti-commandeering doctrine. Accordingly, in *O'Donoghue* it was recognised that the doctrine would not operate if there was 'something in the subject matter, content or context of a particular head of Commonwealth legislative power to indicate to the contrary'.[57] Certain heads of legislative power would seem to impliedly authorise commandeering, with the defence power in s 51(vi) being a clear example.[58] Others are explicit. Most important to the anti-commandeering doctrine is s 77(iii),[59] which enables the Commonwealth Parliament to invest state courts with federal jurisdiction. In other words, s 77(iii) enables the Commonwealth Parliament to make state courts 'judicial agents of the

[52]Ibid 27–8 (Knox CJ and Starke J), 28 (Gavan Duffy J), 54 (Isaacs J). Cf Higgins J at 70.

[53]See also Cheryl Saunders, 'Constitutional Structure and Australian Federalism' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 174, 193–5.

[54]*Clarke* (n 39) [26] (French CJ).

[55]*O'Donoghue* (n 2) 625–6 [56] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See also Hill (n 33) 211.

[56]*Melbourne Corporation* (n 26) 83 (Dixon J); *Queensland Electricity* (n 37) 219–20 (Mason J), 250–1 (Deane J); *Clarke* (n 39) 299 [34] (French CJ).

[57]*O'Donoghue* (n 2) 615 [15] (Gleeson CJ). See also Gummow, Hayne, Heydon, Crennan and Kiefel JJ at 622 [45].

[58]Ibid 622 [45] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 648 [154] (Kirby J), discussing *South Australia v Commonwealth* (1942) 65 CLR 373. See also Kirby J at 652 [172]; *Austin* (n 7) 246 [114] (Gaudron, Gummow and Hayne JJ); Moorhead (n 10) 409.

[59]See especially *O'Donoghue* (n 2) 615 [15]–[16] (Gleeson CJ). Another provision that expressly conscripts the states is s 120.

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Commonwealth' for the exercise of federal judicial power.[60] As will be explored in Part III, the 'autochthonous expedient' has a consequential impact upon the practical operation of any anti-commandeering doctrine.

III. Practical Scope of an Australian Anti-commandeering Doctrine

A consequence of the differing constitutional structures between Australia and the US is that much of the reasoning behind the US anti-commandeering doctrine 'cannot be directly applied to the *Australian Constitution*'.[61] In light of this, the doctrine has been proposed in terms which reflect Australia's distinct constitutional framework. In *O'Donoghue*, it was submitted that:

> It is an implication from the federal structure of the *Constitution* that the Commonwealth Parliament cannot impose an administrative duty on the holder of a State statutory office without State legislative approval.[62]

It may immediately be observed that the limitation takes account of the autochthonous expedient in s 77(iii) by reason of its confinement to the imposition of an administrative duty (as opposed to judicial functions) upon a state statutory officer holder (as opposed to a court of a state).[63] But why is the proposed implication limited to the imposition of a 'duty'? Does it apply to non-statutory state officers? And why is state legislative approval needed to negate its operation? This Part turns to consider each of those questions. It will be argued, however, that the doctrine only stands to function as a 'bright-line' limit upon Commonwealth legislative power if confined in this way.

A. 'Duty'

The High Court has indicated that if the anti-commandeering doctrine were accepted as an incident of our federal structure, it would only apply if a 'duty' were imposed.[64] But what precisely is a 'duty'? Gleeson CJ has explained that, '[i]n this constitutional context, it is the creation by federal statute of an *obligation* to execute federal law that is the essence of the supposed duty',[65] in the sense that performance could be compellable

[60] Zines, 'The Present State of Constitutional Interpretation' (n 1) 236.

[61] *Austin* (n 7) 196 (BM Selway QC) (during argument). See also Saunders (n 53) 193.

[62] See *O'Donoghue* (n 2) 614 [13(1)] (Gleeson CJ). Cf Gummow, Hayne, Heydon, Crennan and Kiefel JJ at 622 [44]–[45]. See also *Huynh* (n 9) 316 [81] (Kiefel CJ, Gageler and Gleeson JJ).

[63] The exhaustive nature of Ch III and s 77(iii) means that: (a) the imposition of a judicial function upon a state court is authorised by s 77(iii); (b) whether or not the imposition of an administrative function on a state court is permissible instead depends on whether it is incidental to a judicial function: *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151–2 (the Court); and (c) the imposition of Commonwealth judicial power upon a body which is not a court of a state is unconstitutional: *Burns v Corbett* (2018) 265 CLR 304, 335 [41], [43] (Kiefel CJ, Bell and Keane JJ).

[64] See *O'Donoghue* (n 2) 627 [68] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Huynh* (n 11) 316 [82]–[83] (Kiefel CJ, Gageler and Gleeson JJ).

[65] *O'Donoghue* (n 2) 617 [22] (Gleeson CJ) (emphasis added). See also *Huynh* (n 9) 316 [82] (Kiefel CJ, Gageler and Gleeson JJ).

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by mandamus.[66] This echoes the operation of its US counterpart, which applies only when federal law 'commands' state legislatures or officers.[67]

The concept of a 'duty' was distinguished in *O'Donoghue* from the 'powers' (or 'functions') which a court may exercise.[68] A 'duty' is the conferral of a power or function that must be exercised; 'that is, a power or function, the exercise of which is mandatory'.[69] The distinction is important, for it has been suggested that there is nothing inherently unconstitutional about federal law conferring *powers* upon state officers. This falls from the Court's decision in *Aston v Irvine*, which held valid federal provisions conferring powers upon state magistrates in respect of interstate service of process.[70] To give state magistrates those powers pursuant to federal law was said to involve 'no interference with the executive governments of the State[s]'.[71] The force of the distinction between duties and powers has been questioned by some,[72] and it is an issue to which this article shall return.

In *O'Donoghue*, s 19(1) of the *Extradition Act* stated that where certain steps had been taken and a magistrate considered there had been a reasonable time to prepare, then:

> the magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country.[73]

Counsel for Messrs Thomas, Zentai and Williams submitted that the subject matter, language and structure of the Act made it clear that s 19(1) imposed a duty, such that a magistrate to whom the application was made 'could not simply abnegate his authority'.[74] Key features in aid of this construction were the mandatory language of 'shall' and that the subject matter of s 19 was a determination that affects liberty. Precluding the majority accepting that submission, however, was s 4AAA of the *Crimes Act 1914* (Cth) ('*Crimes Act*'), which had to be read together with s 19(1) of the *Extradition Act*.[75] Section 4AAA identifies a series of 'rules' of construction that

[66] See *Williams v United States of America* (2007) 161 FCR 220, 222–3 [7] (Branson J) ('*Williams*'), quoted in *O'Donoghue* (n 2) 618 [24] (Gleeson CJ). See also *O'Donoghue* (n 2) 602 (SJ Gageler SC) (during argument).

[67] *Murphy* (n 3) 476 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ), explaining *Hodel* (n 14).

[68] See especially *O'Donoghue* (n 2) 623–4 [48]–[51], 627 [68] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[69] Walker (n 33) 192.

[70] (1955) 92 CLR 353.

[71] Ibid 364 (the Court). In reaching this conclusion, the Court placed reliance on the then-current authority of the US Supreme Court. See also *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 240 (Gibbs J).

[72] See Lindell (n 33) 48–9. Cf Walker (n 33) 192–3.

[73] Section 19(1) has since been amended to read 'magistrate or Judge': see *Federal Circuit Court of Australia (Consequential Amendments) Act 2013* (Cth) sch 1 item 161.

[74] *O'Donoghue* (n 2) 602 (SJ Gageler SC) (during argument), quoting *Ffrost v Stevenson* (1937) 58 CLR 528, 572 (Dixon J).

[75] *O'Donoghue* (n 2) 626 [59] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

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apply if 'under a law of the Commonwealth relating to criminal matters, a function or power that is neither judicial nor incidental to a judicial function or power, is conferred on', relevantly, a state magistrate.[76] One rule is that the function or power is conferred on the person only in a personal capacity.[77] Importantly, s 4AAA(3) provides another rule: 'The person need not accept the function or power conferred'. For Gleeson CJ and the joint judgment (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), s 4AAA(3) had the effect that state magistrates were not obliged to accept the conferral under s 19(1), and, therefore, no 'duty' was imposed.[78] Kirby J, on the other hand, thought that this outcome had an air of artificiality:[79] it is quite unlikely that, as a matter of practical reality, a judicial officer could choose not to exercise a function so conferred. But his Honour's objection is unlikely to carry much weight in circumstances where it has been held that 'acceptance, rather than "non-acceptance", may be inferred from a course of conduct, in particular by exercise of the power or function in question'.[80]

Although s 4AAA(3) of the *Crimes Act* is a firm barrier standing in the way of characterising Commonwealth legislation as imposing a duty, its operation is not absolute. One limit upon its operation is that it only applies to a law of the Commonwealth 'relating to criminal matters'.[81] A second limit is found in s 4AAA(6A), which provides that 'a rule set out in this section does not apply if the contrary attention appears'. In *O'Donoghue*, the joint judgment rejected a submission that the rule in s 4AAA(3) did not apply, by virtue of s 4AAA(6A), because s 19(1) evinced a 'contrary intention' to its application, particularly from the use of the word 'shall'.[82] Their Honours thought it was necessary to consider the functions imposed under Pt II of the *Extradition Act* as a whole,[83] and concluded that no contrary intention could be found from those provisions requiring magistrates to exercise functions if certain 'conditions precedent or jurisdictional facts be satisfied'.[84] For there to be a contrary intention, the *Extradition Act* would 'need to spell out that a State magistrate is obliged to accept the obligation to perform the functions of a magistrate under the Act'.[85]

[76] *Crimes Act 1914* (Cth) s 4AAA(1)(a)–(c). See ibid 617 [21] (Gleeson CJ).

[77] *Crimes Act 1914* (Cth) s 4AAA(2).

[78] *O'Donoghue* (n 2) 617–18 [21]–[25] (Gleeson CJ), 627 [67]–[68], 629 [75] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[79] Ibid 646 [145].

[80] Ibid 627 [65] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See also *CXXXVIII v Honourable Justice Richard Conway White* (2020) 274 FCR 170, 194–5 [104] (the Court).

[81] Although these words were interpreted broadly by the majority in *O'Donoghue*: see at 617–18 [23] (Gleeson CJ), 627–8 [69]–[71] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). Cf Kirby J at 645–6 [140]–[143].

[82] Ibid 622 [42], 627 [66], [67] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[83] This largely derives from s 46(1)(a), which provides that an arrangement between the Governor-General and Governor of a state is 'for the performance … of the functions of a magistrate under this Act': ibid 628 [72] (emphasis omitted).

[84] Ibid 629 [76].

[85] Ibid. Cf Kirby J at 641–3 [129], 645 [139].

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A similar outcome was reached by the majority (Kiefel CJ, Gageler and Gleeson JJ, Jagot J relevantly agreeing on this issue) in *Huynh*.[86] How the anti-commandeering doctrine was invoked in the context of state legislation will be discussed below, but relevant for present purposes is their Honours' consideration of whether the impugned law imposed a duty. Division 3 of Pt 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) ('*CAR Act*') provides an avenue for inquiry into criminal convictions and sentences, which sits outside of appellate review by a court of criminal appeal.[87] Section 78(1) provides that '[a]n application for an inquiry into a conviction or sentence may be made to the Supreme Court', and s 79(1) provides that, '[a]fter considering an application under s 78 or on its own motion', the Supreme Court 'may' either direct that an inquiry be conducted by a judicial officer into the conviction or sentence' (sub-s (a)) or 'refer the whole case to the Court of Criminal Appeal' (sub-s (b)). Mr Huynh made an application under s 78 for review of his conviction, which was subsequently dismissed on the merits by Garling J.[88] His Honour was exercising the jurisdiction of the 'Supreme Court' pursuant to s 75, which provision provides that the jurisdiction of the 'Supreme Court' is to be exercised 'by the Chief Justice or a Judge of the Supreme Court who is authorised by the Chief Justice to exercise that jurisdiction'. Before the High Court, a question arose: was Garling J under a 'duty' to entertain Mr Huynh's application? The majority concluded that Garling J 'did not come under any enforceable obligation to entertain Mr Huynh's application by virtue of the authorisation under s 75 or by virtue of the application being allocated to him'.[89] Rather, his Honour made 'a choice' to entertain an application.[90] Central to this conclusion was s 79(3),[91] which provides an unfettered power by which 'the Supreme Court may refuse to consider or otherwise deal with an application'.

O'Donoghue and *Huynh* illustrate that the question of whether legislation imposes a duty is one of statutory construction: the statute must show that a state statutory officer is obliged to exercise a power or function. Yet the constructions adopted in *O'Donoghue* and *Huynh* raise one notable complexity. When legislation purports to confer a power or function upon a *class* of state officer, such as 'a Judge of the Supreme Court', the function must be allocated to a member of that class by those responsible for allocating those duties, which is often facilitated by an independent statutory process.[92]

[86] *Huynh* (n 9) 316 [82]–[83] (Kiefel CJ, Gageler and Gleeson J, Jagot J agreeing at 357 [298]). It was unnecessary for the minority to consider this question, as their Honours concluded that s 68(1) of the *Judiciary Act 1903* (Cth) could not pick up and apply ss 78 and 79 of the *Crimes (Appeal and Review) Act 2001* (NSW): see at 334 [176] (Gordon and Steward JJ).

[87] Cf *Huynh* (n 9) 305 [10] (Kiefel CJ, Gageler and Gleeson JJ).

[88] Ibid 304 [4] (Kiefel CJ, Gageler and Gleeson JJ), 317 [86] (Gordon and Steward JJ). See *Application of Huy Huynh under Part 7 of the Crimes (Appeal and Review) Act 2001 for an Inquiry* [2020] NSWSC 1356.

[89] *Huynh* (n 9) 316 [82] (Kiefel CJ, Gageler and Gleeson JJ), citing *O'Donoghue* (n 2) 618 [24] (Gleeson CJ).

[90] *Huynh* (n 9) 316 [83] (Kiefel CJ, Gageler and Gleeson JJ).

[91] Ibid 306 [19] (Kiefel CJ, Gageler and Gleeson JJ). See also ibid 322 [114] (Gordon and Steward JJ), 354 [280] (Jagot J).

[92] For example, in *O'Donoghue* (n 2) the legislation provided that the relevant Chief Magistrate could allocate functions to particular magistrates: see *Magistrates Act 2004* (WA) s 25; *Local Courts Act 1982* (NSW) s 14.

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If the function is allocated, then it may be accepted that the particular officer may be compelled to complete the task or exercise the power. But a person could not compel a particular state officer to whom the task had not been allocated to complete the task or exercise a power.[93] This means that legislation that confers a power or function will not, immediately by virtue of that Act, confer an enforceable obligation on a particular officer (ie, confer a 'duty'). This appears to have been the view adopted by Branson J, which was endorsed by Gleeson CJ in *O'Donoghue*: s 19(1) of the *Extradition Act* identified the *role* which was to be performed by a magistrate, but it was the statutory allocation mechanism that identified *who* was to exercise that role in a particular case.[94] It would, however, be a curious result if the character of a statutory function or power could change depending on whether or not it has been allocated by an entirely separate statutory process. The question must surely be capable of being answered by construing the legislation which confers the power or function. The better approach, which is consistent with the independence of the two statutory processes, is to consider whether the relevant statute imposes an enforceable obligation *independent of* any mechanism of allocation. On this approach, if, once the function is allocated, a state officer could be compelled to complete the task or exercise the power, then a 'duty' will exist.

Finally, there is the argument, alluded to earlier, that the anti-commandeering doctrine may apply to preclude the imposition of mere *powers* (or functions) upon state statutory officers.[95] The essence of a 'power' in this context is that the exercise of the power is not mandatory, either because the recipient may choose not to accept the conferral of the power or function (as in *O'Donoghue*), or because the recipient may choose not to exercise the power or function so conferred (as in *Huynh*). But it is difficult to see how the ability of a state to function as a government is impaired by the conferral upon a statutory office holder of a power which need not be exercised.[96] More is needed. A duty, on the other hand, is a power or function that *must* be exercised. The compulsion of state statutory officials and agencies at the hand of the Commonwealth, irrespective of the nature of the power or function conferred, falls foul of the *Commonwealth Constitution*. It 'curtails or interferes with the operations'[97] of a state by adding mandatory obligations upon such officers or agencies, whose functions are ordinarily to be exhaustively contained in the statute which establishes it.[98] In short, it places those state

[93] *Williams* (n 66) 222–3 [7] (Branson J), quoted in *O'Donoghue* (n 2) 619 [24] (Gleeson CJ).

[94] Ibid.

[95] See Lindell (n 33) 48–9, who places some reliance upon the inverse position falling from *Hughes* (n 2).

[96] Cf Walker (n 33) 192–3, where the author raises the possibility that the conferral of a discretionary power, that cannot be refused but need not be exercised, may impair the capacity of a state to function simply by 'requiring [the recipient] to decide whether to exercise the power or not'. However, that view was taken prior to the Court's decision in *Huynh* (n 9), which casts doubt on this possibility.

[97] *Spence* (n 36) 418 [100] (Kiefel CJ, Bell, Gageler and Keane JJ), quoting *Melbourne Corporation* (n 26) 75 (Starke J).

[98] Cf *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117, 128 (the Court) ('*Re Cram*'), cited in Hill (n 33) 214–5. See also Transcript of Proceedings, *O'Donoghue v Ireland & Anor; Zentai; Williams* [2007] HCATrans 723, 107–10 (SJ Gageler SC).

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agencies and officers 'in the position of subjects of the Commonwealth'.[99] That is not to say that the conferral of a mere power may not infringe the *Melbourne Corporation* principle. But it will not be a per se breach. Rather, a case-by-case assessment of the curtailment must be undertaken.

B. Statutory office holder

The limitation has been proposed as applying to 'the holder of a State statutory office', as opposed to simply a 'State officer'.[100] The distinction is important. A statutory office holder, as the name suggests, holds an office created by statute, to which duties and functions are specifically assigned by way of legislation, for example, a judicial officer,[101] a Solicitor-General,[102] or a corruption commissioner.[103] A 'State officer' is simply a person who carries out the duties and functions assigned to a body or person by legislation, for example, an associate to a judicial officer, a government lawyer, or a staffer to a Minister. There has been little attention paid to the significance of this confinement. The only member of the High Court to note the distinction was Gleeson CJ in *O'Donoghue*, who found it unnecessary to pursue the question any further.[104] Yet it is particularly interesting when one considers that the US anti-commandeering doctrine applies more broadly. In *Murphy*, Alito J noted that 'th[e] rule applies … not only to state officers with policymaking responsibility but also to those assigned more mundane tasks'.[105] This would seem to follow from the constitutional rationale of dual sovereignty that underpins the US doctrine: 'because states are sovereign over their own executive officers, *any* federal commandeering would violate state sovereignty'.[106]

It is doubtful that a similar position would be taken in the Australian context, at least insofar as it would amount to a per se breach of the *Melbourne Corporation* principle. That is because it is difficult to conclude that, in every case, the conscription of a state officer would impair the state's ability to function as a government, as opposed to merely affecting the 'ease' of a state's functioning.[107] As Moorhead has noted, 'the effect of commandeering State personnel is not to undermine the "constitutional

[99] Cf *Melbourne Corporation* (n 26) 55 (Latham CJ).

[100] See *O'Donoghue* (n 2) 614 [13] (Gleeson CJ), 622 [44] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Huynh* (n 9) 316 [81] (Kiefel CJ, Gageler and Gleeson JJ). But see *Austin* (n 7) 196 (BM Selway QC) (during argument) ('the State or an officer of the State'; 'a State, its institutions and its officers').

[101] See, eg, the powers, duties and functions assigned to Supreme Court judges under the *Supreme Court Act 1970* (NSW).

[102] See, eg, the powers, duties and functions conferred to the Western Australian Solicitor-General under the *Solicitor-General Act 1969* (WA).

[103] See, eg, the powers, duties and functions conferred on the Commissioner of the Corruption and Crime Commission under the *Corruption, Crime and Misconduct Act 2003* (WA).

[104] *O'Donoghue* (n 2) 616–17 [19]–[20].

[105] *Murphy* (n 3) 473. See also *Printz* (n 3) 929–30 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ).

[106] Gold (n 23) 260 (emphasis added).

[107] See *Western Australia v Commonwealth ('Native Title Act Case')* (1995) 183 CLR 373, 481 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also *Austin* (n 7) 301–2 [282]–[283] (Kirby J); *Spence* (n 36) 496 [313] (Edelman J).

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integrity of the States" in every instance'.[108] This was explained by the joint judgment in *O'Donoghue*:

> The proposition put to one side [in *Austin*] was that it is critical to the constitutional integrity of the States that they alone have the capacity to give directions to their officials and determine what duties they perform. Acceptance of such a proposition could lead to the invalidity of federal laws which merely affected the ease with which the States exercised their constitutional functions, rather than impaired the exercise of those functions.[109]

That said, outside of a per se breach, it stands to reason that the anti-commandeering doctrine could theoretically extend to the imposition of duties on state officers, rather than only those holding statutory office. This extension, however, would rely on there being an established impairment of the state body politic or independence so as to activate the *Melbourne Corporation* principle. It would require a bespoke analysis of the relevant impairment on a case-by-case basis.

The position differs with state statutory office holders. The status of the office affected – namely, one that has been statutorily created and vested with specific functions by Parliament – effectively elides the need for an assessment of the degree of impairment. As Stephen Gageler SC, as he then was, noted in argument before the High Court in *O'Donoghue*:

> a statute creating an office is ordinarily to be construed as requiring the holder of that office to have and to exercise only those functions, whether they be powers or duties, that the Parliament creating the office has chosen to vest in it.[110]

Federal compulsion of a state statutory office holder therefore represents an inevitable constitutional overreach by its very nature. This reasoning is important for a further reason. As both Kristen Walker and Graeme Hill SC have observed,[111] although the doctrine has been proposed as applying to 'the holder of a State statutory office' (ie, a natural person), this reasoning applies equally to state agencies or bodies that are created, and vested with powers and functions, by statute.[112]

C. State legislative approval

The final practical aspect of the doctrine relates to the effect of state consent to any federal commandeering. This is not an issue that has been fully explored in the US decisions,[113] seemingly because the cases focus more on the federal law exceeding

[108] Moorhead (n 10) 420.

[109] *O'Donoghue* (n 2) 625 [53] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted).

[110] Transcript of Proceedings, *O'Donoghue v Ireland & Anor; Zentai; Williams* [2007] HCATrans 723, 107–10. This submission falls from *Re Cram* (n 98) 128 (the Court).

[111] See especially Hill (n 33) 214–5. See also Walker (n 33) 192–3.

[112] See *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287, 292 [7] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Re Cram* (n 98) 128 (the Court).

[113] See Saunders (n 53) 191, citing *Printz* (n 3) 917–18 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ).

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constitutional power which arguably represents a constitutional obstacle even in the face of sub-national acquiescence.[114]

There is an academic consensus that no issue of constitutional immunity should arise where a state Parliament has agreed to the conferral of duties by Commonwealth law.[115] As Professor Zines has said, that power may be understood as implied or inherent in the *Constitution*.[116] But what if a state consents to the conferral of a duty by way of executive agreement? Although neither *O'Donoghue* nor *Huynh* rejected this possibility,[117] there is no principled basis for enabling executive agreement to consent to the conferral of duties on state statutory office holders or statutory bodies. An appreciation of the source of authority makes it plain that legislative approval is required: because the state legislature is the organ that has established the statutory office or body, its consent is needed.[118] As Gageler SC noted in argument during *O'Donoghue*, '[t]he Executive simply has no executive power … to add to the functions of a statutory office in the same way as the Executive has no power, statutory or otherwise, to alter the content of any other law made by the legislature'.[119] If further support were needed for this position, principles of representative and responsible government 'make[] it desirable to ensure that any consent is enshrined in legislation'.[120]

[114]*New York* (n 4) 182–3 (O'Connor J for Rehnquist CJ, O'Connor, Scalia, Kennedy, Souter and Thomas JJ).

[115]James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 7th ed, 2022) 412; Lindell (n 33) 48; Leslie Zines, 'Changing Attitudes to Federalism and its Purpose' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on The Australian Constitution* (Federation Press, 2003) 86, 99–100; Sir Anthony Mason, 'The Australian Constitution in Retrospect and Prospect' in French, Lindell and Saunders (n 115) 1, 18; Hill (n 33) 212–4.

[116]Zines, 'Changing Attitudes to Federalism and its Purpose' (n 115) 99–100. See also Hill (n 33) 213. The decision of *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 might be thought to provide some resistance to this conclusion. But as Hill has explained, the considerations that arise from Ch III are quite different: see at 213. The High Court has emphasised the 'exclusory operation' of Ch III: see, eg, *Rizeq v Western Australia* (2017) 262 CLR 1, 24–5 [58] (Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Rizeq*'). Whereas the Court in *Hughes* (n 2) did not impose an absolute prohibition on Commonwealth officers performing state functions: see at 553 [31] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). This conclusion flows from the nature of the *Melbourne Corporation*, which any anti-commandeering doctrine would closely align: 'If *Melbourne Corporation* is seen as a doctrine which preserves the legislative choice of the states, then ordinarily the existence of state "consent" to the conferral of the Commonwealth function would remove any *Melbourne Corporation* difficulty': Hill (n 33) 212–3.

[117]The majority in *O'Donoghue* (n 2) found it unnecessary to consider this question: at 616–7 [19]–[20] (Gleeson CJ), 622–3 [46]–[47] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). Cf at 647–54 [150]–[184] (Kirby J). Although it was again unnecessary to consider this question in *Huynh* (n 9), the argument was recorded in terms of requiring state 'legislative approval': see at 316 [81] (Kiefel CJ, Gageler and Gleeson JJ), 334 [176] (Gordon and Steward JJ).

[118]Further questions may arise as to what form state legislative approval should take and how relevant provisions should be interpreted. It is not necessary to analyse these ancillary issues in depth, save as to note that there was disagreement between Gleeson CJ and Kirby J on these issues in *O'Donoghue* (n 2), with Kirby J favouring the view that 'explicit approval' was required, whereas Gleeson CJ preferred a looser standard: cf at 618–19 [28]–[29] (Gleeson CJ), 632 [92], 655 [187] (Kirby J).

[119]Transcript of Proceedings, *O'Donoghue v Ireland & Anor; Zentai; Williams* [2007] HCATrans 744, 5302–6. See also *O'Donoghue* (n 2) 622–3 [46] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See also Kirby J at 653 [176].

[120]Lindell (n 33) 48. See also Saunders (n 53) 188.

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The corollary of this reasoning is that if a duty is imposed upon a 'State officer', who does not hold statutory office, then mere state executive agreement is sufficient to ameliorate any constitutional concerns.[121] Although, as argued above, any commandeering in this context would not operate as a per se breach of the *Melbourne Corporation* principle.

D. Limited role; some examples

Overall, there is some room for the anti-commandeering doctrine to operate in Australia in situations where a Commonwealth law seeks to trench on state governmental actors, outside of the *Commonwealth Constitution's* contemplation of such burdens. However, if the doctrine is to operate as a 'bright-line' rule – that is, a per se breach of the *Melbourne Corporation* principle – then it has been argued that there must be (i) the imposition of an administrative 'duty' on (ii) a state statutory office holder or statutory body, where (iii) this has not been acquiesced to by the relevant state legislature. Contrary to this view, Moorhead has argued that the anti-commandeering doctrine could not operate as a bright-line rule. The gravamen of his argument was that the commandeering of '*State officers* may or may not be repugnant to the federal structure of the *Constitution*, depending on the operation of the law'.[122] But that view was expressed prior to the developments in *O'Donoghue*, which saw a refinement of the proposed implication from 'State officers' to 'State statutory office holders'.[123] As argued above, refined in this way the doctrine overcomes what Moorhead saw as the fatal flaw in its operating as a bright-line rule.

This does not foreclose the potential expansion of the doctrine to 'State officers'. Nor does it preclude its applicability in circumstances where a mere power (or function) is conferred. But in those circumstances the anti-commandeering doctrine cannot operate as a bright-line rule which results in invalidity in every instance. Rather, a bespoke analysis would be undertaken into whether there is the requisite impact on state functioning. In other words, those broader conceptualisations would simply fall within the standard *Melbourne Corporation* inquiry. For that reason, the doctrine stands to have its greatest utility operating as a per se breach, though its ambit is accordingly narrower. To make good that final proposition, it is appropriate to consider some examples of Commonwealth legislative provisions currently on the statute books to which it could extend.

[121] See Transcript of Proceedings, *O'Donoghue v Ireland & Anor; Zentai; Williams* [2007] HCATrans 723, 360–2 (SJ Gageler SC). There may be an ancillary question as to which person or body of the state may give such executive consent, or whether consent of the 'State government' is needed: cf Walker (n 33) 196–7; Hill (n 33) 215.

[122] Moorhead (n 10) 418 (emphasis added). In so reasoning, he drew support from *AEU* (n 43) where the Court drew a distinction between the importance of different 'levels' of employee to the capacity of the state to exist independently.

[123] As noted above at n 100, in *Austin* (n 7) Selway QC argued for an implication that would apply to all state officers. However, the vice of its applying to state statutory officers was introduced by Gageler SC before the Full Federal Court and then the High Court: see *Williams* (n 66) 229 [45] (Tamberlin J); *O'Donoghue* (n 2) 601–2 (SJ Gageler SC) (during argument).

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To ensure the smooth running of the federation there are numerous examples where Commonwealth duties are imposed on state statutory office holders but where state legislation authorises such duties. This 'mirror' legislation, as described by Kirby J in *O'Donoghue*,[124] short-circuits the need for further inquiry. For instance, while the *Telecommunications (Interception and Access) Act 1979* (Cth) provides for duties to be imposed on an 'eligible authority' of a state, which includes Crime Commission and Police agencies at the state level,[125] there is state mirror legislation in place providing for recording and reporting obligations to be met in compliance with s 35 of the *Telecommunications Act*.[126] For example, s 35(1)(e) of the *Telecommunications (Interception and Access) Act 1979* (Cth) requires the 'responsible [state] Minister to give to the [Commonwealth] Minister' a written report relevant to the eligible authority's activities. The corresponding South Australian legislation then provides by s 6 of the *Telecommunication (Interception) Act 2012* (SA) that:

> The Attorney-General must, as soon as practicable after receiving a report under this Act, give a copy of the report to the Minister responsible for the administration of the Commonwealth Act.

There are also a number of legislative examples where Commonwealth legislation contemplates state consent being granted before a Commonwealth power or function is assigned to a state office holder.[127] One such example is the *Water Act 2007* (Cth) which indicates in s 134(2) that:

> The Director of Meteorology may, by writing, delegate any or all of his or her functions and powers under this Part to a person who holds, or acts in, an office or position:
>
> (a) with a State or a Territory, or an authority of a State or a Territory; and
> (b) at a level equivalent to that of an SES employee;
>
> if the State, Territory or authority agrees to the delegation.

Alternatively, cooperative federalist schemes also see shared authority and delegation from the Commonwealth to the states as feasible where there is jurisdictional agreement.[128] Thus, while each of these federal laws may impose a duty upon state statutory office holders, there is state legislative authorisation for the conferrals.

[124] *O'Donoghue* (n 2) 632 [91], 651 [166].

[125] *Telecommunications (Interception and Access) Act 1979* (Cth) s 5.

[126] See, eg, *Telecommunications (Interception and Access) Western Australia Act 1996* (WA); *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW); *Telecommunications (Interception) Act 2012* (SA); *Telecommunications (Interception) Tasmania Act 1999* (Tas); *Telecommunications Interception Act 2009* (Qld).

[127] However, as discussed in Part III(C), depending on confirmation by the High Court, there may be a constitutional issue with provisions with provide for state executive as opposed to state parliamentary approval: see, eg, *Archives Act 1920* (Cth) s 20(3).

[128] See, eg, *Fisheries Management Act 1991* (Cth) ss 61, 65. See also *Privacy Act 1988* (Cth) s 6F.

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Commonwealth provisions conferring functions upon a class of state judicial officer generally foreclose commandeering by making it clear that no 'duty' is imposed by reason of the function or power being a valid *persona designata* conferral, such that the judicial officer must consent to its conferral. Section 4AAA of the *Crimes Act* for example provides that non-judicial functions conferred on state or territory judges or magistrates or Justices of the Peace in criminal matters 'employed in a State or Territory court' are personally conferred and that the 'person need not accept the power or function conferred'.[129] Similarly, some Commonwealth provisions are drafted seemingly aware of the potential constitutional risk of Commonwealth overreach. For example, s 592(1) of the *Telecommunications Act 1997* (Cth) provides:

> A power conferred by this Act must not be exercised in such a way as to prevent the exercise of the powers, or the performance of the functions, of government of a State, the Northern Territory or the Australian Capital Territory.

A Commonwealth law that looks more like commandeering arises in in the delegation of fisheries responsibilities. The *Fisheries Administration Act 1991* (Cth) permits the CEO of the Australian Fisheries Management Authority to sub-delegate functions to an 'officer' under that statute which is defined to mean 'a member of the State or Territory police force'.[130] However, such a delegation upon members of the state police force would fall short of a per se breach by reason of their not being state statutory office holders. A better example might therefore be the *Surveillance Devices Act 2004* (Cth) which, in s 55(1), requires the Commonwealth Ombudsman to 'inspect the records of a law enforcement agency to determine the extent of compliance' with the Act. Section 6A defines 'law enforcement agency' to include state agencies, including Corruption and Crime Commissions and Police services. Then, under s 55(4), the 'Chief Officer' of the 'law enforcement agency', such as the Police Commissioner or Commissioner of the Crime Commission, is required to ensure that the agency staff provide the Ombudsman with 'any assistance the Ombudsman reasonably requires'. Should there be no state legislative approval for such cooperation, this conferral upon a state statutory officer holder could represent an example of a violation of the anti-commandeering doctrine.

This brief survey of the Commonwealth statute book reveals that the ambit of the anti-commandeering doctrine, as a per se breach of the *Melbourne Corporation* principle, may be limited. This is hardly surprising. As Dixon J famously remarked: 'In a dual political system you do not expect to find either government legislating for the other.'[131] This observation has even greater force in the context of the Commonwealth imposing enforceable obligations upon state officers or agencies which are established and vested with functions by statute. State legislatures, on the other hand, may more readily impose duties upon its statutory office holders or statutory bodies. The next Part of this article turns to consider how the anti-commandeering doctrine

[129] *Crimes Act 1914* (Cth) s 4AAA(1), (3).

[130] *Fisheries Administration Act 1991* (Cth) s 4.

[131] *Uther* (n 11) 529.

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may have relevance in that context, in light of the High Court's recent decision in *Huynh*.

IV. A new angle? Preventing state laws from applying as laws of the commonwealth

The anti-commandeering doctrine has been proposed as a limit on Commonwealth legislative power. However, the doctrine was invoked in the context of state, not federal, legislation in *Huynh*. The cogent submissions put forth by the Victorian Attorney-General in that case highlight how the anti-commandeering doctrine came to have potential relevance in this unlikely context.

A. Attorney-General (Cth) v Huynh

One of the central questions in *Huynh* was whether ss 78 and 79 of the *CAR Act* apply to a conviction by a New South Wales court for an offence under a law of the Commonwealth by force of s 68(1) of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*').[132] Section 68(1) operates to apply to 'persons who are charged with offences against the laws of the Commonwealth', in respect of whom jurisdiction is invested in state or territory courts under s 68(2), state (or territory) laws that apply to persons charged with state offences which answer the description of laws 'respecting' one or more of six designated categories of criminal procedure outlined in s 68(1).[133] These categories include, for example, the laws 'respecting … the procedure for … the hearing and determination of appeals arising out of [a] trial or conviction or out of any proceedings connected therewith'.[134] In so doing, s 68(1) picks up state law and applies it as a law of the Commonwealth.[135] However, s 68(1), by its terms, will only apply state laws 'so far as they are applicable'. The High Court has held that this qualification means that s 68(1) does not pick up and apply the text of a state law to the extent that in so applying as a Commonwealth law it would be inconsistent with the *Commonwealth Constitution*.[136] That is, state law will not apply as Commonwealth law if it would be contrary to the constitutional limits on Commonwealth legislative power, such as the *Melbourne Corporation* principle[137] or acquiring property on other than just

[132] The Court first considered the anterior question of whether ss 78(1) and 79(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) applied of their own force, and unanimously held that they did not: see *Huynh* (n 9) 308–9 [32]–[38] (Kiefel CJ, Gageler and Gleeson JJ), 326–7 [133]–[141] (Gordon and Steward JJ), 343–5 [219]–[232] (Edelman J), 350–1 [265] (Jagot J).

[133] See generally *Huynh* (n 9) 311 [48], 312 [55] (Kiefel CJ, Gageler and Gleeson JJ).

[134] *Judiciary Act 1903* (Cth) s 68(1)(d).

[135] *Putland v the Queen* (2004) 218 CLR 174, 178 [4] (Gleeson CJ) ('*Putland*'); *Huynh* (n 9) 348 [247] (Edelman J). See generally Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 362, 388–9.

[136] *Huynh* (n 9) 312 [58] (Kiefel CJ, Gageler and Gleeson JJ), citing *Putland* (n 140) 179 [7] (Gleeson CJ), 189 [41] (Gummow and Heydon JJ, Callinan J agreeing at 215 [121]). See also *Huynh* (n 9) 328–9 [149] (Gordon and Steward JJ), 338 [194] (Edelman J); *Tak Fat Wong v The Queen* (2001) 207 CLR 584, 602–3 [48] (Gaudron, Gummow and Hayne JJ).

[137] *Solomons v District Court of New South Wales* (2002) 211 CLR 119, 165–9 [128]–[139] (Kirby J) ('*Solomons*').

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terms.[138] In accordance with these principles, the Victorian Attorney-General submitted that s 68(1) may be prevented from picking up and applying ss 78 and 79 of the *CAR Act*. This is because, if picked up and applied, those provisions would infringe 'one or perhaps two limitations on Commonwealth legislative power',[139] with one of those limitations being the anti-commandeering doctrine.[140] As discussed above, a majority of the Court held that those provisions did not confer a 'duty', such that it was unnecessary to consider whether any anti-commandeering doctrine was infringed.[141] However, Victoria's submissions show that the anti-commandeering doctrine may have room to operate in the context of state legislation, as opposed to Commonwealth legislation.

At least two queries arise from the invocation of the anti-commandeering doctrine in *Huynh*. First, given that laws to which s 68(1) are directed will be laws 'relating to criminal matters', it may be thought that s 4AAA(3) of the *Crimes Act* applies to work powerfully against a finding of commandeering. However, there is good reason to suspect that s 4AAA would not have this effect in the context of s 68(1) of the *Judiciary Act*. This was alluded to by Basten JA in the Court of Appeal decision of *Huynh*.[142] Although his Honour did not precisely explain why this may be so, a persuasive reason was given by the Victorian Attorney-General in *Huynh*. It was submitted that the issue is a temporal one: the result of the law imposing a duty, and the anti-commandeering doctrine thus being infringed, is that the state law is *not* picked up.[143] Therefore, '[t]he translation of the State law into Commonwealth law simply will not occur.'[144] Accordingly, there is no 'law of the Commonwealth' to which s 4AAA(1) speaks, and the rule in s 4AAA(3) is incapable of applying.

Secondly, it might be thought that invoking the anti-commandeering doctrine in the context of state legislation is at odds with its basis: how can it be said that aspects of our federalist system are undermined when a state has itself enacted legislation which confers the particular function? Put in more practical terms, has the state Parliament not itself authorised the imposition of the duty by enacting the legislation in which the duty is found? There is force to this. However, the objection overlooks the fact that s 68(1) of the *Judiciary Act* translates the text of the state law into a law of the Commonwealth. Once this is properly appreciated it is entirely consistent with the doctrine's rationale

[138] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 623 [120] (Gageler J), 659–60 [228]–[230] (Edelman J).

[139] *Huynh* (n 9) 316 [80] (Kiefel CJ, Gageler and Gleeson JJ).

[140] Attorney-General for the State of Victoria, 'Submissions of the Attorney-General for the State of Victoria (Intervening)', Submission in *Attorney-General v Huynh*, S78/2022, 7 October 2022, 6 [17(4)] ('Victoria's Submissions in *Huynh*').

[141] *Huynh* (n 9) 316 [81]–[83] (Kiefel CJ, Gageler and Gleeson JJ).

[142] *Huynh v Attorney General (NSW)* (2021) 107 NSWLR 75, 111 [119].

[143] See, by analogy, observations in the context of s 79(1) of the *Judiciary Act 1903* (Cth): *Masson v Parsons* (2019) 266 CLR 554, 579 [42] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Masson*'). The qualifications in ss 68(1) and 79(1) have been held to operate in a like manner: *Putland* (n 135) 179 [7] (Gleeson CJ); *Huynh* (n 9) 310 [41] (Kiefel CJ, Gageler and Gleeson JJ).

[144] 'Victoria's Submissions in *Huynh*' (n 140) 8 [25].

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for it to preclude the state law applying. To be otherwise would, in effect, permit s 68(1) to exceed Commonwealth legislative power.[145]

B. Limited scope

At first blush, it might be thought that *Huynh* provides ample room for the doctrine to work in this context. However, the tight confines of common application provisions may mean this scope is much narrower.

Section 79(1) of the *Judiciary Act* is the most well-known application provision. It provides that 'the laws of each State or Territory' shall 'be binding on all Courts exercising federal jurisdiction in that State … in all cases to which they are applicable', 'except as otherwise provided by the Constitution or the laws of the Commonwealth'. The express qualification means that s 79(1), like s 68(1), will not pick up and apply state laws to the extent that in so applying as a Commonwealth law it would be contrary to the *Commonwealth Constitution*.[146] This might be thought to open the door for the anti-commandeering doctrine to operate. But, as Kiefel CJ, Gageler and Gleeson JJ emphasised in *Huynh*, there are 'important differences' between the purposes and operations of ss 68(1) and 79(1).[147] Section 68(1) picks up and applies state laws 'to *persons* who are charged with offences against the laws of the Commonwealth'. Section 79(1), on the other hand, is directed to courts: it makes the laws of each state 'binding on *all Courts* exercising federal jurisdiction in that State'. In *Huynh*, Kiefel CJ, Gageler and Gleeson JJ explained that this difference in focus stems from a difference in purpose. Section 68(1) is concerned with picking up aspects of state criminal procedure, so as to ensure that 'federal criminal law is administered in each State upon the same footing as State law and [to avoid] the establishment of two independent systems of justice'.[148] However, as was explained in *Rizeq v Western Australia* ('*Rizeq*'), s 79(1)'s purpose is narrower: it is confined to filling the gap in the applicable law in federal jurisdiction that exists by reason of an absence of state legislative power to regulate or govern the exercise of federal jurisdiction.[149] In accordance with this purpose, *Rizeq* clarified that s 79(1) is concerned only with state laws which regulate the exercise of jurisdiction,[150] meaning laws which are directed towards courts and the powers they require to hear and determine matters.[151] Section 79(1) thus 'operates only where there is already a court "exercising federal jurisdiction" … [t]he section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under State laws'.[152]

[145] Ibid 4–5 [15].

[146] *Solomons* (n 137) 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

[147] *Huynh* (n 9) 310 [42].

[148] Ibid, quoting *R v Murphy* (1985) 158 CLR 596, 617 (the Court).

[149] *Rizeq* (n 116) 18 [32] (Kiefel CJ), 36–7 [90]–[92], 41 [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[150] Ibid 41 [103] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Masson* (n 143) 574–5 [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[151] *Rizeq* (n 116) 15 [20] (Kiefel CJ), 41 [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[152] *Solomons* (n 137) 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), quoted in ibid 33 [82] (Bell, Gageler, Keane, Nettle and Gordon JJ).

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In its function in picking up and applying state laws that confer functions or powers on a court, s 79(1) of the *Judiciary Act* is an exercise of the legislative power conferred on the Commonwealth Parliament by ss 51(xxxix) and 77(iii) of the *Commonwealth Constitution*.[153] However, the anti-commandeering doctrine will not operate if there is something in the subject matter, content or context of a particular head of Commonwealth legislative power that indicates that the doctrine should not apply.[154] As has been explained above, s 77(iii) of the *Commonwealth Constitution* is of this nature, in providing that the Commonwealth Parliament may make laws investing state courts with federal judicial power.[155] The anti-commandeering doctrine cannot, therefore, extend to limiting the imposition of duties upon judicial officers in their capacity as a court, for s 77(iii) expressly contemplates this possibility.[156] Given that s 79(1) of the *Judiciary Act* is *only* concerned with laws that regulate or govern a court's exercise of jurisdiction, it follows that the anti-commandeering doctrine is unlikely to have a role to play in preventing state laws from being picked up by s 79(1).

The position differs with respect to s 68(1) of the *Judiciary Act*. Because s 68(1) is directed to *persons* charged with federal offences,[157] it is not confined to laws regulating the exercise of federal judicial power by courts. In other words, as Edelman J has explained, s 68(1) 'is not merely concerned with the judicial processes governing or regulating the jurisdiction of a court. It is also concerned with anterior and posterior process'.[158] The clearest express example in s 68(1) being laws 'respecting the arrest and custody of offenders or persons charged with offences'. Section 68(1) may, therefore, pick up state laws that confer non-judicial functions on bodies that are not courts.[159] That is why s 68(1) could operate to pick up ss 78 and 79 of the *CAR Act* in *Huynh*, which conferred a non-judicial function on a judicial officer *persona designata*.[160] Consequently, the same constitutional impediments that exist in the

[153] *Rizeq* (n 116) 21 [46], 24–5 [58]–[59], 26 [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[154] *O'Donoghue* (n 2) 615 [15]–[16] (Gleeson CJ), 622 [44]–[45] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[155] See ibid 615 [16] (Gleeson CJ). See also 'Victoria's Submissions in *Huynh*' (n 144) 8–9 [27].

[156] See Moorhead (n 10) 409, citing *Austin* (n 7) 268–9 [179] (Gaudron, Gummow and Hayne JJ).

[157] *Huynh* (n 11) 310 [42] (Kiefel CJ, Gageler and Gleeson JJ), 338 [195] (Edelman J). See generally Attorney-General for the Commonwealth, 'Appellant's Submissions', Submission in *Attorney-General (Cth) v Huynh*, S78/2022, 30 June 2022, 12–5 [33]–[39] ('Commonwealth's Submissions in *Huynh*'). Unlike s 79(1), legislative support for s 68(1) is not confined to ss 51(xxxix) and 77(iii) of the *Commonwealth Constitution*: see *Huynh* (n 9) 311 [47] (Kiefel CJ, Gageler and Gleeson JJ).

[158] *Huynh* (n 11) 345 [235] (Edelman J).

[159] See 'Commonwealth's Submissions in *Huynh*' (n 157) 12–4 [34]–[38]. As the Commonwealth Attorney's submissions comprehensively explain, this conclusion is not defeated by reason of s 68(2), which subsection invests jurisdiction in *courts*. Although laws picked up and applied by s 68(1) are identified by reference to the courts that have been invested with jurisdiction by s 68(2), the grant of jurisdiction is not co-extensive with the laws picked up by s 68(1). The laws that s 68(1) pick up may go beyond those regulating the exercise of judicial power by courts.

[160] It should be noted that the parties proceeded on this basis without argument to the contrary: *Huynh* (n 9) 337–8 [192]–[194], 339 [198]–[201] (Edelman J). Further, although the ultimate outcome of the procedure, under s 86 of the *Crimes (Appeal and Review) Act 2001* (NSW), was the exercise of judicial power, that does not mean that the nature of the function under ss 78 and 79 altered.

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context of s 79(1) of the *Judiciary Act* may – but will not always – be present in the context of s 68(1).

Although it is possible for the anti-commandeering doctrine to operate in the context of s 68(1), it is difficult to conceive of many instances where that will be so. Many laws that fall within the ambit of s 68(1) relate to criminal procedure in relation to judicial proceedings,[161] such that they are likely to regulate the exercise of jurisdiction by courts.[162] And those that operate outside of curial proceedings may preclude the doctrine's application in other ways: s 120 of the *Constitution* appears to expressly permit commandeering of the states in relation to laws respecting the 'custody of offenders or persons charged with offences', which is one of the six categories of criminal procedure in s 68(1); whereas it is difficult to find examples of commandeering upon state statutory office holders or statutory bodies (in the per se breach sense) in the context of state laws respecting other categories of criminal procedure such as 'the arrest … of offenders or persons charged with offences'.[163]

Thus, although *Huynh* illustrates a new potential for the anti-commandeering doctrine, its scope appears to be limited in the context of ss 68(1) and 79(1) of the *Judiciary Act*. Those provisions are not the only federal provisions which purport to pick up and apply state laws.[164] It may be that some of these other provisions have an operation which allows the anti-commandeering doctrine to operate. However, this issue is beyond the scope of this article.[165] This Part has simply served to highlight that the anti-commandeering may have relevance in the context of preventing state laws from being picked up and applied as laws of the Commonwealth.

V. Conclusion

Australian constitutional law inevitably invokes its fair share of crystal ball gazing. Such gazing suggests that the High Court may indeed be called on in the future to

[161] For example, the laws of a state respecting 'the procedure for' an offender's 'summary conviction' or 'the procedure for' an offender's 'trial and conviction on indictment'.

[162] *Huynh* (n 9) demonstrates that, at the very least, laws 'respecting' 'the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith' may confer a non-judicial power on a non-judicial officer (or judicial officer acting *persona designata*). That was because the exercise of non-judicial power under ss 78(1) and 79(1)(b) by a judicial officer acting *persona designata* to refer a case to the Court of Criminal Appeal was seen as an incident of the appellate power in s 86 of the *Crimes (Appeal and Review) Act 2001* (NSW), such that it fell within the ambit of s 68(1): see 315 [72], [74] (Kiefel CJ, Gageler and Gleeson JJ), 345 [232], 348 [248] (Edelman J). But see 337–8 [192]–[194], 339 [198]–[201] (Edelman J).

[163] In the context of laws respecting arrest, duties are commonly imposed upon 'State officers' such as police officers, as opposed to state statutory officers or agencies: see, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) Pt 8.

[164] See, eg, *Crimes Act 1914* (Cth) s 16E(1).

[165] For this to be so, these provisions would need to be qualified in the same way that ss 68(1) and 79(1) of the *Judiciary Act 1903* (Cth) are limited from picking up and applying state laws that would be contrary to the *Commonwealth Constitution*. However, whether or not such provisions contain like qualifications in their terms seems to be beside the point; for a state law to be validly picked up and applied as Commonwealth law, it cannot be contrary to limits on Commonwealth legislative power. Express words of qualification simply state the obvious.

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determine the applicability of the anti-commandeering doctrine in the Australian constitutional context. The doctrine's extension to Australia would seem to be in step with the intergovernmental immunity doctrine in acting as a limit on Commonwealth laws to protect the ability of the states to operate as key players within the federation.

It has nevertheless been opined that embracing an anti-commandeering doctrine in Australia would 'not … add[] very much to the analysis'.[166] If the doctrine were to embrace the imposition of mere powers or functions (without the duty to perform), or to extend to non-statutory state officers, then this is undoubtedly true. It would require a consideration of the particular impairment upon the state's functioning in every case, thus wholly overlapping with the standard *Melbourne Corporation* analysis. However, the doctrine has much to add if it is confined in its application to the levelling of an administrative duty upon a state statutory office holder or statutory body, in the absence of this being contemplated by the *Commonwealth Constitution* or the relevant state legislature. That is because, it has been argued, the imposition of enforceable obligations upon state statutory office holders or statutory bodies represents an inevitable constitutional overreach in the *Melbourne Corporation* sense. This confined operation therefore means the doctrine can operate as a bright line rule, obviating the requirement for undertaking a case-by-base analysis of the curtailment or impairment of the state's functioning. There is a significant advantage to this approach because, as Graeme Hill has noted, 'it is difficult if not impossible for the courts to assess whether a Commonwealth law actually undermines the functioning of the States as governments'.[167]

To the extent that anti-commandeering is accepted as a limit on Commonwealth laws in Australia, the US anti-commandeering jurisprudence is likely to have some influence on the High Court's development of the doctrine's boundaries. For example, recent US decisions like *Murphy*, suggest that it may not matter that a federal law imposes a negative obligation or prevents a state from doing something as opposed to compelling an affirmative act.[168] Other decisions have held that federal laws that apply 'evenhandedly' to states and private citizens will not easily implicate the doctrine.[169] However, much is also likely to be shaped by Australia's distinct constitutional framework, as shown by the jurisdictionally complex potential that *Huynh* has revealed. Regardless, to the extent that there is an Australian future for the anti-commandeering doctrine, the Australian states may well have another, albeit limited, string to their bow in the battle against Commonwealth-state incursion.

[166] Hill (n 33) 211.

[167] Graeme Hill, 'The State of State Immunity – *Clarke* and the *Austin* reformulation' (2011) 6(1/2) *Public Policy* 105, 115. See also Graeme Hill, '*Austin v Commonwealth*: Discrimination and the *Melbourne Corporation* doctrine' (2003) 14(2) *Public Law Review* 80, 83.

[168] See *Murphy* (n 3) 475 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ).

[169] Ibid 476 (Alito J for Roberts CJ, Kennedy, Thomas, Breyer, Alito, Kagan and Gorsuch JJ), quoted in *Haaland* (n 3) 283 (Barrett J for Roberts CJ, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ). See also *Reno v Condon*, 528 US 141, 143–4, 151 (Rehnquist CJ for the Court) (2000). But see Roderick M Hills Jr, 'The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't' (1998) 96(4) *Michigan Law Review* 813, 818.

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