

Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority (1997) 190 CLR 410

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Facts

- Dr Henderson owned a house which was leased by the Defence Housing Authority (**DHA**).
- Under s 5(1) of the *Defence Housing Authority Act* (Cth), the function of the DHA is to provide adequate and suitable housing for members of the Australian Defence Force and their families, officers and employees of the Commonwealth Department of Defence and their families.
- Dr Henderson sought orders from the NSW Residential Tenancies Tribunal (**Tribunal**) requiring the DHA to allow him to enter the premises for the purpose of inspection and give the owner a key to the premises.
- In response, the DHA maintained that it was not bound by the *Residential Tenancies Act 1987* (NSW) as it was immune from state laws about tenant disputes due to the Commonwealth government enjoying Crown immunity from State laws.

Issues

- Does the Tribunal, a New South Wales body, have jurisdiction over the DHA, a Commonwealth body established under section 4 of the *Defence Housing Authority Act 1987* (Cth)?

Held

- The High Court held that the DHA was created under section 61 of the Constitution (concerning the royal prerogative), so there was no actual law in which the NSW law could be in conflict.
- The High Court majority (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; Kirby J dissenting) held that the DHA is subject to the NSW Act.
- Dawson, Toohey and Gaudron JJ held that, where the Commonwealth has a pre-existing relationship with a citizen and a State passes a law which potentially affects that relationship, the State law will be valid so long as it is of general application and does not impose a disability on, or remove a privilege or immunity of, the Commonwealth.
- Brennan CJ (echoed by McHugh J) instead held that such laws would not be valid as the Commonwealth had not chosen whether to be subject to it.
- As five justices agreed that the Commonwealth will only be bound by State law where it has consented to be bound, this has the effect of making the Commonwealth executive superior to those of the States
- Four judges saw a distinction between the capacity of the crown which state law can not affect and the exercise of the crown authority which state law could affect.
- McHugh J thought it was too unrealistic to make that distinction, but held a state law could affect

the manner in which the performance of commonwealth duty.

- The High Court majority rejected the broad proposition that the Commonwealth cannot be bound by State legislation.
- Dawson, Toohey, Gaudron and McHugh JJ agreed that the States do not have the power to alter the legal relationships between the Commonwealth and its subjects.

Quotes

"No implication limiting an otherwise given power is needed; the character of the Commonwealth as a body politic, armed with executive capacities by the Constitution, by its very nature places those capacities outside the legislative power of another body politic, namely a State, without specific powers in that respect.... [T]he fundamental point made in *Cigamatic* is that in the absence of a like power being conferred upon the States, the priority of the Crown in right of the Commonwealth in the payment of debts is not something over which the States have legislative power."

Full Text

The full text is available here:

<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1997/36.html>

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