

CONSTITUTIONAL POWER AND EXTRATERRITORIAL ENFORCEMENT

JUSTICE DG HILL*

Whenever the question of State legislative competence arises three separate but interlocking themes may be identified. First, there is the principle of interpretation that legislation is given a construction which ensures its validity. Second, there is the requirement that, to be valid, State legislation requires some connection with the State. Finally, there is the question of enforcement of State revenue laws outside the jurisdiction. Each must, in its turn, be viewed against the background of the Commonwealth Constitution and the conferral of exclusive legislative power in some areas upon the Federal Parliament. It is convenient to deal here first with the Federal background before exploring the three themes to which reference has been made.

I. THE AUSTRALIAN CONSTITUTION AS A LIMITATION ON POWER

Generally the Australian Constitution will not be an impediment to a State levying stamp duty. The Constitution does not confer exclusive jurisdiction upon the Commonwealth to impose taxation and, as has been clear ever since the *Uniform Tax* case¹ if not before, Commonwealth and State taxing powers co-exist

* Judge of the Federal Court of Australia; Presidential Member of the Administrative Appeals Tribunal.

1 *South Australia v Commonwealth* (1941) 65 CLR 373.

provided that, where each level of government chooses to exercise its power, the Commonwealth tax rate is not set so high that it is practically impossible for the State to levy its own taxes. Where this is the case, the issue is not one of power but of politics.

However, the Constitution does confer exclusive jurisdiction upon the Commonwealth to impose a duty of excise.² Thus, should a State legislature impose a duty of excise in the guise of a stamp duty, the purported duty will be struck down by s 90 of the Commonwealth Constitution. This was the case with s 101A of the *Stamps Act* 1921 (WA) which imposed stamp duty on receipts and which was struck down in *Western Australia v Hamersley Iron Pty Ltd (No 1)*,³ to the extent that it purported to impose an ad valorem duty upon the sales proceeds of ore mined in Western Australia and supplied to buyers in Japan. The invalidity of the legislation was subsequently confirmed by the decision of the High Court in *Western Australia v Chamberlain Industries Pty Ltd*.⁴

Despite the plethora of cases discussing whether a particular impost was a duty of excise, there has really been little dispute as to the nature of an excise duty. It is a tax in respect of goods at any step in the production or distribution of those goods to the point of consumption.⁵ Rather, the area of disputation has been whether the question falls to be determined by reference to the substance of the legislation or its form. Should the Court look to the practical or substantial operation of the statute or confine itself to its legal operation?⁶

It was this difference of view which led to the High Court being equally divided in *Hamersley Iron*. Concentration on the form of the tax enabled those who favoured form to characterise the tax not as a tax upon the sale of goods but as a tax arising because payment for the goods was made outside the State.⁷ Those who saw the tax as a duty of excise emphasised that the requirement to pay the duty arose upon the receipt of the first sale price of goods produced in the Commonwealth.⁸

The receipt duty was not a traditional stamp duty, in that it was payable whether or not there was a form of receipt given. Even where stamp duty retains its traditional character of being a tax upon an instrument, there can be occasions where it may fall foul of s 90. For example, the legislation might impose a duty upon a motor vehicle certificate of registration by reference to the purchase price of the vehicle. Arguably the substance of such a tax would be a sales tax upon cars and thus a duty of excise.⁹ The provisions of the Rewrite¹⁰ defining the

2 Section 90 of the Constitution.

3 (1969) 120 CLR 42.

4 (1970) 121 CLR 1.

5 Cf *Bolton v Madson* (1963) 110 CLR at 271, and *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561.

6 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR at 186 and see *Capital Duplicators*, *ibid* at 591.

7 See *Hamersley Iron*, note 3 *supra* at 63, per Kitto J.

8 *Ibid* at 56, per Barwick CJ.

9 That is presumably why s 84G of the *Stamp Duties Act* 1920 (NSW) required the duty to be calculated by reference to the "value" of the vehicle, defined as the "market value" of the vehicle rather than the sale price, although the two would presumably be the same in an arm's length transaction.

dutiable value of new heavy vehicles (on which duty on motor vehicle certificates is payable) by reference to whichever is the greater of the consideration paid and market value, may give rise to such a question if implemented.

The issue is more likely to arise where the legislature departs from the traditional stamp duty formula and seeks to impose a tax on transactions rather than instruments. For example, a lease over private lands¹¹ for mining will be liable for duty under the Rewrite.¹² The duty will be payable by reference to the "rent". "Rent" is defined broadly and would include a royalty dependent upon production. Is a tax which depends upon production in a State within the scope of s 90 of the Constitution?

There are three other provisions in the Commonwealth Constitution which might require consideration in a particular case. First, s 114 of the Constitution prohibits a State from imposing a tax upon property of the Commonwealth. While the application of that provision to invalidate a State land tax imposed upon Commonwealth property is obvious enough, there are less obvious applications which could warrant attention. So, for example, stamp duty imposed upon conveyances which were the property of the Crown in the right of the Commonwealth might infringe s 114.¹³

Secondly, there is always s 109 of the Constitution. That section provides that, if there is an inconsistency between State and Federal law, the Federal law will prevail to the extent of the inconsistency. If the State law purports to invalidate a transaction implemented through Federal law, there could be an inconsistency. It might well be invalid for a State to impose stamp duty upon an order of the Federal Court and to purport to deny that order any effect unless the duty was paid upon it.¹⁴

Finally, it might be noted that s 52(1) of the Constitution makes it clear that no State has power to enact a law with respect to a Commonwealth place. Does that prohibit a State imposing stamp duty on a lease of land in a Commonwealth place, such as an airport, pursuant to a general charge of stamp duty on leases? The question has been raised in *Allders International Pty Ltd v Commissioner of State Revenue (Vic)*,¹⁵ where it was held that the *Stamps Act 1958 (Vic)* was not a law with respect to a Commonwealth place. An appeal from that decision has been removed to the High Court where, as at the date of writing, it remains undecided.

10 References in this paper to the Rewrite refer to the exposure draft issued on 31 July 1995 on behalf of the participating States, NSW, Victoria, South Australia and the Australian Capital Territory.

11 An example of such a transaction is to be found in *Commissioner of Stamp Duties v Henry* (1964) 114 CLR 322. The problem could not have arisen in that case as only nominal duty was found to be payable. It might have been otherwise if the duty could have been recalculated from time to time by reference to the coal in fact mined.

12 Chapter 4, clause 2.

13 Cf *Superannuation Fund Investment Trust v Commissioner of Stamps (SA) (No 2)* (1980) 80 ATC 4392.

14 Section 65 of the NSW Act seeks now to impose stamp duty on all orders of any court whereby NSW property is transferred to, vests in or accrues to any person and s 29, if applicable to such an order, would purport to render that order ineffective unless and until stamped.

15 (1995) 95 ATC 4257.

II. THE RULE OF INTERPRETATION

The British Parliament is theoretically under no legislative constraint at all. It may legislate as it thinks fit. It may impose taxes without territorial restraint, or for that matter without concern that its taxes may be unenforceable. Should the British Parliament be inclined to do so, it could impose a tax by reference to a dividend payable by one Australian company to another. It would not be to the point that the law of Australia might not enforce that tax and would not recognise the right of the company declaring that dividend to withhold the tax. The same may be said of the Australian Parliament.¹⁶

But while the English Parliament could legislate extraterritorially, it will not be presumed to have done so.

It is often said that the legislatures of the Australian States are subordinate legislatures. That is clearly so if what is meant is that the power of the State legislatures is constrained by the Commonwealth Constitution which confers upon the Commonwealth legislature certain exclusive legislative powers. However, the context in which the State legislatures have been said to be subordinate has been somewhat different. It is a context in which the State legislature is regarded as being inferior to and lacking in sovereignty, in comparison both with the British legislature and the Commonwealth Parliament. But whatever the sense may be in which it is correct to say that the State legislatures are subordinate, it is clear that any rule of territorial interpretation to be adopted in construing the legislation of the British Parliament will equally apply in interpreting the legislation of the State Parliaments.

Hence it can be said that the laws of a State will be construed so as to give them a territorial operation. As Dixon J said in *Barcelo v Electrolytic Zinc Co of Australasia Ltd.*¹⁷

The rule of construction confining general words to an operation which accords with the principles adopted in our Courts for the extraterritorial recognition of rights would, I think, be applied to a statute of the sovereign British Parliament containing provisions expressed as those of the Victorian enactment. There is no reason to consider it less applicable to the statute of a subordinate legislature. The circumstance that the power of the subordinate legislature is territorially restricted affords, if anything, rather more than less reason for applying the prima facie rule.

If it is accepted that there is some territorial constraint on State power, as the above passage suggests, then a State statute will be construed as not going beyond it. It is a generally accepted rule of interpretation that a statute will be construed in such a way as to ensure its validity. The rule is expressed in the Latin tag: *ut res magis valeat quam pereat*. It is a rule which could have no application to the British Parliament. However, as Isaacs J, delivering the judgment of the Court

16 So, for example, Australia can validly impose tax upon a non-resident shareholder in respect of a dividend received from another non-resident shareholder, provided the dividend is declared out of profits sourced in Australia: see *Nathan v Federal Commissioner of Taxation* (1918) 25 CLR 183, where an English payer of dividends to an English shareholder was not entitled to deduct the tax when paying a dividend as the contract of shareholding was governed by English law.

17 (1932) 48 CLR 391 at 427.

(Isaacs, Gavan Duffy and Powers JJ) in *Commissioners of Stamps (Qld) v Arnold Wienholt*,¹⁸ said:

To the Statute of a limited Legislature, however, that principle sometimes has strong application... When the Court is construing the enactment of a body whose powers are limited, it is material to bear in mind that the intention of the legislating body must have been to make its enactment effectual, and that it knew its effort would be futile if those limits were transgressed. Any such transgression must arise from inadvertence in expression, or from a mistaken belief as to the extent of power. In either case the error must clearly appear from the language used, and cannot be assumed.

In seeking to limit the territorial sweep of State legislation, the provisions of Interpretation Statutes have their place. Section 12(1)(b), for example, of the *Interpretation Act 1987* (NSW) requires references to locality, jurisdiction or other matters or thing in New South Wales statutes to be read as references to such localities, jurisdiction or matters and things in and of New South Wales. Where the *Stamp Duties Act 1920* (NSW) ("the NSW Act") requires a company issuing or allotting shares at the direction of another to make out an instrument and stamp that instrument¹⁹ and no territorial connection is made manifest, it would be appropriate to apply s 12(1)(b) to construe the provision as limited to acts of issuing or allotment taking place in the State. So construed, no question of invalidity would arise.

In modern stamp duty legislation the territorial nexus is often clearly spelled out. So, in *Myer Emporium Ltd v Commissioner of Stamp Duties*,²⁰ the Second Schedule charge to the NSW Act imposed stamp duty, inter alia, on transfers of shares in companies incorporated in NSW, irrespective of the location of the share register upon which those shares were, as well as transfers of shares on registers in NSW. Thus, the only question for decision was whether the connection chosen was valid, a question decided in favour of the Commissioner.

By contrast, in *ACI Resources Ltd v Commissioner of Stamp Duties (NSW)*,²¹ the issue for decision was the identification of the territorial connection applicable to loan security duty where the specific charging provision was expressed in general terms. It was held in that case that resort could be had to s 29 of the NSW Act, which provided that unstamped instruments executed in the State or relating, wherever executed, to any matter or thing done or to be done in the State, should not be available to be given in evidence or effective for any purpose, to determine the relevant connection with the State. Thus, a mortgage executed outside the State over property outside the State and providing for payment of principal and interest outside the State but which provided for registration in the State, was liable for duty. The mortgage was one which related to something required to be done in the State.

It is only when the territorial connection has been identified as a matter of interpretation that the question of legislative power arises.

18 (1915) 20 CLR 531 at 540.

19 Section 94A.

20 (1967) 68 SR (NSW) 220.

21 (1986) 86 ATC 4810.

III. TERRITORIAL LIMITATION: THE TRADITIONAL VIEW

The Constitution of New South Wales²² derives from an Act of the Imperial Parliament and it must thus be said that the powers of the State to legislate derive from that Imperial Act. When Australia was first colonised, the view prevailed among the Crown law officers that laws made by colonial legislatures in accordance with powers conferred upon them should not be confirmed or sanctioned by the Crown but should be null and void if purporting to "... regulate, to prevent, or punish any acts done on shipboard beyond those (ie the Territorial) limits..."²³

The basis of the view is not the subject of great discussion.²⁴ Inherent in it may well be the practical fear that, if the various colonial legislatures could all legislate extra-territorially, the laws of one colony could be repugnant to the laws of another, or each could be repugnant to the laws of the Imperial Parliament. The latter problem was dealt with in the *Colonial Laws Validity Act 1865* (UK), by ensuring the supremacy of the Imperial legislature.

The view that the colonial legislatures had power only to legislate within their own jurisdiction persisted into the final years of the last century. It gained strength from the decision of *Macleod v Attorney-General for New South Wales*,²⁵ where the Privy Council interpreted the language of a New South Wales criminal statute directed at bigamy as applying only to persons actually within the jurisdiction, on the basis that the colonial legislature had no power to subject persons outside the jurisdiction to its criminal laws.

The rationale for the view that the jurisdiction of the colonial courts was territorially circumscribed may well also have been based more on the paternalistic concept of the relationship of the colony to the United Kingdom, than to legal principle. The very concept of the colonial legislature being "subordinate" suggests limitation of power. One may ask rhetorically, subordinate to what? The fact that the colonial power to legislate derived from an Imperial statute did not necessitate the view that there was some implied limitation of power not to be found in the statute conferring power. It was certainly clear by 1883 when the Privy Council decided *Hodge v The Queen*,²⁶ that the colonial legislature was more than a mere delegate of the mother parliament which had created it. Nor did it act under any mandate from the Imperial Parliament. Rather, the authority of the colonial legislature was, within the limits of power conferred upon it, supreme, with like powers to those of the Imperial Parliament.

In 1932 the High Court held a taxing provision of a State Act to be invalid by a majority of four to three, on the basis that the legislation had too remote a connection to the State to be characterised as a law "for the peace, welfare and

22 The *Constitution Act 1902* (NSW).

23 See the Circular dated 16 December 1842 reprinted in DP O'Connell and A Riordan (eds), *Opinions on Imperial Constitutional Law*, Law Book Company (1971) at p 89.

24 See the collection of documents in *Opinions on Imperial Constitutional Law*, *ibid* at pp 84ff, and DP O'Connell, "The Doctrine of Colonial Extra-Territorial Legislative Incompetence" (1959) 75 *Law Quarterly Review* 318.

25 [1891] AC 455.

26 (1883) 9 App Cas 117.

good government of New South Wales".²⁷ By the Act, the NSW Parliament had sought to include in the dutiable estate, upon which death duty was charged, the full value of shares held by a deceased person in a company carrying on business in the State. The case thus stood for the propositions that there was a limitation on the power of the State to enact laws; that that limitation was to be found in the words "peace, welfare and good government" in the conferral of power; that it was justiciable whether the legislation came within those words; and that there was a question of degree involved.

In 1933 the Privy Council decided the famous case of *Croft v Dunphy*.²⁸ It was held that the Canadian Parliament could validly enact customs laws permitting the seizure of property outside the then applicable three mile territorial limit (the so called "Hovering Acts"). The argument was put and rejected that the Parliament of Canada, being a subordinate legislature, with power to make laws for the peace, order and good government of Canada, was restricted territorially. The Privy Council said:

Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada (sic) or as being one of the specific subjects enumerated in s 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.²⁹

It is interesting to note that their Lordships raised the possibility that legislation of Canada (and therefore, that of any State of the Commonwealth) may be held to be invalid if it infringed the principles of international law, on the assumption that it might be inferred that the Imperial Parliament had not conferred power to legislate contrary to these principles. It was a possibility which the Court had no need to consider. If the question is one of assumption or perhaps presumption, then there could be scope to argue in 1996 that the Imperial Parliament could not be presumed to have conferred upon any colonial parliament power to legislate to abridge any fundamental freedom, including freedom of speech. This possibility was not picked up again until the decision of the High Court in *Union Steamship Company of Australia Pty Ltd v King*,³⁰ where again it was not explored.

The case of *Broken Hill South Ltd v Commissioner of Taxation (NSW)*³¹ raised the validity of a provision of the income tax legislation of NSW which sought to tax interest on any mortgage over property in the State, irrespective of the domicile or residence of the payee of that interest. Five members of the Court were of the view that the legislation was valid. Rich J dissented. The leading judgment is that of Dixon J. It has often been cited since. His Honour stated the issue as being whether the provision in question exceeded the "territorial limitations upon the legislative power",³² and continued:

27 *Commissioner of Stamp Duties (NSW) v Millar* (1932) 48 CLR 618 at 630.

28 [1933] AC 156.

29 *Ibid* at 163.

30 (1988) 166 CLR 1 at 10.

31 (1937) 56 CLR 337.

32 *Ibid* at 375.

The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicile, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers.

What is not usually quoted is the following:

No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen.³³

In the same case, Evatt J pointed out that constitutionally speaking the status of the States and that of the Commonwealth were equal or “co-ordinate”. His Honour said:

In relation to such a subject matter as that of taxation, and subject, of course, to any overriding provision of the Commonwealth Constitution, it is quite impossible to deny to the States in relation to their geographical area constitutional powers precisely analogous to those possessed by the Commonwealth Parliament in relation to its geographical area. The legislation of the States cannot be deemed ultra vires merely because of territorial reasons, unless analogous legislation of the Commonwealth Parliament would similarly be deemed unconstitutional and void.³⁴

Despite this comment, the High Court did take a different view of the legislative competence of a State as compared with the Federal Parliament. That this is so can be seen by contrasting *Trustees Executors & Agency Co Ltd v Federal Commissioner of Taxation (Bell's case)*³⁵ with decisions such as *Commissioner of Stamp Duties (NSW) v Perpetual Trustee Company Ltd (Watt's case)*³⁶ and *Vicars v Commissioner of Stamp Duties (NSW)*.³⁷ The Evatt J view, expressed in *Bell's case*, was that it would be a rare case indeed where legislation did not satisfy the requirement that it be for the peace, order and good government of the Commonwealth. As applied to taxing statutes, his Honour said:

... it is obvious that the gathering of a revenue for Commonwealth purposes by any system of taxation is a matter of direct and vital concern to the Commonwealth. The method of taxation adopted can only be criticised from the point of view of hardship or political opinion. Such a criticism is irrelevant.³⁸

Logically, what his Honour says is correct. If one focuses on the combination of words “peace, order and good government” or similar alternatives, it is hard to see how taxation as the price of good government could do otherwise than fall

33 *Ibid.*

34 *Ibid* at 378.

35 (1933) 49 CLR 220.

36 (1926) 38 CLR 12, see particularly at 31, per Isaacs J.

37 (1945) 71 CLR 309.

38 Note 35 *supra* at 241.

within them. Yet where State taxation laws have been examined by the High Court, the Court has repeated the mantra that State taxation laws had to be territorial.

The high point of those decisions which required State taxation laws to be territorially connected was the decision of the Privy Council in *Johnson v Commissioner of Stamp Duties*.³⁹ The relevant legislation purported to include in the dutiable estate for the purposes of calculating death duty, property in which a deceased person had an estate or interest for life. Where the deceased was domiciled in NSW the basic operation of the section was extended to property situated outside the State at the date of death. It was held that the extension to property outside the State was invalid. The domicile of the deceased chosen by the legislature as the touchstone of liability was an insufficient connection with the State to ground validity.

IV. STATUTORY INTERVENTION

The United Kingdom Parliament sought to settle, at least in one respect, the status of colonial laws by the *Colonial Laws Validity Act 1865* (UK). This Act provided that no colonial law should be void on the ground of repugnancy to the law of England, other than an Act of the Imperial Parliament extending to the colony or order or regulation made under such Act. Nevertheless, there was concern in the second and third decade of this century as to the relationship between the United Kingdom and the Dominions. This concern found expression in the Balfour Declaration of 1926 which said of the relationship:

They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.⁴⁰

To give legal effect to the principles behind the Balfour Declaration, the Imperial Parliament passed the *Statute of Westminster* in 1931. It provided (by s 3) that the Parliament of a Dominion had full power to make laws having extra-territorial operation. However, that statute applied only if adopted by the Dominion. Australia adopted it in 1942.⁴¹ The statute had no application to a State. However, having regard to what had been said by the Privy Council in *Croft v Dunphy*,⁴² it can readily be argued that the *Statute of Westminster* had no real substantial effect at all so far as applicable to the Dominions.

39 [1956] AC 331.

40 *Report of Imperial Conference* (1926) Cmd 2768.

41 *Statute of Westminster Adoption Act 1942* (Cth).

42 Note 28 *supra*.

V. THE AUSTRALIA ACT AND BEYOND

1986 saw the enactment of complementary legislation in the United Kingdom, the various States and by the Commonwealth, compendiously referred to as the *Australia Act*.⁴³ Any doubt as to the power of a State to legislate extraterritorially was put to an end. The *Colonial Laws Validity Act* 1865 (UK) was thenceforth not to apply to the States. The legislative power of the Parliament of each State was, according to s 2(1) of the *Australia Act*, to include:

full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

Further, it was declared (in s 2(2)) that:

the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing ... confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

The *Australia Act* is not expressed to operate retrospectively. It may not operate to validate a law passed before 1986 if it were otherwise invalid. What then is the position with regard to legislation passed after the commencement date? Importantly, has the *Australia Act* changed the law?

The following propositions can be confidently asserted:

1. Legislation of a State will not be held invalid merely because it is extraterritorial.
2. The Parliament of a State will, subject as hereafter set out, have the same power to legislate as the Imperial Parliament.
3. The powers of a State Parliament will be subject to the provisions of the Commonwealth Constitution.
4. Subject to 3, the only restraint upon the power of a State will be the requirement that a law passed by it be for the peace, order and good government of the State.
5. There will be a presumption in interpreting State legislation, just as there is in interpreting UK or Commonwealth legislation, that the legislature intended to legislate territorially, and in such a way as to be effective.

It has been noted that it had been clear, ever since *Croft v Dunphy*⁴⁴ if not before, that such limitation as there was to the power of a State to legislate extraterritorially was to be found in the words of the grant of power to legislate, that is, the formula "peace, order and good government of [the] State." Thus on its face, the *Australia Act* appears to have had no legal, but only symbolic, effect. The question remaining to be answered, however, is the extent to which those words render justiciable an inquiry into whether particular legislation falls within the formula, and particularly in the context of taxation legislation, whether there is

43 *Australia Act* 1986 (Cth), the *Australia Acts (Request) Act* 1985 (NSW) and identical acts in the other States, form the Australian end of the legislative scheme. The Imperial Act, the *Australia Act* 1986 (UK), completes it.

44 Note 28 *supra*.

now a need to seek a relevant, direct connection with the State for the legislation to be valid.

*Union Steamship Company of Australia Pty Ltd v King*⁴⁵ was decided with respect to facts and legislation arising before the *Australia Act* came into effect. At issue was the validity of a section of the *Workers' Compensation Act 1926* (NSW), concerned with injuries to seamen employed on a New South Wales registered ship or a ship whose first port of clearance and whose destination were in New South Wales. It was submitted that registration of a ship in New South Wales was an insufficient nexus with the State to support the validity of the legislation. The submission was rejected. The unanimous judgment of the High Court, Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ, considers the historical background, to which reference has already been made. The Court made the point that it was *now* accepted (that is to say before the *Australia Act*) that colonial legislatures had the power to make laws which operated extraterritorially.⁴⁶ Reference was made with approval to that part of the judgment of Evatt J in *Bell's case*⁴⁷ where it is said that the supposed territorial restrictions on State Parliaments were confined to "a very small compass indeed". The Court did not indicate whether it approved or disapproved the later comments in that judgment, to the effect that tax matters will always be for the "peace, order and good government" of the taxing State. However, it refused to accede to a submission that the traditional expression of territorial limitation as enunciated by Dixon J in *Broken Hill South*⁴⁸ was now too restrictive, arguing that the State legislatures now stood in the same position as the Imperial legislature and were free from restraint. The Court said:

The short answer to this contention is that the nineteenth century decisions, in comparing the scope and extent of the grant of legislative power to colonial legislatures with the power of the Imperial Parliament, explicitly qualified that comparison by reference to the limits of the grant itself... Accordingly, the nineteenth century decisions do not deny that the words "peace, order and good government" may be a source of territorial limitation, however slight that limitation may be. As each State Parliament in the Australian federation has power to enact laws for its State, it is appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant ...⁴⁹

Their Honours then make reference to the *Australia Act* and the question whether that may have made a difference. The following comments are dicta, but obviously very persuasive dicta:

it is appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant, notwithstanding the recent recognition in the constitutional rearrangements for Australia made in 1986 that State Parliaments have power to enact laws having an extraterritorial operation... That new dispensation is, of course, subject to the provisions of the Constitution (see s 5(a) of each Act) and cannot affect

45 Note 30 *supra*.

46 The cases of *Bonser v La Macchia* (1969) 122 CLR 177; *R v Bull* (1974) 131 CLR 203; *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337; and *Pearce v Florenca* (1976) 135 CLR 507 support this proposition. None of the cases, of course, are tax cases.

47 Note 35 *supra*.

48 Note 31 *supra*.

49 Note 30 *supra* at 13-14.

territorial limitations of State legislative powers inter se which are expressed or implied in the Constitution. That being so, the new dispensation may do no more than recognise what has already been achieved in the course of judicial decisions. Be this as it may, it is sufficient for present purposes to express our agreement with the comments of Gibbs J in *Pearce*... where his Honour stated that the requirement for a relevant connexion between the circumstances on which the legislation operates and the State should be liberally applied and that even a remote and general connexion between the subject-matter of the legislation and the State will suffice.⁵⁰

VI. CONCLUSION

So for the moment it would seem that there is still to be found some territorial restraint upon State legislatures inherent in the grant of power to them to legislate for "the peace, order and good government" of the State. That restraint will be of small compass and the power of the State to legislate will be liberally construed. It may be that the position of the States in the Federation, and the practical requirements that they be subject to Commonwealth supremacy in areas of exclusive Commonwealth competency and that conflict between the States be minimised, may require a distinction to be drawn between the States on the one hand and the Commonwealth on the other, notwithstanding that the language of grant in all cases is the same, or substantially so. There is a question how far a court can go in determining whether a particular law is for "the peace, order and good government" of the State. In *Union Steamship*, the Court, somewhat confusingly, refers to the words "peace, order and good government" as not being words of limitation of power at all, while accepting that they are the source of whatever territorial limitation is still to be found. So the Court makes the point that a court could not, in the course of judicial review, hold to be invalid a law of a State on the ground that it did not secure the welfare and the public interest of the State. The decision of the Court of Appeal in *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations*⁵¹ demonstrates the difficulty of justiciability of the words.

The question remains in the area of State taxes whether today a court would strike down legislation as being without power because there is insufficient or no connection with the State, notwithstanding that the tax imposed operates to benefit the coffers of the State. The logical answer should be that of Evatt J in *Bell's case*. But so to decide would be to concede that numerous earlier decisions of the High Court proceeded upon a wrong premise. The question is far from academic. One example from the Rewrite serves to illustrate the point. An acquisition of dutiable property will give rise to a liability for duty if the proposed provisions become law. Shares in a corporation incorporated outside the jurisdiction will be dutiable property if the corporation in question has a registered office in the jurisdiction, whether or not the shares are registered in a register kept in that jurisdiction. The duty is payable primarily by reference to the value of the shares. If the fact that the Rewrite is a tax law suffices to bring it within power, there is no difficulty. If,

50 *Ibid.*

51 (1986) 7 NSWLR 372.

however, the traditional law applies, it will be necessary to determine whether the connection with the State, the operation of a registered office in the State, is a sufficient nexus to levy tax on a transfer of those shares by reference to the overall value of the shares, where the shares are neither situated in the State nor are held in a corporation incorporated in the State.

VII. ENFORCEMENT OF STATE STAMP DUTY

The private international law rule is that the courts of one jurisdiction will not enforce the revenue laws of another jurisdiction.⁵² It is a rule regarded as well settled by the time of Lord Mansfield CJ,⁵³ although its earlier origins are harder to trace. Not only would there be no enforcement of foreign revenue law, but the courts would not do indirectly that which they would not do directly.⁵⁴

Of course inroads may be made on that private international law rule by international treaty or unilateral legislation. An example is to be found in s 29(2)(a) of the *Bankruptcy Act* 1966 (Cth), discussed in the Federal Court in *Ayres v Evans*.⁵⁵ The occasion of such inroads is outside the present discussion. It suffices to say that, as a general rule at least, State stamp duty would not be enforceable in a foreign jurisdiction outside Australia.

It is difficult to imagine in the 1990s that the States of Australia should be seen to be foreign to each other for the purpose of such a rule. The operation of the rule in a federation (or perhaps more accurately its inappropriateness) is discussed in *Government of India v Taylor*.⁵⁶ The discussion is dicta and is inconclusive. *Permanent Trustee Co (Canberra) Ltd v Finlayson (Niesche's Case)*⁵⁷ potentially raised the issue, but when the legislation was properly construed the question evaporated. Although some⁵⁸ would confine s 118 of the Commonwealth Constitution, and its territorial equivalent the *State and Territorial Laws and Records Recognition Act* 1901 (Cth), to substantive rather than procedural laws, there is really no reason why the direction that the courts of a State (or Territory) give full faith and credit to the laws of another State (or Territory) should not be obeyed in terms. Why should these provisions not mean what they say, with the consequence that the courts of one State could enforce the revenue laws of another State, that is to say, if it be necessary at all in a federation for there to be legislative intervention?

One reason why the problem has probably not arisen is that it is now clear that the revenue authorities can circumvent the rule. By availing themselves of the *Service and Execution of Process Act* 1992 (Cth),⁵⁹ proceedings for recovery of

52 See, for example, *Municipal Council of Sydney v Bull* [1909] 1 KB 7; *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491.

53 See, for example, *Holman v Johnson* (1775) 1 Cowp 341; 98 ER 1120.

54 See, eg *Bath v British and Malayan Trustees Ltd* (1969) 90 WN (Pt 1) NSW 44.

55 (1981) 39 ALR 129.

56 Note 51 *supra*.

57 (1968) 122 CLR 338.

58 See PE Nygh, *Conflict of Laws in Australia*, Butterworths (6th ed, 1996) at p 13ff.

59 Section 15(1).

State stamp duty can be brought in the State where the revenue authority is and served outside that State on the person liable to pay the duty. Once judgment is obtained, that judgment can then be registered in the Supreme Court of the place where the creditor resides and enforced as if a judgment of that Court.⁶⁰ It would seem to be no defence to such an enforcement that the original judgment originated from a tax debt: *R v White (Chief Collector of Taxes of the Territory of Papua New Guinea); Ex parte TA Field Pty Ltd.*⁶¹

60 See Pt 6 of the *Service and Execution of Process Act 1992* (Cth).

61 (1975) 133 CLR 113.