

**COMMONWEALTH PLACES ACQUIRED FOR PUBLIC  
PURPOSES AND STATE TAXES ON COMMONWEALTH  
PROPERTY: A CONSIDERATION OF SOME CONSTITUTIONAL  
ISSUES RELATING TO STAMP DUTIES**

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## I. INTRODUCTION

The decision of the Supreme Court of Victoria in *Alders International Pty Ltd v Commissioner of State Revenue of Victoria*<sup>1</sup> provides an opportunity to consider a number of interesting constitutional questions relating to the operation of State stamp duties on transactions involving land in Commonwealth places.<sup>2</sup> Firstly, does s 52 of the Commonwealth Constitution, which gives the Federal Parliament power with respect to Commonwealth places acquired for public purposes, immunise the Commonwealth from the imposition of State stamp duties on transactions involving these places? Secondly, could s 52 be used to pass legislation immunising transactions involving Commonwealth public places from the operation of State stamp duties, and would the power be subject to any restrictions? Thirdly, does the requirement in s 52 that the Commonwealth's

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1 (1995) 129 ALR 678.

2 An appeal from this decision was heard by the Full High Court on 19 and 20 March, 1996 (M062/95). At the time of writing, judgment was reserved.

places be “acquired for public purposes” limit the Commonwealth’s power under s 52?

It will be submitted in this paper that s 52 does provide the Federal Parliament with power to impose stamp duties on transactions concerning Commonwealth public places, and further, that s 52 does immunise the Commonwealth from State stamp duties. In addition, the requirement of s 52 that a Federal law be a law with respect to Commonwealth places acquired for “public purposes” does not, in any relevant way, operate as a limitation on the power.

It is also submitted in this paper that s 114 of the Commonwealth Constitution immunises the Commonwealth from State stamp duties in respect of transactions where the Commonwealth is purchasing an interest in property - and *may* immunise from State taxes *any* property transaction to which the Commonwealth is a party.

## II. THE FACTS, ARGUMENTS AND HOLDING IN *ALLDERS’* CASE

The facts of *Allders* were straightforward. Allders was lessee of part of the Tullamarine Airport, owned by the Federal Airports Corporation. The Victorian Commissioner of State Revenue levied stamp duty upon the instrument of lease pursuant to the *Stamps Act* 1958 (Vic). Allders challenged the validity of the levy on the basis that s 52 of the Commonwealth Constitution excluded the Commissioner of State Revenue from levying the stamp duty in respect of this Commonwealth place. Section 52 of the Constitution provides:

The Parliament shall, subject to this Constitution, *have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:*

- (i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;
- (ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;
- (iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament. (Emphasis added).

Harper J of the Supreme Court of Victoria had “little difficulty” concluding that, in the circumstances, Tullamarine Airport was a Commonwealth place within the meaning of s 52.<sup>3</sup> Under s 29(1) of the *Federal Airports Corporation Act* 1986 (Cth), Federal airports (including, relevantly, Tullamarine) are held by the Federal Airports Corporation on behalf of the Commonwealth. Having established that the relevant land was part of a “Commonwealth place”, it remained to be decided whether the stamp duty legislation operated over that land.

Here, Harper J had regard to the decision of the High Court of Australia in *Worthing v Rowell & Muston Pty Ltd.*<sup>4</sup> That case concerned the question whether the Royal Australian Air Force Base at Richmond in New South Wales was a Commonwealth place within s 52, and whether State occupational health and

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<sup>3</sup> Note 1 *supra* at 680.

<sup>4</sup> (1970) 123 CLR 89.

safety regulations validly operated within that Commonwealth place. Harper J referred to the judgment of Kitto J (dissenting), who considered the meaning of the prefatory words "with respect to" in ss 51 and 52 of the Constitution, and stated that the phrase "refers to such a direct and substantial connexion between a law and a specified topic that the law is in point of character a law on that topic."<sup>5</sup> Applying this test, Harper J concluded that duty imposed under the *Stamps Act 1958* (Vic) was correctly characterised as a tax in respect of the *instrument* of lease, rather than a tax in respect of the *property* in the Commonwealth place. That Commonwealth property was merely the subject matter of the lease:

The tax does not attach to land, except in so far as the taxable instrument evidences a lease over land. It is the existence of the instrument which is the essential element. It is with the instrument that the tax has a direct and substantial connection. It does not, it seems to me, have a direct and substantial connection with land. It does not impinge upon what is done on land, except to the extent that an instrument of lease is involved.<sup>6</sup>

Consequently, since the Victorian Act was characterised as a law with respect to an instrument, not a Commonwealth public place, the operation of the duty imposed by the *Stamps Act 1958* (Vic) was not inconsistent with the exclusive grant in s 52 of the Constitution.

### III. SECTION 52: WHAT IS THE SCOPE OF THE POWER AND HOW "EXCLUSIVE" IS IT?

Although s 52 was held not to exclude State stamp duties in this instance, Harper J, in obiter, suggested that the Commonwealth could exercise its power under s 52 to pass legislation imposing taxes with respect to Commonwealth places.<sup>7</sup> It is submitted that this view is correct. The power of the Federal Parliament to pass laws with respect to Commonwealth public places under s 52(i) is plenary. A law imposing taxes in Commonwealth places would be properly characterised as a law with respect to Commonwealth places. Section 52, a plenary power, could, then, be used to immunise the Commonwealth from the operation of State stamp duties. It is trite to state that where a law falls within the legislative competence of the Commonwealth, the State will be bound by the law, and any State law inconsistent with the Federal law will be invalid to the extent of its inconsistency under s 109. This is so notwithstanding that Federal legislation may adversely affect State property, revenue or prerogatives or the performance of State statutory functions.<sup>8</sup>

However, Harper J apparently based his conclusion that the Victorian stamp duties legislation did not have a "direct and substantial connexion" with the land at Tullamarine Airport on the view that State stamp duties were referable to any land transactions, not this land transaction in particular. Of course, it is well

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5 *Ibid* at 111, per Kitto J.

6 Note 1 *supra* at 681.

7 *Ibid* at 683.

8 *Trade Practices Commission v Manjfal Pty Ltd (No 2)* (1990) 27 FCR 22.

established that the Commonwealth can be “affected by” state laws of general operation.<sup>9</sup> But this principle must be qualified in a context where s 52 operates. Section 52 is not only plenary, it is also exclusive. It is power to act as the sole legislative authority in Commonwealth places, excluding the legislative authority of the States in those places.<sup>10</sup> “Exclusive” in this context means “to the exclusion of the States”.<sup>11</sup> It would be inconsistent with the exclusivity of s 52 to enable the States to impose stamp duties in respect of Commonwealth places. Accordingly, it is submitted that s 52 immunises the Commonwealth from the operation of State stamp duties without the necessity of Commonwealth legislation so providing. This point is reinforced by ss 4(1) and 4(5)(a) of the *Commonwealth Places (Application of Laws) Act 1970* (Cth), which provide that:

4. (1) The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time.

...  
(5) *Subsection (1) of this section does not:*  
(a) *have effect so as to impose any tax;... (Emphasis added.)*

Further, it can be argued that the Commonwealth’s power with respect to places acquired for public purposes is not limited to those matters which have a direct and substantial connection with those places. In applying the approach of Kitto J in *Worthing’s* case, Harper J neglected the broader approaches adopted by three members of the *majority* in that case. For example, Barwick CJ said that he was “unable to conclude that the only laws which were intended to be placed beyond the power of a State by the exclusive nature of the legislative power given by s 52 were laws passed by the State operating only or specifically in the seat of government or a place acquired by the Commonwealth for public purposes”.<sup>12</sup> Similarly Menzies J saw s 52 as a “general” law-making power.<sup>13</sup> Windeyer J, like Barwick CJ, saw s 52 as a provision wide enough to regulate “conduct of persons in a place, or transactions there”.<sup>14</sup> Any doubt that these broader approaches to the characterisation of laws under s 52 were restricted to a minority of the Court (ie three of the four majority judges) was laid to rest in *R v Phillips*, where a majority of the Court confirmed that s 52 is a general law-making power with respect to Commonwealth places.<sup>15</sup> If the broader approach had been adopted by Harper J, he may have held that the State stamp duties fell within the exclusive zone of Commonwealth power under s 52.

9 *Commonwealth v Bogle* (1953) 89 CLR 229 at 259, per Fullagar J.

10 *Worthing v Rowell & Muston Pty Ltd*, note 4 *supra* at 103, per Barwick CJ; at 120, per Menzies J; at 131, per Windeyer J and at 139, per Walsh J. McTiernan, Kitto and Owen JJ dissented. Section 52(i) does not exclude the legislative authority of the Commonwealth under s 122: *Svikart v Stewart* (1994) 181 CLR 548 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ; Toohey and Gaudron JJ dissenting.

11 See *Nott Bros & Co Ltd v Barkley* (1925) 36 CLR 20 at 29, per Isaacs J, approved by Mason CJ, Deane, Dawson and McHugh JJ in *Svikart v Stewart*, *ibid*.

12 Note 4 *supra* at 102.

13 *Ibid* at 120.

14 *Ibid* at 131.

15 (1970) 125 CLR 93. See for example at 102, per Barwick CJ; at 105, per McTiernan J; at 107-8, per Menzies J and at 121, per Owen J.

#### IV. LIMITATIONS ON SECTION 52 - ARE COMMONWEALTH PLACES "PARTS OF STATES" WITHIN SECTION 51(ii)?

In arriving at the conclusion that s 52 could support laws with respect to taxation in Commonwealth places, Harper J considered the view that the Commonwealth's power to impose taxes under s 52 might be limited by the requirement in s 51(ii) that Federal laws imposing taxation must not discriminate between States or parts of States.<sup>16</sup> Harper J indicated that there were two ways of approaching this issue - one which would support the use of s 52 as a source of power with respect to taxation in Commonwealth public places (subject to these limitations), and another which would not.

The first approach was to apply the principle of interpretation adopted by the High Court in *Attorney-General (Cth) v Schmidt*.<sup>17</sup> Harper J expressed this principle in the following way:

...when a power is conferred and some qualification or restriction is attached to its exercise, other powers should be construed, absent any indication of contrary intention, so as not to authorise an exercise of the power free from the qualification or restriction.<sup>18</sup>

Harper J intimated that this approach to the interpretation of s 52 would allow the Commonwealth to use that power to pass laws with respect to taxation in Commonwealth places, but that power would be subject to the limitation expressed in s 51(ii).

The second approach removes the power to tax from s 52. Comparing the power to tax to the power to compulsorily acquire property,<sup>19</sup> Harper J remarked:

It must be acknowledged...that other judges have suggested that the power to support a law for the compulsory acquisition of property has its only source in s 51(xxxi) of the Constitution. For example, in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 177, Brennan J said:

Section 51(xxxi) of the Constitution has a dual effect. First, it confers power to acquire property from any State for any purpose for which the parliament has power to make laws and it conditions the exercise of that power on the provision of just terms. Secondly, by an implication required to make the condition of just terms effective, it abstracts the power to support a law for the compulsory acquisition of property from any other legislative power (s 122 apart).

If this be an accurate statement of the law, then by similar reasoning the same result must follow in relation to the exercise of the power to impose taxation: by an implication required to make the condition of non-discrimination effective, s 51(ii) abstracts the power to support a law imposing a tax from any other legislative power.<sup>20</sup>

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16 Similar issues are considered by D Rose, "The Commonwealth Places (Application of Laws) Act 1970" (1971) 4 *Federal Law Review* 263 at 272-3.

17 (1961) 105 CLR 361.

18 Note 1 *supra* at 683.

19 Section 51(xxxi) of the Commonwealth Constitution.

20 Note 1 *supra* at 683.

Harper J suggested that if this second view was correct, any power with respect to taxation which might find its source in s 52 would be abstracted from that head of power, and that would leave s 51(ii) as the sole source of the Commonwealth's power with respect to taxation.

Harper J adopted the first approach. But either way, the question whether Commonwealth places are "parts of" States within the meaning of s 51(ii) (and, possibly, s 99),<sup>21</sup> needs to be considered. This is because s 52, like s 51(ii), operates "subject to this Constitution", including the restrictions on tax laws in the Constitution. The question is this: do Commonwealth places form an exclusive "part of" the Commonwealth once they have been acquired for public purposes? Once acquired, are these places then no longer "parts of" a State or States?<sup>22</sup> If this is the case, could s 52 authorise tax laws operating only in respect of Commonwealth places which would be immune from the restrictions in ss 51(ii) and 99?

There are a few impediments to this view being accepted. Firstly, in a number of earlier cases it has been suggested that when the Commonwealth acquires a place within a State for public purposes that place remains within that State. In *R v Bamford*,<sup>23</sup> the majority of the Supreme Court of New South Wales took the view that land acquired under s 85 of the Constitution did not cease to be part of the State from which it was acquired. The District Court of New South Wales reached the same result in respect of a s 51(xxxi) acquisition in *Kingsford-Smith Air Services Ltd v Garrison*.<sup>24</sup>

Secondly there are the views expressed obiter by a number of the members of the High Court that places acquired by the Commonwealth *remain* "part of" the State from which they are acquired. So, for example, Walsh J in *Worthing's* case remarked:

...a place so acquired continues to be part of the territory of the State in which it is situated and is not excised from the State so as no longer to be for any purpose a part of it.<sup>25</sup>

A third impediment to the view that Commonwealth places are no longer "parts of" States would be the doubt expressed as to the meaning of the phrase "parts of States" in s 51(ii) (and, it might be assumed, this doubt extends to the interpretation of s 99). Two views of the meaning of the phrase have been expressed. The more expansive view, drawn from the majority judgment in *R v Barger*,<sup>26</sup> was that:

21 Section 99 of the Commonwealth Constitution provides: "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

22 Cf C Howard, "Federal Places and Exclusive Legislative Powers" (1970) 9 *University of Western Australia Law Review* 360 at 361.

23 (1901) 1 SR (NSW) 337.

24 (1938) 55 WN (NSW) 122.

25 Note 4 *supra* at 136. See also *R v Phillips* (1970) 125 CLR 93 at 100, per Barwick CJ; *semble* at 111, per Menzies J and at 112, per Windeyer J.

26 (1908) 6 CLR 41.

The words 'States or parts of States' must be read as synonymous with 'parts of the Commonwealth' or 'different localities within the Commonwealth'. The existing limits of the States are arbitrary, and it would be a strange thing if the Commonwealth Parliament could discriminate in a taxing Act between one locality and another, merely because such localities were not coterminous with States or with parts of the same State.<sup>27</sup>

If the phrase "States or parts of States" is interpreted to mean "different localities within the Commonwealth" then this would clearly include Commonwealth public places. In that case a law immunising the Commonwealth from State stamp duties might be considered to involve an unconstitutional discrimination or preference. On the other hand, the "narrow" (and literal) view, expressed by Isaacs J in the same case, was that:

...the treatment that is forbidden, discrimination or preference, is in relation to the localities considered as parts of States, and not as mere Australian localities or parts of the Commonwealth considered as a single country...the pervading idea is the preference of locality merely because it is a locality, and because it is a particular part of a particular State.<sup>28</sup>

It is submitted that none of these impediments should prevent the conclusion that Commonwealth places are no longer "parts of" States once they are acquired. Firstly, the earlier cases were decided before the High Court's landmark decision in *Worthing's* case, where it was made clear that s 52 gives the Commonwealth *exclusive* power over Commonwealth places. Secondly, the obiter views expressed by a number of members of the High Court that Commonwealth places are "part of" the States in a "territorial" sense, although jurisdictionally separate, is inconsistent with the exclusivity of s 52 contemplated by the majority in *Worthing's* case and *R v Phillips*. Finally, views of Isaacs J regarding the scope of the discrimination restriction in s 51(ii) are to be preferred for the same reason: they do not clash with the principle of exclusivity enunciated by the Court, and further, they were approved by the High Court in *Cameron v Deputy Federal Commissioner of Taxation*<sup>29</sup> and by the Privy Council in *Deputy Federal Commissioner of Taxation v W R Moran Pty Ltd.*<sup>30</sup>

## V. PLACES ACQUIRED FOR "PUBLIC" PURPOSES: A SOURCE OF LIMITATION ON S 52?

If the constitutional prohibitions in ss 51(ii) and 99 do not limit the Commonwealth's power under s 52, does the requirement that the Commonwealth's places be acquired "for public purposes" impose any relevant limitation on the Commonwealth?

In the *Allders* case, the Commissioner argued that Allders' leasehold interest resulted in the relevant place no longer being a *Commonwealth* place. Harper J

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27 *Ibid* at 78, per Griffith CJ, Barton and O'Connor JJ.

28 *Ibid* at 107-8.

29 (1923) 32 CLR 68.

30 (1940) 63 CLR 338 at 348.

suggested that a distinction might be drawn between the Commonwealth's activities in its "private" capacity as opposed to its "public" capacity:

If a place is otherwise a Commonwealth place, it does not, it seems to me, necessarily lose that character on the creation of a leasehold interest in it. I say "necessarily" because it may be that the result would be different if the lease be perpetual or for a very long term, such as 99 years; or if the grant of the lease resulted in the land being used for purposes which (apart from such public use element as is preserved by the continuing links between the land and the Commonwealth as lessor/proprietor) were purely private.<sup>31</sup>

In the instant case, Harper J stressed that the lease was for a term of eight years. Even though the land was used by private interests for the purpose of generating private profit, the land was an ancillary part of a Federal airport, and therefore remained a Commonwealth public place.

This analysis was accompanied by a reference, with approval, to the comments of Macrossan CJ and Davies JA in *Kangaroo Point East Association Inc v Balkin*<sup>32</sup> to the effect that:

...it is sufficient for the operation of s 52(i) in this case that the subject land was acquired by the Commonwealth for a public purpose and that it remains property of the Commonwealth.

This statement is correct and, in truth, it was unnecessary for Harper J to speculate as to the "public" or "private" nature of the Commonwealth's use of its land. Section 52 refers to "places acquired by the Commonwealth for public purposes". A literal reading of this phrase only requires that the Commonwealth have a "public purpose" at the time of the acquisition.<sup>33</sup> The words of s 52 do not read "places acquired and used by the Commonwealth for public purposes". There is no requirement of a continuing public purpose. The dictum of Windeyer J in *Attorney-General (NSW) v Stocks and Holdings (Contractors) Pty Ltd*<sup>34</sup> that s 52 may cease to apply to a Commonwealth place if the Commonwealth granted a lease of that place should not be followed.<sup>35</sup> It would be chaotic if the applicability of Commonwealth or State laws depended on the nature of the Commonwealth's use of its places at any given time.

In addition, the words "public purposes" in s 52(i) are not words of limitation - it is for Parliament to determine what the "public purposes" of the Commonwealth are, even if this includes running a business or engaging in some other "private" purpose.<sup>36</sup>

In conclusion, it is submitted that s 52 excludes the operation of State stamp duties in Commonwealth public places; that the Commonwealth could use s 52 to confirm this exclusivity through legislation; that the restriction on the Commonwealth's taxation power in s 51(ii) (and s 99) would not limit this power

31 Note 1 *supra* at 680.

32 (1993) 119 ALR 305.

33 See PH Lane, "The Law in Commonwealth Places" (1970) 44 *Australian Law Journal* 403 at 408.

34 (1971) 124 CLR 262 at 281.

35 See D Rose, note 16 *supra* at 267.

36 There are no definitive statements regarding the meaning of the phrase "public purposes" but these words are unlikely to be construed as words of limitation: see D Rose, *ibid* at 265; also *Worthing's case*, note 4 *supra* at 125-7, per Windeyer J.



in any relevant way (if it is accepted that Commonwealth places are not “parts of” States); and that the requirement of “public purposes” in s 52 is also not a relevant limitation on the scope of the power.

## VI. SUBSTANCE OR FORM - COULD SECTION 114 BE USED TO CHALLENGE STATE STAMP DUTIES ON TRANSACTIONS INVOLVING COMMONWEALTH PLACES?

This paper will now consider whether it is possible to argue that s 114 of the Constitution prohibits the States from levying stamp duties in respect of transactions involving Commonwealth property. Section 114 provides that:

A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, *or impose any tax on property of any kind belonging to the Commonwealth*, nor shall the Commonwealth impose any tax on property of any kind belonging to a State. (Emphasis added).

Would the stamp duties imposed in *Allders'* case survive a s 114 challenge?

Perhaps not. First, the High Court's decisions on s 114 confirm that a tax on property is a tax on *property of any kind* - and it is submitted below that this would include the instrument of lease as a type of property. Section 114, as a constitutional prohibition, must be given a substantive operation and this requires that the substantive effect of State tax laws are taken into account.<sup>37</sup> The High Court has confirmed that a tax on the use of property which is an incident of the ownership or holding of property is a tax on property within the meaning of s 114.<sup>38</sup> Leasing property is a way of using property and thus a tax on a lease is a tax on property. Accordingly, it is submitted that State stamp duties on land transactions involving property purchased by the Commonwealth may be *ultra vires* the States. This may not help *Allders*, but it is certainly worth considering in more detail.

## VII. A TAX ON AN INSTRUMENT CREATING AN INTEREST IN PROPERTY IS A TAX ON PROPERTY

The principle that an instrument creating an interest in land is a type of property was confirmed in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA) (No 2)*.<sup>39</sup> In that case, the Full Court of the South Australian Supreme Court considered whether s 114 would strike down South Australian stamp duties applying to certain conveyancing instruments. The majority, King CJ and Mitchell J, held that an instrument relating to a transfer of land *to* the Commonwealth was itself “property” within the meaning of s 114. King CJ remarked:

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37 *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219 at 227, per curiam.

38 *Ibid.*

39 (1980) 25 SASR 35.

...the duty on a memorandum of transfer becomes chargeable at the point at which the instrument becomes the property of the transferee...When such delivery or other act occurs the instrument, if it is not already the property of the transferee, becomes the property of the transferee. It follows, in my opinion, that stamp duty, being a tax on a memorandum of transfer which has become effective as a transfer, is a tax on an instrument which is the property of the transferee. It would seem to follow that where the transferee is the Commonwealth the memorandum of transfer is the property of the Commonwealth for the purpose of s 114 of the Constitution.<sup>40</sup>

Both King CJ and Mitchell J approved the following dictum of Barwick CJ in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*.<sup>41</sup>

If stamp duty were payable it would be payable by the Commonwealth. It is an exaction falling on the Commonwealth. Further, in form it is a tax upon the document by which the Commonwealth acquires the land to which the instrument relates. It falls upon the document when the document has itself become the property of the Commonwealth. Unless the document is stamped, that is, the tax upon it paid, its function as a document is largely, if not indeed entirely, stultified...Thus, even in the most technical sense, the duty, in my opinion, is a tax upon the property of the Commonwealth. It falls squarely, in my opinion, within the operation of s 114, which is expressed in universal terms 'any tax on property of any kind'.<sup>42</sup>

There is no relevant distinction to be drawn between a conveyancing instrument and a lease instrument in these circumstances. *Alders* case may only be distinguished on the basis that in that case, the Commonwealth was not liable to the duty as the owner of the relevant instrument, therefore the tax was not on a Commonwealth-owned instrument as property.

If this argument is not correct, it might yet be possible to argue that a State tax on Commonwealth land transactions of *any kind* have a substantive effect on the use of Commonwealth property whether or not the Commonwealth is the purchaser of the property. This argument relies on the principle that s 114 must be given a substantive operation, and this can only be done if the substance of State tax laws is considered in determining their validity in face of the prohibition.

Comments supporting a substantive approach to s 114 have recently been made by the High Court. In *Deputy Commissioner of Taxation v State Bank of New South Wales*,<sup>43</sup> the Court said:

In the context of a constitutional immunity from taxation on property, it is not possible to make a rigid dichotomy between a tax on property and a tax on transactions. A tax framed as a tax on transactions may in some circumstances amount to a tax on property. Such a tax, though it may take the form of a tax on transactions, may yet be in truth and substance a tax on property. If it were otherwise, the constitutional immunity would be little more than an empty shell, easily circumvented by framing the tax as a tax on transactions, though upon analysis, the tax is tantamount to a tax upon the ownership or holding of property.<sup>44</sup>

The Court was more equivocal in its treatment of taxes on the *use* of property:

...a tax on the use of property, without more, would not be properly characterized as a "tax on property" for the purposes of s 114. On the other hand, a tax imposed on the *use or occupation of land by the owner* would be a tax on property for the purposes of

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40 *Ibid* at 38.

41 (1979) 145 CLR 330.

42 *Ibid* at 337.

43 (1992) 174 CLR 219.

44 *Ibid* at 227.

the section for the reason that it is tantamount to a tax upon the ownership or holding of the relevant property.<sup>45</sup> (Emphasis added)

The question is then whether a tax on a lease as a form of use of the land would be “tantamount to a tax upon the ownership or holding of the relevant property”.

It is difficult to see how it could be otherwise. A landowner’s decision to lease his or her property involves “the exercise of a right central to the concept of ownership”, and according to the High Court, if a tax affects such a right “that is enough to bring the tax within the ambit of the constitutional prohibition.”<sup>46</sup> The leasing of land is a type of use of land. As Griffith CJ remarked in *Attorney-General for Queensland v Attorney-General for the Commonwealth*, “the right of alienation is a part or incident of property, and not something extrinsic or additional to it.”<sup>47</sup>

Whether the Court would be prepared to adopt this approach to the concept of “use” is an open question. In addition, it might be considered unusual that s 114 should operate to immunise every Commonwealth property transaction from State taxes, even in circumstances where the Commonwealth is not directly liable to the tax. Nevertheless, it is submitted that this approach is consistent with a substantive reading of the prohibition in s 114, if the words “tax on property” are equated with a “tax on the use of property as an incident of the ownership of property”.

## VIII. CONCLUSION

It has been suggested that s 114 “does not prevent stamp duty from being imposed on a document of transfer involving Crown property”,<sup>48</sup> and *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*<sup>49</sup> has been cited in support of this proposition. However that decision did not deal directly with the issue. In that case, the High Court was asked to consider whether the Superannuation Fund Investment Trust, a body incorporated under the *Superannuation Act 1976 (Cth)*, was liable to duties under the *Stamp Duties Act 1923 (SA)* in respect of certain property transactions in that State. However, a number of provisions of the Federal Act indicated an intention to *consent* to the imposition of the duties, and a majority of the Court disposed of the issue on this and other grounds.<sup>50</sup> Accordingly, the issue whether State stamp duties were susceptible to challenge under s 114 did not need to be considered.<sup>51</sup>

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45 *Ibid.*

46 *Ibid* at 228.

47 (1915) 20 CLR 148 at 162.

48 RD Lumb and GA Moens, *The Constitution of the Commonwealth of Australia, Annotated*, Butterworths (5th ed, 1995) at [736].

49 Note 41 *supra*.

50 *Ibid* at 347, per Stephen J; at 357, per Mason J; at 357, per Murphy J. Aickin J disposed of the issue on other grounds. Barwick CJ dissented.

51 See *Superannuation Fund Investment Trust v Commissioner of Stamps (SA) (No 2)* (1980) 25 SASR 35 at 36, per King CJ.

In conclusion, it is submitted that s 114 of the Commonwealth Constitution immunises the Commonwealth from the operation of State stamp duties in respect of instruments creating an interest in Commonwealth property. This is because an instrument creating a legal interest in property is a type of property itself and s 114 prohibits taxes on property of any kind, where the Commonwealth is liable. Where the Commonwealth is not liable, it is further submitted that taxes on the use of property, including a lease of property, are, in substance, “taxes on property” within s 114. It is submitted that there are no prior decisions of the High Court which preclude this conclusion.