

LEGISLATIVE COMMENT THE AUSTRALIA ACT 1986 — SOME LEGAL CONUNDRUMS

1. INTRODUCTION

The *Australia Act* 1986 (Cth.) was designed “to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation”.¹ The enactment of identical legislation² by the United Kingdom Parliament has, as was aptly pointed out by Sir Anthony Mason, brought “legal and constitutional theory into line with reality”.³ Whilst the overall effect for the Commonwealth of Australia is “symbolically significant”, the legislation has a greater degree of practical importance for the component States of the Australian federation.

This article explains the changes effected by the *Australia Act* and discusses the conundrums arising from the enactment of this legislation.

2. MECHANISMS FOR ENACTING THE LEGISLATION

The *Australia Act* 1986 signifies the culmination of extensive discussions between the Commonwealth, State and United Kingdom governments and Her Majesty, which spanned a few years prior to its enactment. The legislation was enacted pursuant to s.51(xxxviii) of the Commonwealth Constitution — the second occasion on which this power has been invoked.⁴ However, because of some doubts about the scope of the placitum, an alternative mechanism based on “request and consent” legislation was employed.

¹ Preamble to the *Australia Act* 1986 (Cth.). See, generally, D.J. Cremean, “Australia — You’re Legislating in it!” (1986) 60 *L.I.J.* 436; Ian S. Dickinson, “The Australia Act 1986 — An End to Constitutional Links Between Australia and the U.K.” (1986) 136 *N.L.J.* 401; J. Goldring, “The Australia Act 1986 and the Formal Independence of Australia” [1986] *P.L.* 192; J. Goldsworthy and H.P. Lee, “Constitutional Law” in Baxt & Kewley (eds.), *An Annual Survey of Australian Law* (Sydney: Law Book Co., 1986), at 130-4; A.D. Watts, “The Australia Act 1986” (1987) 36 *I.C.L.Q.* 132.

² *Australia Act* 1986 (U.K.). Hereinafter when the phrase “Australia Act” is mentioned it refers to both the U.K. and the Commonwealth legislation unless the context indicates otherwise.

³ Sir Anthony Mason, “The Wilfred Fullagar Memorial Lecture: Future Directions in Australian Law” (1987) 13 *Mon. L.R.* 149.

⁴ The first occasion was to give effect to the “Offshore Settlement”: see *Coastal Waters (State Powers) Act* 1980 (Cth.). See also R.D. Lumb, *The Constitution of the Commonwealth of Australia Annotated* (Butterworths, 4th ed., 1986), at pp.196-7. As to the scope of this power, see also: G. Winterton, “Section 51(xxxviii) of the Constitution and Amendment of the ‘Covering Clauses’” (1982) 5 *U.N.S.W.L.J.* 327; R.D. Lumb, “Section 51, pl.(xxxviii) of the Commonwealth Constitution” (1981) 55 *A.L.J.* 328.

The following steps were therefore agreed upon as necessary to implement the agreement to sever the remaining constitutional links between Australia and the United Kingdom Parliament, Government and judicial system. The Parliament and Government of every State would:

- (1) Request the Commonwealth Parliament, pursuant to section 51(38) of the Commonwealth Constitution, to enact its Australia Act.
- (2) Request and consent in accordance with constitutional convention to the United Kingdom Parliament enacting its Australian Act.
- (3) Request and consent to the Commonwealth Parliament in turn requesting and consenting to the United Kingdom Parliament enacting its Australia Act. The request and consent of the Commonwealth Parliament to the Australia Act of the United Kingdom is required by section 4 of the Statute of Westminster.⁵

Section 51(xxxviii) empowers the Commonwealth Parliament to make laws with respect to the “exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia”. Given the existence of doubts⁶ about this provision the utilization of alternative mechanisms ensures that the legislation is beyond challenge.

The main consequence of using alternative mechanisms is the existence of two Australia Acts, one enacted by the United Kingdom Parliament and the other by the Commonwealth Parliament. Both Acts are identical in all material respects⁷ and were proclaimed to come into force simultaneously.⁸

3. POSITION PRIOR TO THE AUSTRALIA ACT 1986

To appreciate the significance of the changes wrought by the *Australia Act* 1986, the position prior to its coming into force should be considered.⁹

In the first place the *Colonial Laws Validity Act* 1865 (U.K.) (C.L.V.A.) imposed a number of fetters upon the legislative competence of the States and the Commonwealth. Designed with the main aim of liberating “the local legislatures from the spectacular aberrations of South Australian Judge

⁵ See Second Reading Speech Notes on the Victorian “Australia Acts (Request) Bill 1985”, 2-3. For the request and consent of the Commonwealth Parliament and Government, see the *Australia (Request and Consent) Act* 1985 (Cth.), and for that of the States, see: (i) New South Wales – Ad No. 109/1985; (ii) Queensland – No. 69/1985; (iii) South Australia – No. 95/1985; (iv) Tasmania – No. 99/1985; (v) Victoria – No. 10203/1985; and (vi) Western Australia No. 65/1985.

⁶ See R.D. Lumb, *The Constitution of the Commonwealth of Australia Annotated*, pp.196-7.

⁷ There are minor differences in s.16 between the British and Commonwealth Australia Acts. For example, the *Statute of Westminster* does not need defining in the British Act. To ensure that both Acts commence operation at the same time, the Commonwealth Australia Bill bore the date “1986”. To ensure consistency in the numbering of both Acts, the short title of the Commonwealth Act, unlike the normal Australian practice, is placed at the end of the Act.

⁸ 5.00 a.m. Greenwich mean time, 3rd March 1986 – see *Commonwealth Gazette* No. 5.85 (Sunday, 2nd March 1986).

⁹ See Geoffrey Sawyer, “The British Connection” (1973) 47 *A.L.J.* 113.

Benjamin Boothby, who had persistently struck down any local legislation which had, in his view, "the slightest whiff of inconsistency with the general principles of English law",¹⁰ it was nevertheless clear from the terms of the C.L.V.A. that the United Kingdom Parliament retained supremacy over the colonial legislatures. Thus, any law made by a colonial legislature which was repugnant to the provisions of a British Act "extending to" the colony would be void and inoperative.¹¹ This disability was equally applicable to the Commonwealth Parliament until the adoption of the *Statute of Westminster* 1931 (U.K.), which on adoption was made retrospective to 3 September 1939.¹² This "unequal" position was pointed out by Coper in the following vivid terms:

"Thus was created a bizarre situation, infinitely stranger than fiction: a federal system in which the central body had shaken off its colonial shackles and was fully sovereign within its own sphere of competence, but whose regional units were subjected to laws which were made by a foreign power and which the regional units were powerless to displace".¹³

The key aspects of the *Statute of Westminster* 1931 were that the C.L.V.A. was no longer applicable to the Commonwealth,¹⁴ that a Commonwealth law was not "void or inoperative" on the ground of repugnancy to a British Act and that the Commonwealth Parliament could repeal or amend British laws extending to the Commonwealth.¹⁵ It was also provided that the United Kingdom Parliament could not legislate in relation to the Commonwealth unless the Commonwealth had "requested and consented" to the enactment.¹⁶

Section 3 of the *Statute of Westminster* 1931 is also important for it expressly provides as follows: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation". As the discussion below will indicate, the doctrine of extra-territorial legislative incompetence of the States may be one of the as yet unresolved conundrums arising from the enactment of the *Australia Act* 1986.

The other point to be made at this stage is the important and controversial s.5 of the C.L.V.A., which provided as follows:

"... every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament,

¹⁰ Michael Coper, *Encounters with the Australian Constitution* (C.C.H. Australia Ltd., 1987) 7.

¹¹ C.L.V.A., s.2. This was reinforced by s.3 which provided as follows: "No Colonial Law shall be or deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order or Regulation as aforesaid".

¹² See *Statute of Westminster Adoption Act* 1942 (Cth.). See also, Sir Owen Dixon, "The Statute of Westminster, 1931" in *Jesting Pilate* (Law Book, 1965) 82-99.

¹³ Michael Coper, *op. cit.* 6.

¹⁴ Sub-s.2(1).

¹⁵ Sub-s.2(2).

¹⁶ S.4.

Letters Patent, Order in Council, or Colonial law for the time being in force in the said Colony.”

4. CHANGES ARISING FROM THE AUSTRALIA ACT 1986

(i) The United Kingdom Parliament

The first important change brought about by the Act was the termination of the power of the United Kingdom Parliament to make laws having effect as part of Australian law. This is implicitly provided for in the following terms by s.1:

“No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.”¹⁷

(ii) Removal of Limitations on the Legislative Powers of the State Parliaments

Section 3 of the *Australia Act* is modelled on s.2 of the *Statute of Westminster*. The C.L.V.A. is rendered inapplicable to any law made by the Parliament of a State after the commencement of the *Australia Act*. In consequence the restriction which prevented the States from legislating inconsistently with United Kingdom legislation extending to the States is terminated. Sub-s.3(2) makes it clear that the common law doctrine of repugnancy is excluded and that State Parliaments can enact legislation repugnant to the laws of England or to existing or future United Kingdom Acts. It is also expressly provided that the powers of the State Parliaments include the power to repeal or amend these United Kingdom Acts insofar as they form part of the law of a State: Sub-s.3(2).

However, it should be noted that sub-s.3(2) is subject to ss.5 and 6 of the *Australia Act*. Section 5 qualifies sub-s.3(2) by making the grant or declaration of State legislative power contained therein subject to the Commonwealth of Australia Constitution Act and the Commonwealth Constitution. Sub-s.3(2) does not operate so as to give any force or effect to a provision of an Act of a State Parliament that would repeal, amend or be repugnant to the *Australia Act*, the Commonwealth of Australia Constitution Act, the Commonwealth Constitution or the *Statute of Westminster* 1931, as amended and in force from time to time.

Sub-s.3(2) is also subject to s.6 which preserves the substance of s.5 of the C.L.V.A. Thus, a law made after the commencement of the *Australia Act* by a State Parliament respecting the “constitution, powers or procedure” of the Parliament shall be of no effect unless it is made in such “manner and form” as may from time to time be required by a law made by that Parlia-

¹⁷ Ss.4, 9(2) and (3), and 10(2) of the *Statute of Westminster* 1931, insofar as they were part of Australian law, were repealed by s.12 of the *Australia Act* 1986 in supplementation to s.1 of the *Australia Act* 1986.

ment, whether made before or after the commencement of the Act. This provision keeps alive the issue of the powers of a State Parliament in relation to "entrenchment" provisions.

The full power to make laws of the State Parliaments is described in sub-s.2(1) as follows:

"It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation."

Sub-section 2(2) removes any "other limitations on the legislative powers of the States that might exist by reason of their former colonial status". Sub-section 2(2), however, also provides that it does not confer upon any State any capacity that the State did not have immediately before the commencement of the *Australia Act* to engage in relations with countries outside Australia. Section 2 is also subject to ss.5 and 6 of the *Australia Act*.

According to the Explanatory Memorandum to the Australia Acts (Request) Bill 1985, sub-s.2(1) corresponds to s.3 of the *Statute of Westminster*. The conundrum which is posed by sub-s.2(1) arises from the fact that there is a slight difference in wording from s.3 of the *Statute of Westminster* which simply provides as follows:

"It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

Sub-section 2(1) contains the words "for the peace, order and good government of that State". When the course of decisions in Australia relating to the doctrine of extra-territorial legislative incompetence of the State Parliaments is considered it will be seen that the territorial restrictions on the State Parliaments have been attributed to the "peace, order and good government" formula in the State constitutions.¹⁸ The conundrum that is posed is whether sub-s.2(1) has effectively displaced the doctrine which curbs the legislative capacity of the State Parliaments.

Section 4 of the *Australia Act* expressly repeals ss.735 and 736 of the United Kingdom *Merchant Shipping Act* 1894, insofar as they are part of the law of a State. Section 4, which corresponds to s.5 of the *Statute of Westminster*, makes it unnecessary for the States to enact special legislation to free themselves from the restrictions of ss.735 and 736 of the *Merchant Shipping Act* 1894, under which certain State laws on merchant shipping require the confirmation of the Queen acting on the advice of United Kingdom Ministers, or must be reserved for the signification of the Queen's pleasure.

Another restriction on the competence of the State Parliaments which has been terminated relates to those rules governing the disallowance of State laws or the withholding of assent to such laws. Sections 8 and 9 of the *Australia Act* put to an end the mechanisms dating from colonial days whereby supervision of the legislation enacted by State Parliaments was achieved.

¹⁸ See P.J. Hanks, *Australian Constitutional Law* (3rd ed., Butterworths, 1985), 265-303. In the case of Victoria see s.16 of the *Constitution Act* 1975 (Vic.) which provides: "The Parliament shall have power to make laws in and for Victoria in all cases whatsoever".

Section 8 ensures that a State Act that has been assented to by the State Governor is not subject to disallowance by the Queen.¹⁹ The section also prevents the suspension of operation of a State law pending the signification of the Queen's pleasure.

Sub-section 9(1) provides that any law or instrument requiring a Governor to withhold assent from any Bill passed by a State Parliament in accordance with any prescribed manner and form requirement, shall be of no effect. Sub-section 9(2) precludes the operation of any law or instrument which requires the reservation of any State Bill for the signification of the Queen's pleasure.

(iii) Powers and Functions of the Queen and Governors in respect of the States

Section 7 deals with the position of State Governors. They are vested with all of the Queen's existing powers and functions in respect of the States except those in relation to appointments of State Governors, the termination of their appointments, and awards of imperial honours.

The *Australia Act* does not deal explicitly with the awards of imperial honours (to be made by the Queen upon advice of the Premier of a State which wishes to issue them). However, procedures acceptable to the Commonwealth and State governments, the Queen and the United Kingdom Government have been formulated. The implementation of these procedures simply necessitates amendments to the prerogative instruments in the United Kingdom constituting the various orders and prerogative instruments in the United Kingdom constituting the various orders and awards.²⁰

The most significant change brought about by s.7 is the termination of the position under which the Queen was advised by United Kingdom Ministers, following recommendations by the State Premiers to the Foreign and Commonwealth Office of the United Kingdom Government. The Queen is now to be advised directly by the Premier of a State in relation to the exercise of her powers and functions in respect of the State.

Furthermore, when the Queen is personally present in a State, she is not precluded from exercising any of her powers and functions in respect of that State. However, she will do so on any occasion only if there has been mutual and prior agreement between the Queen and the Premier that it would be appropriate for her to do so. The Commonwealth Attorney-General said that all the State Premiers have confirmed their acceptance that such mutual and prior agreement is an essential ingredient of the proposed arrangements.²¹

¹⁹ On this score, the States are theoretically "superior" in position to the Commonwealth for s.59 of the Commonwealth Constitution provides that "The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known". In real terms, the power in s.59 is treated as an "inoperative" provision — see R.D. Lumb, *op. cit.* 230.

²⁰ See Second Reading of the Australia Bill 1986, *Commonwealth Parl. Debs.* (H. of R.), 2685.

²¹ *Ibid.*

(iv) Termination of Appeals to the Privy Council

The absurd situation where a State Supreme Court could find itself faced with two binding, yet conflicting authorities has now been overcome by s.11 of the *Australia Act*. The thrust of this section is to remove the remaining avenues of appeal from Australian courts to the Privy Council, thus making the High Court of Australia the final court of appeal for all Australian courts.²²

(v) Repeal or Amendment of the Australia Act or the Statute of Westminster

By virtue of s.15 of the *Australia Act*, the Act and the *Statute of Westminster* in their application to Australia can be repealed or amended only by an Act of the Commonwealth Parliament passed at the request or with the concurrence of the Parliament of all the States. This "unique system" provides for an "entrenchment" of the *Australia Act* and the *Statute of Westminster*. However, an exception is provided for in sub-s.15(3) which envisages the possible exercise by the Commonwealth Parliament of any powers that may be conferred upon it by any alteration to the Commonwealth Constitution made in accordance with s.128 of the Constitution. The insertion of s.15 of the *Australia Act* also poses another conundrum, which is dealt with below.

(vi) Miscellaneous

The remaining provisions of the *Australia Act* deal with a miscellany of matters. Section 10 provides that, after the commencement of the Act, the United Kingdom Government is to have no responsibility for the government of any State. Section 12 repeals ss.4, 9(2) and (3) and 10(2) of the *Statute of Westminster*, insofar as they were part of the law of the Commonwealth, of a State or of a Territory.²³ Sections 13 and 14 simply make necessary consequential changes to the Constitution of Western Australia and Queensland in respect of the termination of the powers and responsibilities of United Kingdom Ministers in respect of the States.

Finally, ss.16 and 17 provide for matters of interpretation, short title and commencement.

²² "Australian court" is defined by s.16 of the *Australia Act* to mean "a court of a State or any other court of Australia or of a Territory *other than the High Court*" (emphasis added). However, as pointed out by Geoffrey Sawer (*The Australian Constitution*, 2nd ed., A.G.P.S., 1988), the Commonwealth Parliament had, in 1975, legislated to end all appeals to the Privy Council from the High Court with the exception arising from s.74 of the Commonwealth Constitution. S.74 of the Commonwealth Constitution provides for a grant of a certificate by the High Court in relation to appeals concerning *inter se* questions. However, "it is clear that the High Court regards itself as the final arbiter of Australian constitutional matters, and therefore such a certificate will not be granted in the future." Lumb, *op. cit.* 263.

²³ Sawer explains: "Sections 4, 9(2) and 9(3) go because they assume continuing power in the British Parliament to legislate for Australia. Section 10 goes so as to remove the possibility of the Commonwealth opting out of the *Statute of Westminster*, thereby ensuring that the Statute remains a basic part of the constitutional structure and capable of amendment or repeal only as provided in s.15 of the *Australia Act*". (*The Australian Constitution*, p.78).

5. SOME CONUNDRUMS ARISING FROM THE AUSTRALIA ACT

(i) Validity of s.15 of the Australia Act

The first conundrum which will be considered here revolves around s.15 of the *Australia Act*. This conundrum was commented upon by G.J. Lindell²⁴ and Professor L. Zines.²⁵ To facilitate the discussion it may be worthwhile to set out the precise wording of the section as follows:

“15(1) This Act or the Statute of Westminster 1931, as amended and in force from time to time, insofar as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

(2) . . .

(3) Nothing in subsection (1) above limits or prevents the exercise by the Parliament of the Commonwealth of any powers that may be conferred upon that Parliament by any alteration to the Constitution of the Commonwealth made in accordance with section 128 of the Constitution of the Commonwealth after the commencement of this Act.”

If it is intended in the future to “repeal” or “amend”, say, the *Australia Act* the process to be adopted is that specified by sub-s.15(1), namely, an Act of the Commonwealth Parliament passed at the request or with the concurrence of the Parliament of *all* States. But this sub-section does not limit or prevent the conferral of power upon the *Commonwealth Parliament* to amend or repeal the *Australia Act* by employing s.128 of the Commonwealth Constitution. Lindell observed as follows:

“By implication it may be argued that this precludes the use of s.51(xxxviii) or s.128 in any other way. This may have interesting implications for a State Parliament which approaches the Commonwealth Parliament for assistance in removing a ‘manner and form’ limitation contained in the constitution of that State.”²⁶

Lindell went on to express doubt whether s.15 of the *Australia Act* 1986 (Cth.) could be construed as limiting the future exercise of either s.51(xxxviii) or s.128 in the way adverted to above. That Act, he pointed out, is primarily at least, based on s.51(xxxviii) which, like all other powers contained in s.51 is prefaced by the words “subject to this Constitution”. Lindell submitted:

“The Act could not therefore alter the terms of s.128 without itself having been passed in accordance with the procedure set out in s.128.”²⁷

It must be pointed out that Lindell was referring to the *Commonwealth* version of the *Australia Act*, and not the British *Australia Act*. In that sense,

²⁴ G.J. Lindell, “Why is Australia’s Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence” (1986) 16 *F.L.R.* 29.

²⁵ *The High Court and the Constitution* (2nd ed., Butterworths, 1987) 271-3.

²⁶ G.J. Lindell, *op. cit.* p.35, fn.22.

²⁷ *Ibid.*

there is clearly a big question mark over the validity of s.15 of the Commonwealth Act. Zines strongly asserted:

“Any attempt to regard the whole of the Australia Act as based on Commonwealth constitutional power is impossible. It is clear that the provisions of s.15 can only be valid as a result of British paramount power, a power that ceased the moment it was, in this case, exercised.”²⁸

In other words, s.15 has to rely on the British Act to supply the legal validity.

The reliance on a British Act to reduce Commonwealth constitutional power without resort to the process provided by s.128 was regarded by Zines as “somewhat startling”. He added:

“It is inconsistent with political assumptions that have been made for many years, viz that s.128 was the only method that could or would be employed to amend the Constitution . . . On the other hand, the view that the British parliament would not amend the Constitution probably did not envisage a request by all the parliaments of Australia.”²⁹

(ii) State Extraterritorial Legislation

Has the doctrine of extraterritoriality been effectively jettisoned by sub-s.2(1) of the *Australia Act*? There appears to be an ambiguity overhanging this provision. The requirement of “peace, order and good government” in sub-s.2(1), it could be argued, has failed to achieve for the State Parliaments what had been achieved for the Commonwealth Parliament by s.3 of the *Statute of Westminster*.

The argument is premised on the understanding that the “peace, order and good government” formula provides the rationale for the existence of the extraterritorial doctrine. However, it has been asserted by Moshinsky that “the words used in s.2 of the *Australia Act* do not inadvertently preserve a territorial limit on legislative competence, but simply match the plenary grant of power to the State Parliaments for intraterritorial legislation”.³⁰ Moshinsky further submitted that the problem that had arisen in some of the case-law stemmed from confusion of the very general and undemanding requirement that all laws be for “peace, order and good government”, with the separate and specific requirement of a nexus with the enacting State. Moshinsky added:

“The peace, order and good government provision applies to both intraterritorial and extraterritorial legislation, providing a potential safeguard against unjust and capricious law-making, which would be of no relevance to the peace, order and good government of the State.”³¹

Moshinsky sought to elaborate on his comments as follows:

²⁸ Zines, *op. cit.* 273.

²⁹ *Id.*, 272.

³⁰ Mark Moshinsky, “State Extraterritorial Legislation and the Australia Acts 1986” (1987) 61 *A.L.J.* 779, 781.

³¹ *Id.* 782.

"With extraterritorial legislation, the better approach prior to the *Australia Acts* was to first see if the legislation fulfilled the very general criteria of being for 'peace, order and good government', then to go on to the separate and more demanding test of a connection or nexus with the State. Simply asking whether a law is for the peace, order and good government of a State begs the question of whether there is the substantial relationship. The better approach of distinguishing between the 'vague and imprecise' peace, order and good government test and the 'rather more specific' nexus with the State test was taken in *Pearce v. Florenca*³² by Gibbs and Mason JJ., in *Robinson v. The Western Australian Museum*³³ by Gibbs J., in *McLaine Watson and Co. Private Ltd v. Bing Chen and Ors*³⁴ by Helsham C.J., and in *Traut v. Rogers*.³⁵ However, it is submitted with great respect that an incorrect approach in not distinguishing the general peace, order and good government test from the specific nexus with the State test was taken in *Pearce v. Florenca*³⁶ by Jacobs J. and in *Robinson v. The Western Australian Museum*³⁷ by Barwick C.J."³⁸

This assertion by Moshinsky is, it is submitted, misconceived. A reading of some of the case authorities on the doctrine makes it very clear that the "peace, order and good government" requirement and the nexus requirement are not separate requirements. The latter is a particular aspect of the former: thus, a law which fails to satisfy the nexus test cannot be regarded as a law for the peace, order and good government of the legislating state.

Moshinsky referred to Gibbs J.'s judgment in *Pearce v. Florenca* as supporting the proposition that the "peace, order and good government" requirement is a separate requirement from the nexus test. It is submitted that this is a misreading of Gibbs J.'s stand. Gibbs J. said:

"However, the test whether a law is one for the peace, order and good government of the State is, as so stated, exceedingly vague and imprecise, and a rather more specific test has been adopted; it has become settled that a law is valid if it is connected, not too remotely, with the State which enacted it, or, in other words, if it operates on some circumstance which really appertains to the State."³⁹

It can be seen that Gibbs J. was postulating the nexus requirement as a more specific way of determining whether the law is for the peace, order and good government of the State; and not insisting on a separate requirement, as asserted by Moshinsky.

In *Millar v. Commissioner of Stamp Duties*,⁴⁰ Rich, Dixon and McTier JJ., in relation to the validity of the duty imposed by s.103(1)(b) of the *Stamp Duties Act 1920* (N.S.W.), said: "In doing so, it adopts a connection which is too remote to entitle its enactment to the description a law for the

³² (1976) 135 C.L.R. 507, 517 and 524.

³³ (1977) 138 C.L.R. 283, 303-4.

³⁴ [1983] 1 N.S.W.L.R. 163, 168-9.

³⁵ (1984) 27 N.T.R. 29, 31-2 (F.C.).

³⁶ (1976) 135 C.L.R. 507, 526-7.

³⁷ (1977) 138 C.L.R. 283, 294-5.

³⁸ Moshinsky, op. cit. pp.782-3.

³⁹ (1976) 135 C.L.R. 507, 517.

⁴⁰ (1932) 48 C.L.R. 618.

peace, welfare and good government of New South Wales".⁴¹ In *Broken Hill South Ltd v. The Commissioner of Taxation (N.S.W.)*,⁴² Dixon J. formulated the nexus test in the following terms:

"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."⁴³

It is clear that the formulation of the nexus test by Dixon J., a test which has subsequently been adopted in other cases, is based on the notion that an extraterritorial law which lacks a "nexus" would not be for the peace, order and good government of the State.

Another argument which has been invoked to point to the deficiency of the doctrine is that prior to the *Australia Act* it would have been possible for a State Parliament to amend the "peace, order and good government" formula in the State constitutions by using s.5 of the C.L.V.A. Section 5 provided that the colonial legislature was given full powers to make laws respecting the powers of the legislature itself. This argument was developed by Trindade in his article "The Australian States and the Doctrine of Extraterritorial Legislative Incompetence"⁴⁴ and also advanced by Gibbs J. in *Pearce v. Florenca*⁴⁵. Moshinsky then said:

"It thus would be ironic now if the words "peace, order and good government" in the *Australia Acts* were held to provide a basis for continuing the doctrine of extraterritoriality, as the States would be in a worse position than before the Acts came into force, when each State could amend its own Constitution. No State alone can amend the *Australia Acts*, which requires the co-operative procedure laid down in s.15."⁴⁶

The argument, however, is not without flaw. It could be queried whether the State Legislature prior to the *Australia Act* could have amended the State Constitution in the fashion proposed by Trindade and Gibbs J. Emphasis was not given to the words "shall in respect to the Colony *under its jurisdiction*",⁴⁷ in s.5 of the C.L.V.A., for it could be argued that the presence of those words would inhibit the State Parliament from freeing itself of the extraterritorial doctrine.

⁴¹ Id. 632.

⁴² (1937) 56 C.L.R. 337.

⁴³ Id. 375.

⁴⁴ (1971) 45 A.L.J. 233.

⁴⁵ (1976) 135 C.L.R. 507, 515.

⁴⁶ Moshinsky, op. cit. p.782.

⁴⁷ Emphasis added.

A strong argument which can be mounted against the retention of the extraterritorial limitation is to highlight the legislative intention of the *Australia Act*. The Explanatory Memorandum to the Australia Bill 1986 (Cth.) and the Australia (Request and Consent) Bill 1985 (Cth.) said: "Sub-clause 2(1) makes it clear that the State Parliaments have full power to make laws having extra-territorial operation."⁴⁸ The Explanatory Memorandum to clause 2 of the Australia Acts (Request) Bill 1985 (Vic.) said: "Sub-clause 2(1) corresponds to section 3 of the Statute of Westminster which provides that the Commonwealth Parliament has full power to make laws having extra-territorial operation."⁴⁹ In the Second Reading of the Australia Acts (Request) Bill 1985 (Vic.) it was said: "[A]ny existing uncertainty as to the capacity of State Parliaments to make laws which have an extra-territorial operation will be removed . . .".⁵⁰

Despite the stated legislative intention the perplexing question remains: how is it that, given the clear statutory basis of the doctrine in Australia, the words "peace, order and good government" are still retained in s.2(1) of the Australia Act? Surely, such a fundamental underpinning of the extraterritorial doctrine cannot be nudged aside when the words forming the very foundations of the doctrine are retained. The arguments advanced for rejecting the extraterritorial doctrine are not fully convincing. An ambiguity still overhangs s.2(1) of the *Australia Act*.⁵¹

(iii) "Manner and Form" post-Australia Act

Section 6 of the *Australia Act* provides as follows:

"Notwithstanding sections 2 and 3(2) above, a law made after commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act."

Can it be argued that the invocation of the maxim *expressio unius est exclusio alterius* precludes the application of a "manner and form" to a law which could not be characterized as one respecting "constitution, powers and procedure" of the State legislature?

Prior to the *Australia Act*, when questions arose concerning the bindingness of "restrictive procedures" enacted by a State Parliament, they were

⁴⁸ At p.3.

⁴⁹ At p.3.

⁵⁰ Vic. *Parl. Debs.*, L.A., 19 September 1985, Vol. 379 at p.219, 220. However, Christopher D. Gilbert said:

"If resort is made to the various debates on the Australia Bill in the State, Commonwealth and British Parliaments, it is not immediately clear whether the legislatures intended that s.2(1) of the Australia Acts should repeal the extraterritorial fetter completely, or that the Dixonian re-definition of the doctrine was being enacted."

— "Extraterritorial State Laws and the Australia Acts" (1987) 17 *F.L.R.* 25.

⁵¹ See G.J. Lindell, *op. cit.* p.37, fn.30.

resolved by invoking s.5 of the C.L.V.A. The logical pattern of analysis in the context of s.5 of the C.L.V.A. required two questions to be considered: (i) was the later law a law which could be characterized as a law respecting "constitution, powers and procedure of the State legislature"; (ii) was a "manner and form" prescribed by the earlier law.⁵²

The same pattern of analysis is required by s.6 of the *Australia Act*. However, if the later law cannot be characterized as one relating to "constitution, powers and procedure", does this mean that a "manner and form" provision can be ignored? In such a context, s.6 of the *Australia Act* is rendered irrelevant.

There is no clear answer to this conundrum even in the pre-*Australia Act* days. Reference was made to the proposition articulated by the Privy Council in *Bribery Commissioner v. Ranasinghe*⁵³ that "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law".⁵⁴

In *Bribery Commissioner v. Ranasinghe*, the impugned legislation did not contain a certificate of the Speaker stating that the legislation had been passed by the necessary two-thirds majority as required by Clause 29(1) of the *Ceylon (Constitution) Order-in-Council* 1946. The legislation was held to be invalid. Similarly, in *Harris v. Minister of the Interior*,⁵⁵ the Appellate Division of the South African Supreme Court invalidated the *Separate Representation of Voters Act* 1951 as it had not been passed by a two-thirds majority at a joint sitting of both Houses as required by s.152 of the *South Africa Act* 1909 (U.K.). It is significant to note that at the time of these decisions the C.L.V.A. no longer applied to the laws of these two countries.

In *Victoria v. The Commonwealth and Connor*,⁵⁶ Gibbs J. referring to these two decisions, observed as follows:

"In all of these cases it happens that the restrictions on the manner of the exercise of legislative power that had to be considered related to amendments to the Constitution, but the principle which has been evolved is not limited to constitutional amendments."⁵⁷

This observation of Gibbs J. is startling: it means that a "manner and form", regardless of its nature, is binding in relation to any type of legislation.

The difficulty of this issue is illustrated by the cautious approach of the judges of the South Australian Supreme Court in *West Lakes Ltd v. South Australia*.⁵⁸ King C.J. thus said:

⁵² It would appear that this pattern of analysis was not adopted by the High Court in *The South Eastern Drainage Board v. Savings Bank of SA* (1939) 62 C.L.R. 603: the Court asked whether the earlier law was a law respecting the constitution, powers or procedure of the South Australia legislature. For an interesting approach to the characterization of a law as a law respecting the "constitution, powers or procedure" of a State legislature, see the judgment of Hoare J. (dissenting) in *Commonwealth Aluminium Corporation Limited v. Attorney-General* [1976] Qd.R.231; and for a comment on this approach, see J. Goldsworthy, "Manner and Form in the Australian States" (1987) 16 *M.U.L.R.* 403, 414-7.

⁵³ [1965] A.C. 172.

⁵⁴ *Id.* 197.

⁵⁵ [1952(2)] S.A. 428.

⁵⁶ (1975) 134 C.L.R. 81.

⁵⁷ *Id.* 163.

⁵⁸ (1980) 25 S.A.S.R. 389.

"The question of whether the parliament can only exercise its power to make laws respecting topics other than those enumerated in s.5 of the *Colonial Laws Validity Act* in the manner and form (if any) required by its own legislation or whether it may ignore any such requirements, is one of great constitutional importance. In view of the conclusions which I reached as to the other issues in the case, it is unnecessary for me to decide that question, and I think that it is undesirable therefore that I should express any view upon it."⁵⁹

Zelling J. said that whilst he accepted, without deciding, that it was possible to have a section entrenched by a manner and form provision which did not fall within s.5 of the C.L.V.A., nevertheless, it would require "very clear words" before a court would find that that was what had happened.⁶⁰ He also added:

"It is one thing to find manner and form provisions in a statute affecting the constitution, it is quite another to find Lord Birkenhead's proverbial Dog Act or a provision thereof elevated to constitutional status."⁶¹

Matheson J.⁶² pointed out that Gibbs J.'s statement that the principle in *Bribery Commissioner v. Ranasinghe* "is not limited to constitutional amendments" was obiter and not expressed by any of the other justices in *Victoria v. The Commonwealth and Connor*. He said:

"I do not think his Honour meant that all Acts of parliament, no matter what their subject matter, can contain manner and form requirements which bind successive parliaments."⁶³

It can therefore be asserted that the Australian courts have not clearly rejected the possibility of a "manner and form" applying to legislation, not relating to "constitution, powers and procedure".

It is beyond the scope of this comment to explore the various conceptual approaches to this issue. Perhaps, the answer may lie, as pointed out by Goldsworthy in his scintillating article "Manner and Form in the Australian States",⁶⁴ in the "continuing constituent power" vested in the State Parliaments by sub-s.2(2) of the *Australia Act*. Section 5 is expressly subject only to s.6 of the *Australia Act* and therefore the implication is that a "manner and form" would apply only if the later law relates to "constitution, powers and procedure" as required by s.6, or if the restrictive procedure has re-defined the "Parliament" of a State for the purpose of a law not relating to "constitution, powers and procedure".⁶⁵

In the end it may well be that the answer does not lie solely in a legalistic application of the provisions of the *Australia Act*. In this area of constitutional law a blend of legalism, doctrines of "representative" government and the "will" of the people may be resorted to in order to resolve this conundrum.

⁵⁹ Id. 396.

⁶⁰ Id. 413.

⁶¹ Ibid.

⁶² Id. 422.

⁶³ Ibid.

⁶⁴ (1987) 16 *M.U.L.R.* 403.

⁶⁵ Goldsworthy would also accept the bindingness of what he would label as "pure procedures" (for example, requirements relating to timing): id. 408.

(iv) Altering the Preamble and Covering Clauses

The final conundrum which has to be addressed revolves around the question of how the preamble and covering clauses 1-8 of the *Commonwealth of Australia Constitution Act 1900* (U.K.) can be altered.

The amendment process in s.128 of the Commonwealth Constitution poses a puzzle: the section provides for alteration of "This Constitution" which is found in covering clause 9 of the *Commonwealth of Australia Constitution Act 1900* (U.K.). If a literal construction of s.128 is adopted, the section cannot extend to the alteration of the preamble and covering clauses 1-8.⁶⁶

As was observed by the Constitutional Commission, until recently "it was generally assumed that the only way in which the preamble and covering clauses 1-8 of the Act could be altered was by an Act of the United Kingdom Parliament passed at the request and with the consent of the Government and Parliament of the Commonwealth".⁶⁷ However, the power of the United Kingdom Parliament to legislate for Australia has been terminated by s.1 of the *Australia Act*. The Constitutional Commission said:

"The question therefore is whether we are left with provisions in the *Commonwealth of Australia Constitution Act 1900* which are immutable — provisions which no one can validly alter or repeal. The answer must surely be 'No'."⁶⁸

A possible basis for effecting alterations to the preamble and the covering clauses is s.51(xxxviii). That section empowers the Commonwealth Parliament, "subject to this Constitution", to make laws with respect to:

"The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia."

However, the Constitutional Commission felt it would be "unsafe and unwise" to rely on s.51(xxxviii) as a basis for implementing their proposed alterations to the covering clauses 1-8.⁶⁹ Since s.51(xxxviii) is expressed to be sub-

⁶⁶ Such an interpretation of s.128 was generally supported: see e.g. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (London: Australian Book Co., 1901), 989; W.H. Moore, *The Constitution of the Commonwealth of Australia* (London: Sweet & Maxwell, 2nd ed., 1910), 603; *Report of the Royal Commission on the Constitution of the Commonwealth* (1929), 288; G. Sawyer, "The British Connection" (1973) 47 *A.L.J.* 113, 114, n.3; Wynes, *Legislative, Executive and Judicial Powers in Australia* (Sydney: Law Book Co., 5th ed., 1976), 541. Cf. George Winterton, "Section 51(xxxviii) of the Constitution and Amendment of the 'Covering Clauses'" (1982) 5 *U.N.S.W.L.J.* 327, 328. Winterton reiterates his view in "An Australian Republic" (1988) 16 *M.U.L.R.* 467, 476.

⁶⁷ *First Report of the Constitutional Commission*, Vol. 1, April 1988, 181 (to be hereinafter referred to as the "First Report"). For an illuminating discussion of the pre-*Australia Act* position relating to the amendment of the preamble and the covering clauses, see Gregory Craven, *Secession: the Ultimate States Right* (Melbourne U.P., 1986) ch.6.

⁶⁸ *Id.* 182.

⁶⁹ *Id.* 183. Note the hesitant comment of Sawyer at p.78 of *The Australian Constitution*: "If the official view of section 51(xxxviii) relied on to support the Australian enactment is valid, the same interpretation of section 51(xxxviii) would probably support the use of that section as a basis for the amendment or repeal of [covering clauses 1-8]".

ject to the Constitution, any law made pursuant to it which conflicts with the Constitution is invalid. The Constitutional Commission proffered its reasons for discouraging the invocation of s.51(xxxviii). The Commission said:

“Any law which changes the meaning or operation of the Constitution is a law to alter the Constitution.”⁷⁰

The Commission expressed the view that a law to alter covering clauses 2, 5 or 6 might clearly alter the operation and meaning of the Constitution. The same however could not be said of covering clauses 1, 3, 4, 7 and 8. While conceding that s.51(xxxviii) could be used to give effect to some of the Commission’s recommendations,⁷¹ nevertheless, the Commission expressed the view that “it is both safe and proper to proceed on the basis that alterations to [the preamble and covering clauses 1-8] can be made, and should only be made, by constitutional alteration pursuant to section 128 of the Constitution”.⁷² According to the Commission, the power conferred by s.128 to alter “this Constitution” is not expressly limited as regards the subjects or content of laws for alteration of the Constitution. Furthermore, nothing in s.128 expressly prohibits alterations to the Constitution which involve additions of sections to deal with matters which are not dealt with in the Constitution as enacted in 1900. There is also nothing in s.128 which expressly prohibits alterations to the Constitution which relate to matters dealt with in the provision of the *Commonwealth of Australia Constitution Act 1900* which precedes covering clause 9. The Commission added:

“There is, for example, nothing in section 128 which expressly prohibits alterations of the Constitution which involve incorporation within the Constitution, with some changes, of definitions of words and phrases in the Constitution which are presently defined in the covering clauses.”⁷³

The Commission rejected any suggestion that because of s.8 of the *Statute of Westminster*, the preamble and covering clauses 1-8 have the status of higher law. The Commission’s assertions appear to be founded on the firm belief that the High Court of Australia, when called upon, would interpret s.128 in the light of the fact that under the *Australia Act 1986* (U.K.) the United Kingdom Parliament renounced authority to legislate for Australia.

The Commission said:

“An amendment or repeal of, or addition to, entrenched provisions relating to the organisation and powers of government in a country is, in its ordinary meaning, concerned with the Constitution.”⁷⁴

The Commission also said:

⁷⁰ Ibid.

⁷¹ The Constitutional Commission recommended against altering or repealing the preamble to the *Commonwealth of Australia Constitution Act 1900* (*First Report*, 145). In relation to the covering clauses, the Commission recommended that covering clauses 2 and 5 should be altered, covering clauses 7 and 8 should be repealed, and covering clauses 3, 4 and 6 should be retained: *First Report*, 162-181.

⁷² *First Report*, 184.

⁷³ Id. 184-5.

⁷⁴ Id. 186.

"Whatever may have been the position before 1986, section 1 of the *Australia Acts* has, in our view, the effect of doing away with the concept of the Constitution having an inferior status to any other law."⁷⁵

The Commission thus concluded that the provisions for alteration of the Constitution operate to their full extent, encompassing all matters relating to the mode of government in Australia.

The Commission's arguments appear to be based upon a flexing of a perceived independent status of the Commonwealth. They are arguments which appeal to the nationalistic instinct. Limitations on s.128 which would subordinate the Commonwealth Constitution to "anachronistic" constraints would be swept aside by a broad reading of s.128.

A curious implication flows from the Commission's arguments. If s.128 is not restricted in relation to the subjects or content of laws for alteration of the Constitution, then surely s.128 can be employed to enlarge the scope of powers available under s.128.⁷⁶ For instance, why can't s.128 be amended by using the mechanism in s.128 to bring within the ambit of the amending power the preamble and covering clauses 1-8. The opening words of the amended s.128 would then read as follows: "This Constitution, *the preamble and the covering clauses 1-8 of the Commonwealth of Australia Constitution Act 1900* shall not be altered except in the following manner . . .". The critics of such a suggestion would argue that there would be nothing to constrain an unlimited exercise of the power, such as amending s.128 to permit the process to be employed, say, to amend the Indian Constitution. Such a criticism fails to take into account the distinction between validity and enforceability. In the case of amendments to the preamble and the covering clauses 1-8, unlike amendments to the Indian Constitution, the High Court of Australia is in a position to ensure compliance with the amendments. It may be debatable whether the proposed amendment to s.128 would be a neater and more acceptable approach than that suggested by the Constitutional Commission. The policy considerations advanced by the Constitutional Commission are considerations which are likely to prevail in the High Court. This may be regarded as a matter of pure speculation but, in the writer's view, it is a safe bet to take a punt on a broad construction of s.128 by the High Court.⁷⁷

⁷⁵ Id. 187.

⁷⁶ As to whether s.128 can be used to amend s.128 itself, Lumb said:

"There appears to be general agreement among most commentators that section 128 . . . may today be invoked to bring about fundamental changes to the Constitution, including the revision of section 128 itself."

— "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 *F.L.R.* 148, 160. References to the writings of these commentators are found in fn.56 of Lumb's article.

⁷⁷ It is instructive to note the following observations of Sir Anthony Mason in his Menzies Lecture:

"[T]he legislation that terminated Australia's residual constitutional links with the United Kingdom . . . now provides a firmer foundation for the view that the status of the Constitution as a fundamental law springs from the authority of the Australian people."

— "The Role of a Constitutional Court in a Federation — A Comparison of the Australian and the United States Experience" (1986) 16 *F.L.R.* 1, 24. See also Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 *F.L.R.* 148, 158-63.

6. CONCLUSION

This article highlights the existence of a number of interesting constitutional problems arising from the enactment of the *Australia Act*.⁷⁸ The response of the judiciary to these conundrums will undoubtedly hold the interest and fascination of constitutional lawyers.

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⁷⁸ As to the impact of the *Australia Act* upon the question of whether an Australian republic is constitutionally attainable, see George Winterton, "An Australian Republic" (1988) 16 M.U.L.R. 467.

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