'LAWS FOR THE GOVERNMENT OF ANY TERRITORY': SECTION 122 OF THE CONSTITUTION

By LESLIE ZINES*

The many problems relating to Commonwealth power to make laws for a Territory have arisen because the power itself was a constitutional afterthought. The late Professor Ross Anderson described the Commonwealth of Australia as 'the child of as hard-headed a *mariage de convenance* as was ever arranged in the *salons* of France'.[1] The marriage was, however, between the self-governing colonies which later became the States. Those who arranged the marriage were concerned primarily with the health and prosperity of the parties to, and the issue of, the union. Whether they were in favour of granting large powers to the Commonwealth or were staunch believers in 'State Rights' or whether they were for or against Federation, the chief issue was whether and to what extent each of the colonies should voluntarily reduce its own governmental power by giving some of it to a new self-governing colony which would in area and population embrace all the existing colonies.

Many provisions of the Constitution were therefore apparently designed to protect the interests of the States — Commonwealth legislative authority is confined to express affirmative and enumerated powers, the States have equal representation in the Senate regardless of population, the Constitution can only be amended with the consent, *inter alia*, of the electorates of a majority of the States, the Constitutions of the States are preserved.

Other provisions were calculated to ensure that the new government would be of a type familiar in the various colonies e.g., provisions for an elected Parliament, the requirement that ministers be members of Parliament (section 64), appropriation of revenue by Parliament (section 81), some measure of religious freedom (section 116), the requirement of 'just terms' for the acquisition of property (section 51 (xxxi.)) and provision for trial by jury (section 80).

What the founding fathers no doubt envisaged was a self-governing and broadly 'democratic' political entity formed by union of constituent states of a similar type.

Provision, however, was also made for 'dependencies' of the Commonwealth.

---

* LL.B. (Syd.), LL.M. (Harvard); Barrister-at-Law; Reader in Law, School of General Studies, Australian National University.

[1] Else-Mitchell (ed.), *Essays on the Australian Constitution* (2nd ed. 1961) 93.

Section 122 provides—

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Covering clause 5 of the Constitution Act also contemplates the operation of Commonwealth law in areas outside the States by providing that the Constitution Act and laws made by the Commonwealth Parliament shall be binding on, *inter alia*, ' the courts, judges, and people of every State and of every part of the Commonwealth '.

The chief questions that have arisen with respect to section 122 have been the extent to which the other provisions of the Constitution defining and limiting Commonwealth legislative, executive and judicial power are applicable to the exercise of powers by the Commonwealth in and for the Territories.

On this general question three different approaches can and have been adopted at various times but none of them has been consistently adopted by all the judges in any one case. The matter has been further complicated as will be shown later by a recent reluctance to over-rule some previous decisions, even though the basic principles behind them have in some cases been rejected. The three general approaches are:—

(a) The ' disparate power ' theory — According to this approach, the position of the Commonwealth in relation to a Territory is similar to that of, say, New South Wales in respect of its own area before federation: the Commonwealth Parliament has full sovereign authority over the Territory concerned. This power is untrammelled by other provisions of the Constitution which are thought to have the object of limiting and defining Commonwealth power in the ' federal system '. The Constitution is a sort of ' social contract '[2] between the peoples of the States, and is not concerned with delicate adjustments of power outside the dual system of government which is the hallmark of federation and which

[2] The ' social contract ' view of the Constitution has been thought by some to require a distinction between internal and external Territories. This is based on the fact that at the time of federation, the Northern Territory was part of South Australia and the area of the Australian Capital Territory was part of New South Wales. In section 6 of the Constitution Act ' The States ' are defined to include ' South Australia including the northern territory of South Australia '. The preamble to the Act refers to the fact that ' the people of " the various colonies " have agreed to unite in one indissoluble Commonwealth '. It could be argued, therefore, that as the people of the Northern Territory and those in the area that is now the Australian Capital Territory were from the beginning within ' The Commonwealth ' and parties to the agreement, referred to in the preamble, those Territories must be treated as an integrated part of the ' federal system '. In *Mitchell v. Barker* (1918) 24 C.L.R. 365, 367, Griffith C.J. said ' It may be that a distinction may some day be drawn between Territories which have and those which have not formed part of the Commonwealth '. In *Spratt v. Hermes* (1965) 39 A.L.J.R. 368, the High Court rejected this view and held that there was no relevant legal distinction between internal and external Territories.

the Constitution is principally designed to achieve. On this reasoning the provisions and doctrines relating to such things as the separation of powers, free trade, religious freedom, compensation for acquisition of property, jury trials and life appointments for judges are not ' applicable to the Territories '. They do not limit the full sovereign power given to the Commonwealth by section 122. Associated with this approach are usually statements that distinguish between the Territories and ' the Commonwealth proper ' or that state that the Territories are not ' part of ' or ' fused with ' the Commonwealth.

(b) The ' full integration ' theory—Under this approach no distinction is made between the Territories and ' the federal system '. The power of the Commonwealth under section 122 is to be treated like that of any other exclusive Commonwealth power. Any generally described limitations on Commonwealth power apply, unless the contrary is clearly indicated, to an exercise of power in the Territories. Laws for the government of a Territory may operate anywhere within the Commonwealth. Similarly, power to make laws ' for the peace, order and good government of the Commonwealth ' extends, where relevant, to the Territories which are part of ' the Commonwealth '.

(c) The ' modified integration ' theory — According to this approach, one commences with the view that the Territories are integral parts of the Commonwealth as in theory (b); however, it is necessary to have regard to the nature of the Territories power. Some of the provisions of the Constitution will be found on examination to have an object that is inapplicable to the Territories and designed only to bind the Commonwealth in so far as its government of ' the federal system ' is concerned. *Prima facie*, however, references to ' the Commonwealth ' in the Constitution include the Commonwealth acting under section 122 or under any other power.

Judgments of the High Court over the last fifty years have reflected all three theories in varying degrees. Judges have often lamented the inconsistencies of approach in past cases. These inconsistencies and difficulties have become more emphasised as a result of the decision in *Lamshed v. Lake*[3] and the recent decision of *Spratt v. Hermes.*[4] The matter has become further confused because a number of judges in *Spratt v. Hermes* refused to overrule earlier decisions even though those cases were based on general principles that the judges concerned regarded as wrong.

In what follows it is proposed to discuss (a) the principal cases up to 1958, (b) the effect of the decision in *Lamshed v. Lake* (1958) and then (c) the present position that results from the decision in *Spratt v. Hermes* (1965).

[3] (1958) 99 C.L.R. 132.
[4] (1965) 39 A.L.J.R. 368.

The Early Decisions and the 'Disparate Power' Theory

In *Buchanan v. The Commonwealth*[5] it was held that section 55 of the Constitution, which relates to the form of taxation legislation and is designed to protect the powers of the Senate, was not applicable to laws of taxation for the Northern Territory.[6] The emphasis in the judgment of Barton A-C.J. was on the inappropriateness of section 55 in relation to the Territories and the inconvenience that could result in applying it to legislation for the Territories. His Honour noted the object of the provision to protect the powers of the Senate 'which represents the States as such' and summed up his argument as follows.[7]

> Here [i.e. in section 55] there is a purpose running through the provisions for the composition and functions of the two Houses, which has no relevance to the purposes for which the Parliament is empowered to legislate for the territories of the Commonwealth.

Isaacs J. took a similar line for the most part, pointing out that provisions intended to guard the Senate and the States had no application to the Northern Territory; but he also distinguished the Territory from 'the Commonwealth proper' and said 'now that it [the Northern Territory] is a territory of the Commonwealth, it is not fused with it'.[8]

With Isaacs J., therefore, we find two strains of argument corresponding to theories (a) and (c) above — one relying, like Barton A-C.J., on the inappropriateness of the particular provision and the other propounding a broader view requiring special treatment for the Territories.

In *R. v. Bernasconi*[9] the emphasis was on the latter view. In that case the question before the Court was whether the power of the Commonwealth Parliament under section 122 of the Constitution was restricted by the provision in section 80 that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. The High Court held that the answer was 'No'.

The Court's decision rests on the view that a law of a Territory (in that case, Papua) was not a 'law of the Commonwealth' within the meaning of section 80. This was primarily based on the view that Chapter III (which includes section 80) relating to the judicial power of the Commonwealth was not applicable to the Territories. Griffith C.J. said—

---

[5] (1913) 16 C.L.R. 315.

[6] s. 55 provides as follows—'55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect. Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.'

[7] (1913) 16 C.L.R. 315, 329.

[8] *Ibid.* 335.

[9] (1915) 19 C.L.R. 629.

> Chapter III is limited in its application to the exercise of the judicial powers of the Commonwealth in respect of those functions of government to which it stands in the place of the States, and has no application to territories.[10]

Isaacs J. also emphasised the Commonwealth's full sovereignty over the Territory but in addition referred to the inappropriateness of section 80 to some of the Territories.

> If, for instance, any of the recently conquered territories were attached to Australia by act of the King and acceptance by the Commonwealth, the population there, whether German or Polynesian, would come within section 122, and not within section 80. Parliament's sense of justice and fair dealing is sufficient to protect them, without fencing them around with what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system.[11]

The tendency, therefore, was to regard a Territory as being outside or subordinate to the Commonwealth proper and to give the Commonwealth unfettered power in the Territory; but, also, to support this view by an appeal to policy considerations relating to the particular provisions involved.

In *Porter v. The King*; *ex parte Yee*,[12] section 21 of the Supreme Court Ordinance 1911-1922 of the Northern Territory made under section 13 of the Northern Territory (Administration) Act 1910 provided for an appeal to the High Court from the Supreme Court of the Northern Territory. It was argued that the provision was void, first, because Chapter III of the Constitution did not apply to the Territories; a court of a Territory was therefore, not a federal court within the meaning of section 73 which is included in Chapter III and which provides for an appeal to the High Court from, *inter alia*, a federal court. Secondly, Parliament could not confer appellate jurisdiction on the High Court under section 122 because it had been held in *In re Judiciary and Navigation Acts*[13] that the jurisdiction of the High Court was confined to such jurisdiction as was conferred or authorised by Chapter III.

The High Court (Isaacs, Higgins, Rich and Starke JJ.; Knox C.J. and Gavan Duffy J., dissenting) rejected these submissions and upheld its jurisdiction to hear the appeal on the ground that the exclusive and exhaustive nature of Chapter III, providing for the judicature and its functions, referred only to the federal system. Knox C.J. and Gavan

---

[10] *Ibid.* 635.

[11] *Ibid.* 638. It was pointed out by Evatt J., in *Ffrost v. Stevenson* (1937) 58 C.L.R. 528, 592 that section 80 itself contemplates that a trial might take place outside a State. The concluding words of the section are ' if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes '. See also Cowen, *Federal Jurisdiction in Australia* (1959) 128.

[12] (1926) 37 C.L.R. 432.

[13] (1921) 29 C.L.R. 257.

Duffy J. dissented on the grounds that *In re Judiciary and Navigation Acts* established that the whole of the original and appellate jurisdiction of the High Court was to be found within Chapter III and that laws for the government of the Territory did not include a power to impose duties on persons or organisations (such as the High Court) not within the Territory.

The judgment of Higgins J., one of the majority in *Porter's* case, was to cause difficulty later. Higgins J. had dissented in *In Re Judiciary and Navigation Acts* on the grounds that the jurisdiction Parliament purported to confer in that case (the giving of advisory opinions) was within Chapter III and that even if it did not come within those provisions, Chapter III did not exhaustively describe the jurisdiction that could be vested in the Court.

In *Porter's* case Higgins J. did not distinguish *In re Judiciary and Navigation Acts* on the same basis as the other majority judges. Instead he seemed to accept that decision as applicable to the High Court in relation to the Territories but declared that it was binding only in respect of the conferring of original — and not appellate — jurisdiction on the High Court.[14]

Putting aside the views of Higgins J., the opinions of the majority and minority judges in *Porter's* case both involved the notion of the Territories power being in some sense separated from the rest of the Constitution. The whole court considered that *Bernasconi* established that Chapter III did not extend to the Territories which were governed under section 122 alone.

The emphasis on ' separation ' was taken a stage further by Latham C.J. and Williams J., in *Australian National Airways Pty. Ltd. v. The Commonwealth*[15] (hereinafter referred to as the *A.N.A.* case). The trend of the earlier cases, as has been seen, was to insulate the Territories power from the rest of the Constitution. The *A.N.A.* case raised the question whether persons in the States or, in the words of Isaacs J., ' the Commonwealth proper ' were to be free from having applied to them laws made under section 122 even though those laws might otherwise be properly categorised as for the government of a Territory. Latham C.J. and Williams J. answered this question in the affirmative and held section 122 to be geographically limited to the Territories.

Dixon and Starke JJ., and possibly Rich J., took the opposite view, *viz.*, that laws made under section 122 might operate in the States. This

[14] In *Federal Capital Commission v. Laristan Building and Investment Co. Pty. Ltd.* (1929) 42 C.L.R. 582, 585, Dixon J. said ' It thus appears that three of the six members of the Court who took part in the decision of *Porter v. The King*; *ex parte Yee* treated s. 122 as insufficient to empower the Legislature to invest the High Court with original jurisdiction in respect of a Territory '. In *Spratt v. Hermes* the High Court again seemed evenly divided on this question.

[15] (1946) 71 C.L.R. 29.

approach was followed by the High Court in *Lamshed v. Lake* and will be dealt with later.

In the *A.N.A.* case the Australian National Airlines Act 1945 purported, among other things, to establish an airline service between Territories and other places in Australia. Latham C.J. was prepared to uphold the relevant provisions, but made the following remarks[16]—

> Thus the Commonwealth Parliament in the case of a Commonwealth Territory has the same power as a colony of Australia had before Federation . . . [A] law for the government of a Territory cannot operate as law in a State . . . The position is exactly the same as between, for example, Western Australia and South Australia. A Western Australian law does not operate in South Australia and vice versa . . . So, a Territorial law, though fully effective in relation to the Territory, cannot be enforced outside the Territory in respect of which it is made.

The result of this reasoning was that a Commonwealth air service between a Territory and a State could only be conducted with the consent of the State concerned. The reasoning of Williams J. was similar.

The Privy Council in the *Boilermakers' Case*[17] in effect summed up the trend of the decisions and opinions dealt with above. Their Lordships seemed to approve *Bernasconi* and remarked[18]—

> The legislative power in respect of the Territories is a disparate and non-federal matter. If in regard to it an exception is made to the exclusiveness of Chapter III it has no bearing upon the problem which faces their Lordships [i.e. the exercise of judicial power within the ' federal system '].

The tendency in the above cases and opinions was towards upholding the unlimited sovereignty of the Commonwealth in respect of its Territories and to regard the various limitations, definitions and restrictions outside section 122 as being concerned with the exercise of power in the area comprised by the States. The social or political reasons given for the position were that many of the provisions of the Constitution such as sections 51 or 55 were clearly intended only to operate within the federal system or were otherwise unsuited to conditions in the various Territories. It would seem to follow as a corollary of this view that the Commonwealth cannot rely on the Territories power to bind persons or property within the States which are part of a ' self-governing community ' and cannot be made subject to a head of power designed to govern ' dependencies '.

---

[16] *Ibid.* 62. It was for similar reasons, among others, that Knox C.J. and Gavan Duffy J. dissented in *Porter's* case. ' We think that a power to make laws for the government of the Territory does not include a power to impose duties on persons or organisations not within the Territory . . . ' In the *A.N.A.* case Dixon J. (at 84) after referring to the sort of approach taken by Latham C.J. said ' I think that the decision in *Porter's* case tends in the contrary direction '.

[17] (1957) 95 C.L.R. 529.

[18] *Ibid.* 545.

Before turning to recent developments, it is necessary to mention *Waters v. The Commonwealth*[19] which is the only case dealt with in this article that has to date been overruled. The case was decided by Fullagar J. sitting as a single judge. Relying on *Bernasconi's* case His Honour held that as Chapter III of the Constitution did not extend to the Territories, an action could not be brought against the Commonwealth in the original jurisdiction of the High Court under section 75 (iii.)[20] of the Constitution in respect of an act alleged to have been done by the Commonwealth in the Northern Territory.

Despite criticism of this decision[21] it did emphasise the basic principle in the earlier cases that section 122 was the sole charter of government for the Territory. Other provisions of the Constitution (or, at any rate, Chapter III) were irrelevant. It was unnecessary for the Court to consider whether under section 122 the Parliament could by legislation confer original jurisdiction on the High Court because it had not purported to do so. This was the issue left in an unsatisfactory state by the decision in *Porter's* case.

Lamshed v. Lake[22]: An Attack on the Separation Theory

This case was concerned with the question whether a law could be made under section 122 which operated within the area of a State. As mentioned above, Latham C.J. and Williams J. in the *A.N.A.* case considered that the answer was ' No '.

On the view that Commonwealth power under section 122 is not restricted by other provisions, it is submitted that the conclusion reached by these two judges was desirable. If the various checks, balances and limitations in the Constitution are not ' applicable to the Territories ' because designed to protect the people and institutions of a State, the Commonwealth should not be in a position to impose duties on the people of a State under a power that is not subject to those restrictions and limitations.

In the *A.N.A.* case, however, Dixon and Starke JJ. were of the opinion that section 122 did operate to give the Commonwealth power to legislate in respect of acts, events or things outside the area of the Territories. Dixon J. rejected the notion of a Territories power separated from the Constitution in these words[23]—

---

[19] (1951) 82 C.L.R. 188.

[20] s. 75 (iii.) gives the High Court original jurisdiction in all matters ' In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party '.

[21] See, in particular, Derham, ' Suits Against the Commonwealth, arising in the Territories ' (1953) 2 *U of Queensland L.J.* 93 and a reply by Cowen, *Federal Jurisdiction in Australia*, (1959) 142.

[22] (1958) 99 C.L.R. 132.

[23] (1946) 71 C.L.R. 29, 85.

> It is absurd to contemplate a central government with authority over a Territory and yet without power to make laws, wherever its jurisdiction may run, for the establishment, maintenance and control of communications with the Territory governed. . . . For my part, I have always found it hard to see why section 122 should be disjoined from the rest of the Constitution and I do not think that *Buchanan's Case* and *Bernasconi's Case* really meant such a disjunction.

It is clear that the phrase ' wherever its jurisdiction may run ' in the above passage refers to the whole of the Commonwealth and its Territories. According to this approach, the only question one need ask regarding the validity of a law purportedly made under section 122 is whether it can be categorised as a law for the government of a Territory. If a law operating throughout the Commonwealth answers that description it is valid.

This view received the approval of a majority of the High Court in *Lamshed v. Lake*. Section 10 of the Northern Territory (Administration) Act 1910-1955 provided that trade, commerce and intercourse between the Northern Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. The issue before the Court was whether this provision validly applied in South Australia so as to prevent section 14 of the Road and Railway Transport Act, 1930-1939 (S.A.) (which prohibited carriers from using certain roads without a licence) from applying to a carrier in the course of a journey from Adelaide to Alice Springs. The High Court by majority (Dixon C.J., Webb, Kitto and Taylor JJ.; McTiernan and Williams JJ. dissenting) held that it did so apply. Dixon C.J. strongly attacked the notion of the ' separateness ' of the Territories and the Territories power by developing his argument in the *A.N.A.* case.

The State of South Australia had argued that under section 122 the Commonwealth Parliament was in the position of a local legislature in and for the Territory with its power limited to the area of the Territory. Dixon C.J. replied[24]—

> To my mind s. 122 is a power given to the national Parliament of Australia as such to make laws ' for ', that is to say ' with respect to ', the government of the Territory. The words ' the government of any territory ' of course describe the subject matter of the power. But once the law is shown to be relevant to that subject matter it operates as a binding law of the Commonwealth wherever territorially the authority of the Commonwealth runs.

The Chief Justice pointed out that, on any view, it was necessary in applying section 122 to refer to some other parts of the Constitution. The reference to ' The Parliament ' in section 122, for example, necessarily referred to Parts I, II, III and IV of Chapter I. Section 122 deals with

[24] (1958) 99 C.L.R. 132, 141.

territories accepted by and placed under the authority of the 'Commonwealth', which word must refer to the executive government described in Chapter II.

His Honour saw no reason why, for example, section 116 (the religion clause) should not apply to laws made under section 122 and why section 120 (dealing with the custody of offenders against the laws of the Commonwealth) should not include offences created under section 122. Dixon C.J. even considered that there were a number of powers in section 51 that were applicable to the Northern Territory e.g., the powers with respect to 'postal, telegraphic, telephonic, and other like services', 'the naval and military defence of the Commonwealth', 'fisheries in Australian waters beyond territorial limits', 'banking, other than State banking; also State banking extending beyond the limits of the State concerned', 'naturalization and aliens' and the incidental power.

Similarly it was thought that a law operating in the Northern Territory which interfered with the freedom of inter-State trade, e.g., by interfering with the carriage of goods between Queensland and Western Australia, might be obnoxious to section 92.

On this reasoning, section 10 of the Commonwealth Act was held to operate validly in South Australia and to be a 'law of the Commonwealth' within the meaning of section 109.

Where did this decision leave the earlier cases? Were they to be explained merely in the inappropriateness to the Territories of the particular constitutional provisions involved? How could a Territory law not be a 'law of the Commonwealth' within the meaning of section 80 and yet be a 'law of the Commonwealth' for purposes of section 109? If some of the powers in section 51 operated in a Territory was a judge in the Territory having jurisdiction in respect of a law made under that section exercising the judicial power of the Commonwealth?

Had the High Court jurisdiction, under section 75 of the Constitution, in respect of acts in the Territories irrespective of whether section 51 operated in the Territories? Could original jurisdiction be conferred on the High Court under section 122? If section 122 could operate in a State was a Territory court created under that section a 'federal' court within the meaning of section 71?

Dixon C.J. did not expressly approve of *Bernasconi's* case or the view that Chapter III was inapplicable to the Commonwealth. However he said[25] 'since Chapter III has been considered to be concerned with jurisdiction in relation to that division of powers [between a central and local State legislature] (*R. v. Bernasconi*) it may be treated as inapplicable so that laws made mediately or immediately under section 122 are primarily not within the operation of the Chapter'.

[25] *Ibid.* 142.

It is submitted that Dixon C.J.'s views as expressed in *Lamshed v. Lake* are basically opposed to the broader views expressed in *Buchanan*, *Bernasconi* and *Porter*. While Dixon C.J. emphasised the connexion between the Territories and the rest of the Commonwealth and that between section 122 and the rest of the Constitution, the earlier cases had emphasised that the Territories power was 'separate' and 'disparate'. If the earlier cases were to stand together with *Lamshed v. Lake* it could only be on the basis that they had been accepted as an authority for a long time or because of some peculiar characteristics of Chapter III and section 55.

Spratt v. Hermes: 'Separation' v. 'Integration'

Some of the above questions posed by the decision in *Lamshed v. Lake* were answered in the recent case of *Spratt v. Hermes*.[26] Spratt was charged in the Court of Petty Sessions in the Australian Capital Territory with sending in that Territory a letter which had contained words of a grossly offensive character contrary to the provisions of section 107 (c) of the Post and Telegraph Act 1901-1961. The defendant raised an objection that the Court was without jurisdiction because the trial involved an exercise of the judicial power of the Commonwealth within the meaning of Chapter III and the magistrate who constituted the Court, Mr. Hermes, was not appointed for life as required by that Chapter (section 72).

The magistrate overruled the objection and Spratt applied for a writ of prohibition in the Supreme Court of the Territory to restrain the magistrate from hearing the charge. Bridge J. stated a case to the High Court pursuant to section 13 of the Australian Capital Territory Supreme Court Act 1933-1960 which provided that the Judge 'may state any case or reserve any question for the consideration of a Full Court of the High Court, or may direct any case or question to be argued before a Full Court of the High Court, and a Full Court of the High Court shall thereupon have power to hear and determine the case or question'.

The questions the judge asked were (1) whether section 72 of the Constitution applied to a magistrate sitting as a Court of Petty Sessions in the A.C.T. and (2) whether Mr. Hermes, having been appointed a magistrate in the A.C.T. and without having been appointed upon the terms specified in section 72, had jurisdiction to hear and determine the charge.

The High Court unanimously answered 'No' to the first question and 'Yes' to the second question.

One of the defendant's main arguments was that the Australian Capital Territory was not governed under section 122 but under section 52 (i.)

[26] (1965) 39 A.L.J.R. 368.

which gives the Parliament power to make laws *for the peace order and good government of the Commonwealth*[27] with respect to, *inter alia*, ' the seat of government of the Commonwealth '. Whatever might be said of the other Territories, therefore, it was argued that cases such as *Bernasconi* were inapplicable to the Australian Capital Territory which was co-terminus with the seat of government and was also part of the federal system. Therefore, laws operating in that Territory were laws of the Commonwealth and subject to Chapter III. This argument was consistent with the decision of Dixon J. sitting as a single judge in *Federal Capital Commission v. Laristan Building and Investment Co. Pty Ltd.*[28]

It was rejected by a unanimous Court who held that the power to make laws in respect of the A.C.T. was derived from section 122.[29]

The Court was therefore, obliged to consider the broader question of the nature of Commonwealth power in the Territories. There were really two main issues in the case—

(a) The power of Parliament to create a court for a Territory with jurisdiction to enforce the Post and Telegraph Act in that Territory without complying with the provisions of section 72 of the Constitution;

(b) the jurisdiction of the High Court to deal with the above issue in the instant case.

As the matter came up on a case stated it involved the exercise by the High Court of *original* jurisdiction.[30]

It is proposed to deal with these questions separately.

(*a*) *Applicability of section* 72 *of the Constitution to Territorial Courts*

Sections 71 and 72 of the Constitution provide as follows—

> 71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.
>
> 72. The Justices of the High Court and of the other courts created by the Parliament—
>
> (i.) Shall be appointed by the Governor-General in Council:

---

[27] Emphasis added.

[28] (1929) 42 C.L.R. 582, 585.

[29] This is the view advocated by J. Q. Ewens in ' Where is the Seat of Government '? (1952) 25 A.L.J. 532. See also Cowen, *Federal Jurisdiction in Australia* p. 148, for the opposing view. The judges refused to discuss in detail the meaning and extent of the seat of government power.

[30] It will be recalled that in *Porter's* case three judges out of six were of the opinion that original jurisdiction could not be conferred on the High Court under s. 122; also in *Waters v. The Commonwealth*, Fullagar J. felt constrained to hold, in accordance with the view he held of *Bernasconi*, that Chapter III itself did not confer any original jurisdiction on the High Court in respect of acts arising in the Territories.

(ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

It was held in *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd*[31] that a court within the meaning of section 71 must consist of judges appointed for life, subject to the powers of removal set out in section 72. In *Spratt v. Hermes* the Court unanimously held that the requirement of life tenure in section 72 only referred to the Courts mentioned in section 71. The Court of Petty Sessions of the Australian Capital Territory did not come within the description ' such other federal courts as the Parliament creates ' and therefore there was no constitutional requirement of life tenure. The reasons of the several judges, however, varied widely.

Barwick C.J. refused to accept the full-blown view of ' separation ' expounded in *Bernasconi* and *Porter*: his attitude seemed to be that, *prima facie*, the power in section 122 was to be treated, for relevant purposes, like any other power of the Commonwealth and was to be construed in the light of the whole Constitution. However, on examination it might be shown that certain particular provisions in, or doctrines derived from, the Constitution were inapplicable to the exercise of that power.

The Chief Justice, therefore, did not accept the broader ratio of *Bernasconi* that Chapter III was inapplicable to the Territories. It is submitted His Honour's reasoning may be summarised as follows:—

The powers and functions given to the Commonwealth by the Constitution may be divided, for relevant purposes into two broad categories —' federal ' and ' non-federal '. The ' federal ' powers are those exercisable within the federal system i.e., the area composed of the States. Most of the federal legislative powers are included in section 51. Non-federal functions are those exercisable in the Territories where the Commonwealth does not share sovereign legislative authority with another government.

Nevertheless there is only one ' Commonwealth ' and any reference to it in the Constitution applies, generally speaking, to the Commonwealth in respect of all its powers and functions, whether federal or non-federal. In some cases, however, the Constitution itself may give a contrary indication. This is so in the case of section 71 which refers expressly to ' federal ' courts. The Chief Justice stated that his conclusion was, therefore, based on the language of the particular provisions concerned and not on

[31] (1918) 25 C.L.R. 434.

any general notion of Chapter III or any other part of the Constitution being inapplicable to the Territories.

His Honour accepted the actual decision in *Bernasconi* that section 80 did not apply to offences created under section 122; but he seems to have done so more out of respect for the age of the decision than because he thought it was correct. He added a further ground that there was no important policy reason for overruling the decision because owing to the decisions in *R. v. Archdall and Roskruge; ex parte Carrigan*,[32] and *R. v. Federal Court of Bankruptcy; ex parte Lowenstein*[33] ' what might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural device '. He added ' There does not seem to me to be any single theme running throughout Chapter III which requires it to be treated so much all of one piece that if any part of it relates only to federal matters, every part of it must likewise be restrained '.[34]

Some parts of Chapter III he affirmed were clearly applicable to the Territories. An *inter se* question within section 74, for example, could arise out of an exercise of power under section 122 because a law made under section 122 was a ' law of the Commonwealth ' within section 109, and laws for a Territory might operate in a State (*Lamshed v. Lake*). His Honour expressly followed the views of Dixon C.J. in *Lamshed v. Lake* by pointing out that many other provisions of the Constitution were ' applicable to the Territories '.

Barwick C.J.'s view is summed up in the following passage—

> It may also be granted that the powers which were given to the Commonwealth were of different orders, some federal, some limited by subject matter, some complete and given expressly and some no doubt derived by implication from the very creation or existence of the body politic. Consequently the need to observe the nature of the powers sought to be exercised at any time by the Commonwealth is ever present. But the Constitution brought into existence but one Commonwealth which was, in turn, destined to become the nation. The difference in the quality and extent of the powers given to it introduced no duality in the Commonwealth itself. . . . Consequently . . . the expression ' law of the Commonwealth ' embraces every law made by the Parliament whatever the Constitutional power under or by reference to which that law is made or supported.[35]

His Honour concluded that a departure from the broader doctrine of *Bernasconi* would not result in any change in the actual result of any of the reported cases with the exception of *Waters v. The Commonwealth* (which is dealt with below).

---

[32] (1928) 41 C.L.R. 128.
[33] (1938) 59 C.L.R. 556.
[34] (1965) 39 A.L.J.R. 368, 373.
[35] *Ibid.*

Windeyer J. took an approach similar to that of the Chief Justice. It is submitted that the doctrine expounded by these two judges is similar to theory (c) set out at the beginning of this article.

It places emphasis on the Territories being part of the Commonwealth and on construing the Territories power as part of the Constitution. At the same time, it preserves the distinction between 'federal' and 'non-federal' functions and so leaves open a possible construction that particular provisions of the Constitution are not applicable to the Territories.

The fact that in the instant case the Territory court was purporting to enforce a law made by Parliament upon a subject matter falling within section 51 (v.) of the Constitution and intended to operate throughout the Commonwealth was adverted to by the Chief Justice and Kitto J. This aspect of the case is dealt with below.

Menzies J. went much further in the direction of 'integration'. His Honour agreed with the Chief Justice and Windeyer J. that 'the Commonwealth' included the Territories geographically and affirmed its unity as a body politic. But he took issue with the other two judges on the division of Commonwealth functions into 'federal' and 'non-federal' categories.

His Honour said that he could not grasp how the Territories, which were inescapably parts of the Commonwealth, were not part of 'the Federal System': 'It seems to me that section 122 which subjects Territories to the legislative power of the Parliament and makes provision for the representation of those Territories in Parliament itself cannot be regarded as dealing with non-federal matters'.[36] Menzies J. pointed out that as a result of the decision in *Lamshed v. Lake* laws made under section 122 might operate in the States and that section 122 was not the only source of power to make laws for the government of the Territories. His Honour's holding, therefore, that the Court of Petty Sessions of the Australian Capital Territory was not a 'federal court' within section 71 would seem to be based solely on the view that past decisions (with the exception, as we shall see, of *Waters*' case) should not be overruled. It is submitted, therefore, that Menzies J. is inclined to theory (b) as stated above, *viz.*, that section 122 should, generally speaking, be treated in the same way as any other Commonwealth power, except in those cases where prior decisions of the High Court demand special treatment as in the cases of *Bernasconi* and *Buchanan.*

Despite the disagreement between Barwick C.J. and Windeyer J. on the one hand, and Menzies J. on the other, the above judgments are all, generally, in accordance with the spirit of *Lamshed v. Lake* in opposing the 'separation' theory.

[36] *Ibid.* 383.

The other three judges were more cautious. Owen J. was not prepared to deal with general principles and relied mainly on previous authority. Kitto J., however, seemed to go furthest in regarding section 122 as a disparate power. His Honour inclined towards theory (a) stated above. This is rather surprising as he substantially agreed with Dixon C.J. in *Lamshed v. Lake*. He appears to have had some change of heart. For example, he referred to the suggestion in *Lamshed v. Lake*[37] that sections 116 and 118 of the Constitution applied to the Territories and said ' further consideration has made me more doubtful than I was about them '.

Kitto J. regarded ' the Commonwealth ' as *prima facie* meaning ' The Federated States '. A Court created under section 122 was not therefore exercising ' the judicial power of the Commonwealth '. The emphasis in his judgment is on the unlimited power given by section 122 and the inapplicability of most provisions of the Constitution to the exercise of power under section 122. The chief difficulty in this judgment, however, is that he disapproved of *Waters'* case. This will be dealt with below. Otherwise His Honour accepted the broader view of *Bernasconi* in these words — ' Chapter III treats of the Commonwealth in the sense of a polity which consists of the federated communities and is, therefore, confined geographically to the regions comprising the States '.[38]

For Kitto J., therefore, the fact that section 71 referred to ' federal courts ' merely confirmed the inference which the more general considerations suggested to him.

Taylor J. did not elaborate any general view but seemed to accept the broader views expressed in *Bernasconi* and *Porter* that Chapter III was inapplicable to the Territories.

It is submitted that, from the point of view of general principles, the reasons of the various judges for their unanimous decision that courts created under section 122 are not federal courts within the meaning of section 71 and therefore are not governed by section 72 may be summarised as follows —

(i) *Barwick* C.J. *and Windeyer* J. The Territories are parts of the Commonwealth. Any general limitation on Commonwealth power applies in respect of section 122 unless it can be shown that the limitation concerned is intended to deal only with ' federal ' powers. Section 71 is explicit in this regard as it refers to ' federal ' courts.

(Similar to theory (c) referred to above).

(ii) *Menzies* J. The Territories are parts of the Commonwealth and of the ' federal system '. No distinction can, therefore, be made between the Commonwealth in its federal and non-federal aspects. Generally speaking, there is no reason in principle for regarding provisions of the

[37] (1958) 99 C.L.R. 132, 142-3.
[38] (1965) 39 A.L.J.R. 368, 378.

Constitution as inapplicable to the Territories. (Similar to theory (b) referred to above). However, prior decisions to the effect that courts created under section 122 need not comply with section 72 should be not disturbed even though the reasoning of those cases is unacceptable.

(iii) *Kitto* J. Except in some instances (e.g. covering clause 5) ' the Commonwealth ' means the central government acting in the area comprised of the federated States. Chapter III, for example, in referring to ' the judicial power of the Commonwealth ' must be distinguished from the judicial power of the Territories exercisable under section 122. (Similar to theory (a) referred to above).

(iv) *Taylor* J. seemed to agree with the approach of Kitto J.

(v) *Owen* J. relied on previous authority without discussion of the basic principles of ' separation ' or ' integration '.

(b) *Original Jurisdiction of the High Court in respect of the Territories.*

All the judges held that the High Court had jurisdiction to hear the case. They all agreed that the jurisdiction that was conferred on the High Court by section 75 of the Constitution or which could be conferred under section 76 was not restricted to jurisdiction in respect of acts, persons or things outside the Territories. It was unanimously held, therefore, that *Waters*' case was wrongly decided.

The particular issue in *Spratt v. Hermes* was a matter ' arising under this Constitution or involving its interpretation ' within section 76 (i.). If Parliament had no power under section 122 to confer additional original jurisdiction on the High Court, it was generally agreed that section 13 of the Australian Capital Territory Supreme Court Act could be ' read down ' with the aid of section 15A of the Acts Interpretation Act 1901-1964 to refer only to matters dealt with in sections 75 and 76.

Nevertheless, the judges expressed their views whether original jurisdiction could be conferred on the High Court under section 122. Barwick C.J., Kitto and Menzies JJ. were of the opinion that the conferring of such jurisdiction was authorised by section 122. Taylor, Windeyer and Owen JJ. took the opposite view.

The difficulty caused by *Porter's* case is thus not resolved, the Court being again evenly divided.

The conclusion that sections 75 and 76 operate in the Territories is, of course, consistent with the general approach of Barwick C.J., Menzies and Windeyer JJ. In the case of Kitto and Taylor JJ. however, it is difficult to reconcile their decision in this respect with the general principles they expound.

Kitto J. said —

> The statements appearing in the judgments that Chapter III ' has no application to the Territories ', ' does not extend to the

> Territories ', are, as I read them, elliptical and mean only that the Chapter has no application to the exercise of that judicial power which exists as a function of government of a Territory. The doctrine of the case does not set any limit to the operation which section 75 or section 76 have according to their terms for those sections confer jurisdiction (section 75) or authorize the Parliament to confer jurisdiction (section 76) as part of the judicial power of the Commonwealth referred to in section 71.[39]

What is so confusing about this line of reasoning is that Kitto J. regarded ' the Commonwealth ' as including, *prima facie*, only the area comprised by the States. It is hard to discover why the High Court, in exercising jurisdiction regarding acts in the Territories is not, on Kitto J.'s view, exercising ' that judicial power which exists as a function of government of a Territory '. Indeed, His Honour referred to *Bernasconi* as drawing a distinction ' between provisions of the Constitution that relate only to the federal system and provisions that relate to non-federal matters '. The problem is to see how the exercise of jurisdiction in the Territories can, consistently with Kitto J.'s theory, be said to relate to ' federal matters '.

On the question of the conferring of jurisdiction on the High Court under section 122 all the judges accepted as law the decision in *Porter's* case that appellate jurisdiction could be so conferred. Barwick C.J., Kitto and Menzies JJ. could find no relevant distinction, for present purposes, between appellate and original jurisdiction. Taylor and Owen JJ. simply pointed to the balance of authority which denied the proposition that Parliament could so confer original jurisdiction. Windeyer J., in agreeing with this view, recognised the difficulty of finding a logical basis for the distinction but he said: ' I do not think that the interests of a supposedly logical consistency compel us to say that the Parliament could give the Court original jurisdiction in matters other than those specified in section 76 '.[40]

Critique

Spratt v. Hermes leaves a number of questions unresolved and casts doubt on several other matters that some may have thought were resolved by the decision in *Lamshed v. Lake*. In the light of the different approaches taken by the various judges in *Spratt v. Hermes* this should cause no surprise. Some of these issues relate to (a) the effect of section 51 in the Territories (b) the effect of constitutional limitations on Commonwealth power in the Territories (c) the operation of section 122 in the States, and (d) the position of the High Court in relation to the Territories. Each of these is dealt with below:

---

[39] *Ibid.* 376.
[40] *Ibid.* 386.

(a) The effect of section 51 *in the Territories.*

As mentioned above, Dixon C.J. in *Lamshed v. Lake* considered that many of the powers referred to in section 51 operated in the Northern Territory. His Honour specifically mentioned the postal power. In *Spratt v. Hermes*, an offence under the Post and Telegraph Act, which operated throughout the Commonwealth and the Territories, was involved. Barwick C.J., in that case, while referring to a number of provisions that Dixon C.J. had regarded as operating in the Territories, did not specifically refer to section 51. All His Honour said in relation to this question was that he agreed with the reasons given by Kitto J. for deciding a non-Chapter III Court might enforce in a Territory a law made ' upon a subject matter falling within section 51 of the Constitution and intended to operate throughout the Commonwealth '.[41]

Kitto J. stated that the law under which the charge was laid operated as a law in the Territory by force of section 122 as a law for the government of the Territory ' whereas it operates in the Commonwealth proper by force of section 51 (v.) as a law for the peace, order and good government of the Commonwealth '.[42]

It would seem to be a reasonable inference from this statement that Kitto J. did not regard section 51 as operating in the Territories and that the Chief Justice agreed with that view. If this is a correct statement of their opinion it was of course unnecessary for them to consider whether a court of a Territory would be a ' federal ' court within section 71 insofar as it had jurisdiction to enforce laws operating in the Territories by force of section 51 of the Constitution, because no laws operating there would owe their validity to section 51.

Windeyer J. referred to Dixon C.J.'s judgment in *Lamshed v. Lake* with apparent approval. His Honour mentioned the case of Parliament making a law intended to be of general application throughout the whole of the Commonwealth and its Territories and said, ' If it be within power under section 51, it will by the combined effect of that section and of section 122, be law in and for the States and the Territories '.[43] On the question whether section 51 does operate in the Territories this statement is ambiguous.

Menzies J. specifically mentioned that ' section 122 is not the only source of power to make laws for the government of the territories '.[44]

It is a possible view, therefore — which Menzies J. and, perhaps, Windeyer J. might endorse — that an Act such as the Post and Telegraph Act operates in the Territories under both section 51 (v.) and section 122.

[41] *Ibid.* 374.
[42] *Ibid.* 379.
[43] *Ibid.* 386.
[44] *Ibid.* 383.

Insofar as this is the opinion of the judges concerned, the unanimous decision in *Spratt v. Hermes* makes it clear that a court that does not satisfy the requirements of Chapter III may nevertheless hear a charge under that Act in respect of an offence committed in a Territory. From this point of view, the important factor seems to be not the power under which the law was made, but the power under which the court was created.

The result of *Spratt v. Hermes* is that it will usually be unimportant to know whether a law operating in a Territory is made under section 51 or section 122. The question, however, has considerable practical interest in connexion with section 51 (xxxi.) — the acquisition power — with its requirement of 'just terms'.

In *Kean v. The Commonwealth*[45] Bridge J. expressed the view that the Commonwealth was bound by section 51 (xxxi.) in legislating under section 122 for the acquisition of property in the Northern Territory. Whether a majority of the High Court would follow this opinion is not clear from *Spratt v. Hermes*. It is submitted that it is in accordance with the view of Dixon C.J. in *Lamshed v. Lake* and, as explained below, is certainly desirable if, as was held in that case, section 122 has 'extra-territorial' operation. However, the opinion of Bridge J. in *Kean's* case seems inconsistent with the approach taken by Barwick C.J. and Kitto J.

(b) *The Operation of Constitutional Limitations in the Territories.*

Although section 51 (xxxi.) for all practical purposes acts as a limitation on the legislative power of the Commonwealth, at any rate in its federal capacity, it is in form a grant of power. Therefore, even if section 51 is not applicable to a Territory because section 122 gives complete power to legislate, a different view might be taken of provisions that are both in form and effect limitations on power e.g., sections 92 and 116. In *Lamshed v. Lake* Dixon C.J. regarded both these sections as limiting Commonwealth power under section 122.

In *Spratt v. Hermes* Kitto J. expressed doubts whether section 116 did operate in the Territories. This is consistent with his general view of the 'disparate' nature of the Territories power. It is submitted, however that Barwick C.J. Menzies and Windeyer JJ. would agree with the opinion of Dixon C.J. Barwick C.J. and Windeyer J. would hold that provisions such as sections 92, 116 or 118 were not applicable to the Territories if it could be shown they were appropriate to the Commonwealth only when acting in its 'federal' capacity. In my opinion, they would not limit the operation of those provisions, particularly when one has regard to the obvious doubts Barwick C.J. had about the correctness of the actual decision in *Bernasconi's* case.

[45] (1963) 5 F.L.R. 432. See note by T. J. Higgins in 1 F.L. Rev. 146.

(c) *The operation of Section* 122 *in the States.*

Lamshed v. Lake decided that laws made under section 122 might validly operate outside the area of the Territories and affect persons, acts or things in the States. Barwick C.J., Menzies and Windeyer JJ., in *Spratt v. Hermes* all expressly approved of this decision. In *Lamshed v. Lake*, itself, Taylor J. agreed with the Chief Justice and Kitto J. gave a judgment to the same effect in this respect as that of the Chief Justice. In *Spratt v. Hermes*, Barwick C.J. showed how an *inter se* matter could arise in respect of section 122 as a result of the operation of that section in the States. This reasoning makes doubtful the distinction all the judges with the exception of Menzies J. purport to draw between section 122 and the ' federal ' legislative powers in section 51.

Insofar as section 122 (aided by section 51 (xxxix.)) can operate in the States it cannot be described as ' non-federal ' as Barwick C.J. defines it, viz ' in the sense that the total legislative power to make laws to operate in *and for* the territory is not shared in any wise with the States '.[46]

The decision in *Lamshed v. Lake*, for example, does not deny that, in the absence of contrary Commonwealth legislation, a State may make laws for encouraging or preventing trade between that State and a Territory. The fact that inconsistency under section 109 or an *inter se* question under section 74 can arise in relation to a law made under section 122 would seem to indicate that section 122 is of vital concern to ' the Commonwealth proper ' ' the federated States ' or the ' federal system '.

Accepting the decision in *Lamshed v. Lake*, therefore, it would seem that the exercise of judicial power under section 122 need not be confined to the area of the Territory. Barwick C.J. for example said that ' The reported cases establish that the Commonwealth using its legislative power derived from section 122 can create courts with jurisdiction in respect of occurrences in *or concerning* a Territory '.[47] Does this mean that the geographical area of jurisdiction of a court not constituted in accordance with section 72 may include the States?[48] If this is so it might have been better and more in accord with the ' social contract ' among the people of the States to have taken the view of Latham C.J. and confined the operation of section 122 to the geographic limits of the Territories. Perhaps the answer is that if a court created under section 122 is given jurisdiction in the area of the States it is a ' federal court ' within section 71, and therefore, the jurisdiction can only be validly conferred if section 72 is complied with. Kitto J., for example said ' an offence in the territory against a law of the Territory is in its nature triable in the exercise of that judicial power which appertains

[46] (1965) A.L.J.R. 368, 371.

[47] *Ibid.* Emphasis added.

[48] See, for example, the Crimes (Aircraft) Act 1963, s. 22.

to the government of the territory and not, *unless there be some federal factor in the case*, to the judicial power which appertains to the Government of the federation of States '.[49]

No confident answer can be given to this question as most of the judges seem to assume that ' a Territory Court ' will only deal with matters in the Territory. The difficulty arises because of the view that section 122 is not a ' federal ' power. Only Menzies J. seemed to deny this proposition, but even he felt that previous decisions should not be overruled.

Other difficulties may arise because of the ' extra-territorial ' operation of section 122. If section 51 does not limit the power in section 122 so that the Commonwealth may acquire property ' for the purposes of the Territory ' without just terms, are the people of the States deprived of the Constitutional guarantee when property in a State is acquired for that purpose ?

While it may be inconvenient to disturb earlier decisions regarding judicial power in, or even concerning, a Territory, it is submitted that section 51 (xxxi.) should be construed as limiting section 122.

(d) *The Position of the High Court in Relation to the Territories.*

It is now clearly established that the High Court can exercise jurisdiction conferred directly by section 75 or by legislation under section 76 in respect of acts and persons in a Territory. The problem, left undecided, is the extent to which functions may be given to the High Court under section 122. The decision in *Porter* to the effect that the High Court may be given appellate jurisdiction in respect of the decisions of courts created under section 122 has been affirmed. On the question of original jurisdiction the Court seemed to be evenly divided (as it was in *Porter's* case), although in some cases the views expressed were *obiter.*

The chief ground for decision in *In re Judiciary and Navigation Acts* was that an application for an advisory opinion was not a ' matter ' within Chapter III.

If the view is ultimately accepted that Chapter III does not limit the power of Parliament to confer jurisdiction on the High Court under section 122 it would follow that Parliament could under that section authorise the High Court to give advisory opinions. It might also be inferred that, because section 122 does not embody any separation of powers, that non-judicial functions could also be conferred on the High Court.

It is submitted, however, that even the judges who regard Chapter III as not limiting Commonwealth power in relation to High Court jurisdiction would not countenance the conferring of non-judicial functions.

[49] (1965) A.L.J.R. 368, 379. Emphasis added.

This result could perhaps be based on the ground of protecting a ' federal judicial institution '. A judge in those circumstances might say, in the words of Windeyer J., ' I do not think that the interests of a supposedly logical consistency compel us to say that the Parliament can give the Court ' this function.

Conclusion

It is respectfully submitted that there is a failure by all the judges in *Spratt v. Hermes*, with the exception of Menzies J., to see all the implications of the decision in *Lamshed v. Lake*. For if the people of the States are to be subject to laws made under section 122 the power given by the section is as ' federal ' as the powers conferred by section 51. If, as Windeyer J. stated, ' a limitation and division of sovereign legislative authority is of the essence of federalism ' then the type of power conferred by section 122 is not outside that concept.

On the assumption that section 122 could affect only the people of the Territories there might be a case for agreeing with Isaacs J. (although I do not think it is a strong case) that ' Parliament's sense of justice and fair dealing is sufficient to protect them '. Our federal compact, however, contains numerous provisions to show that it was not intended that the people of the States, at any rate, should rely solely on Parliament's sense of justice and fair dealing.

Surely, it is a surprising result if, by laws made under section 122, (a) property in the States can be acquired by the Commonwealth without just terms, (b) inter-State trade can be prohibited, (c) a person in a State can be made liable to trial on indictment without a jury for an offence committed in a State, (d) provisions which are otherwise in breach of section 116 can be applied in the States or (e) justices not appointed in accordance with section 72 can have territorial jurisdiction in the States.

It would be even more surprising if section 122 could be construed so that it was subject to the various restrictions and limitations in the Constitution insofar as it operated in a State, but not so when it operated in a Territory.

I, therefore, respectfully agree with Menzies J. that the dichotomy of ' federal ' and ' non-federal ' powers of the Commonwealth cannot be successfully maintained.

For many, however, the biggest problem that arises as a result of the decision in *Spratt v. Hermes* is not the desirability or otherwise of the decision but the impossibility of predicting future decisions of the High Court in relation to section 122 because of the wide diversity of opinion by members of the Court on fundamental principles.