RESOLVING COMMONWEALTH AMBIGUITY BY REFERENCE TO STATE LAWS

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It is common for courts interpreting words in Commonwealth statutes to invoke State law to clarify the meaning of those words. For example, if a Commonwealth statute uses the word "shareholder" without adequate definition, reference will be made to State law as to the meaning of that word.

How is this approach to be justified? Part of the answer is that reference to State law was intended by the Commonwealth Parliament: but where is that intention to be found? Specifically, are sections 79 and 80 of the Judiciary Act 1903-1969 (Cth) relevant?

> Those sections are in the following terms:
> 79. The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.
> 80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

There have been few cases in which either section has been expressly applied to clarify by recourse to State law ill-defined words in a Commonwealth Act. The sections have been more commonly invoked in cases where there is no procedure laid down in a Commonwealth Act, or where a court is exercising federal jurisdiction in respect of, say, a common law contest between residents of different States. The leading Australian text on conflict of laws contains the following paragraph:[1]

> Sections 79 and 80, it appears, are only applicable where a person seeks to enforce a right created by the law of a State in a federal court or in a court exercising federal jurisdiction. The position is otherwise where the plaintiff is seeking to enforce a right created by federal law. In so far as federal law has omitted to give a remedy the court may, under s. 80, invoke State law in order to enforce the federal right. In so far as federal law does not prescribe procedure, State law under s. 79 will govern matters of procedure. But in defining the extent of the right itself only federal law can

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[1] Nygh, *Conflict of Laws in Australia* (2nd ed. 1971) 786.

> be relevant. State law cannot be invoked to supplement or extend that right.

The major Australian case relied upon is *Deputy F. C. T.* v. *Brown.*[2] That was a case in which the executors in a deceased estate had distributed the assets before receiving an assessment in respect of income derived by the deceased, so that they had no estate assets to pay tax. The Deputy Commissioner sought to recover the tax from the beneficiary. He relied on a principle of equity that an unpaid creditor of a deceased estate may proceed against the beneficiaries to whom assets have been distributed, if a distribution has been made without due provision for the debt, the assets being no longer traceable and the debt being otherwise incapable of recovery. Dixon J. referred to section 79 and said[3]

> liability to pay federal tax is a matter of federal law and . . . the function of s. 79 is not to provide from State law a new source of liability for federal tax.

There is nothing in the judgment to the effect that, where the Commonwealth Act itself creates the liability, but in doing so uses ill-defined words which have a clear meaning in State law, sections 79 and 80 cannot be applied. That issue was not before the Court.

A number of cases have considered the meaning of section 56 of the Judiciary Act 1903-1969 (Cth), which provides:

> 56. (1) A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth —
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> (a) in the High Court;
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> (b) in the Supreme Court of the State or Territory in which the claim arose; or
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> (c) in any other court of competent jurisdiction of the State or Territory in which the claim arose.
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> (2) For the purposes of paragraph (c) of the last preceding subsection —
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> (a) any court exercising jurisdiction at any place in the capital city of a State, or in the principal or only city or town of a Territory, that would be competent to hear the suit, if the Commonwealth were, or had at any time been, resident in that city or town, or in a particular area in that city or town, is a court of competent jurisdiction; and
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> (b) any other court is not a court of competent jurisdiction if its competence to hear the suit would depend upon the place where the Commonwealth resides or carries on business or at any time resided or carried on business.

Can sections 79 and 80 be invoked to complete the meaning of the undefined words "contract" and "tort"?

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[2] (1958) 100 C.L.R. 32.
[3] *Id.* 40.

In *Musgrave* v. *The Commonwealth*[4] Latham C.J. at first instance answered that question in the affirmative, and applied section 79. On appeal, Dixon J., without disagreeing with the Chief Justice, commented:[5]

> Secs. 79 and 80 of the Judiciary Act apply only where otherwise Federal law itself is insufficient, and it may be considered that the provisions of Federal law do impliedly prescribe the law that is to govern the delictual responsibility of the Commonwealth for a given act of its servants. For once an intention is discovered, either in sec. 75 of the Constitution or in Part IX of the Judiciary Act 1903-1934 that the Commonwealth should be under a substantive liability for tort, it may well be thought to be part of this intention that the liability should be that otherwise flowing from the law of the State or territory in which the wrongful act or omission is committed or made.

It was unnecessary for His Honour to determine whether reference to State law was authorized by section 56 or sections 79 and 80, because, on the facts, the same State law was to be applied in either event. But His Honour raised the possibility that sections 79 and 80 may in fact be inapplicable.

In *Washington* v. *The Commonwealth*[6] Jordan C.J. held that the Commonwealth's tort liability under section 56 was affected by the State's Compensation to Relatives Act, as it stood when section 56 was enacted. It appears that His Honour was wrong in this latter respect, and that the provisions of the Judiciary Act are ambulatory in effect.[7] This must raise a question as to the reliability of the judgment in other respects. His Honour remarked, *obiter*:[8]

> The latter section [section 80], which makes applicable the common law as modified by the Statute law in force in the State in which the court in which the jurisdiction is exercised is held, is itself applicable only so far as the laws of the Commonwealth are not applicable. With respect to the matter now in question there is law of the Commonwealth which is applicable, namely, that contained in s. 56 and perhaps also in s. 64.

Curiously, he cited *Musgrave's* case, though the strongest pronouncement on the question in that case (the judgment of Latham C.J.) would favour the application of section 79.

In *Suehle* v. *The Commonwealth*[9] Windeyer J. took a view of the facts which made it unnecessary to decide whether the applicable law

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[4] (1937) 57 C.L.R. 514, especially 531-532.

[5] *Id.* 547-548. Rich J. 543, found it unnecessary to comment on whether reference to State Law flowed from s. 56 or ss. 79 and 80. Evatt and McTiernan JJ. 551, found that s. 79 did not introduce the "general body" of N.S.W. law merely because the action happened to have been heard by the High Court in Sydney. They offered no further elaboration.

[6] (1939) 39 S.R. (N.S.W.) 133.

[7] *Suehle* v. *The Commonwealth* [1967] A.L.R. 572, 574.

[8] (1939) 39 S.R. (N.S.W.) 133, 143.

[9] [1967] A.L.R. 572.

was that of South Australia or New South Wales.[10] But he offered some *obiter dicta* on the effect of sections 56, 79 and 80, *inter alia*. He regarded section 56 as providing the answer to the question of the law to be applied, because section 56 contains "within itself an implication that the law to be applied is the law of the State where the tort was committed and the cause of action arose".[11] Sections 79 and 80 "apply only when the laws of the Commonwealth do not otherwise provide",[12] and, upon its proper construction, section 56 is a law of the Commonwealth which makes a different provision. None of this indicates that on a general plane lack of definition in a Commonwealth Act is not enough to attract sections 79 and 80. Rather, the specific words and context of section 56 made it sufficient to cover the issue at hand without recourse to those sections. If anything, His Honour's remarks favour the view that lack of definition may, in an appropriate case, render the Commonwealth Act insufficient, so that sections 79 and 80 would be invoked. Had His Honour regarded the sections as totally inapplicable in this area, we might fairly have expected him to say so.

Indeed, in *Parker* v. *The Commonwealth*[13] the same judge contemplated the application of section 80 in respect of a Commonwealth liability arising under section 56.[14] Upon its proper construction, section 56 itself did not provide the choice of law rule in respect of a statutory (as opposed to a common law) claim, and section 80 filled the gap.[15]

In the result, decided cases do not resolve the problem of applicability of sections 79 and 80 to ill-defined words in a Commonwealth Act. The major arguments in favour of applying the sections are the following.

First, the words of both sections, particularly the words "so far as their provisions are insufficient to carry them into effect" in section 80, are wide enough to embrace the present situation.[16] Secondly, the sections provide a simple solution to a problem which otherwise can be solved only by reference to principles of statutory interpretation which are extremely difficult to apply. Thirdly, the sections authorize the court to apply the modern State law rather than the State law in force in 1903 when the sections were enacted,[17] and in this regard produce a result which accords with common sense.

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[10] *Id.* 573.

[11] *Id.* 573.

[12] *Id.* 574. This approach has been criticized by Lane in 41 A.L.J. 210.

[13] (1965) 112 C.L.R. 295.

[14] *Id.* 307. It is not certain that the liability arose under s. 56, but it certainly arose under Commonwealth law, *id.* 306.

[15] *Suehle's* case, [1967] A.L.R. 572, 574.

[16] Phillips, "Choice of Law in Federal Jurisdiction" (1961) 3 M.U.L.R. 170, especially 188, 192, 352, thinks that this is the literal meaning of the words, though he raises questions of constitutional validity.

[17] *Suehle* v. *The Commonwealth* [1967] A.L.R. 572, 574; but see *Washington* v. *The Commonwealth* (1939) 39 S.R. (N.S.W.) 133, 143-144. The precise point of time for determining State law is uncertain.

There are, however, a number of arguments against applying the sections in the present situation. While it seems to the writer that none of them is conclusive in itself, their cumulative effect is to suggest strongly that the sections have no application here.

The first argument is as follows: Neither section can have any relevance unless the court in question is exercising "federal jurisdiction". It has been pointed out that these words are used in a number of different senses in the Constitution and the Judiciary Act.[18] In sections 79 and 80, they seem to refer to the original jurisdiction of the High Court,[19] the jurisdiction of other federal courts exercising the judicial power of the Commonwealth, and the federal jurisdiction vested by the Commonwealth Parliament in State courts under section 77(iii) of the Constitution. In *Musgrave* v. *The Commonwealth*[20] Latham C.J. (at first instance) was dealing with an action against the Commonwealth for libel brought in the original jurisdiction of the High Court. In holding that section 79 applied to the case before him, he said

> In the case of *Lady Carrington Steamship Co. Ltd.* v. *The Commonwealth*[21] Higgins J. doubted whether the High Court was exercising Federal jurisdiction in a case such as this. In Australia jurisdiction may be exercised in Admiralty and perhaps under the British Bankruptcy Act, which is neither Federal nor State jurisdiction, but the courts in Australia are either Federal or State. A State court may exercise either its State jurisdiction under State statutes or Federal jurisdiction under sec. 77(iii) of the Constitution. In my opinion Federal courts exercise Federal jurisdiction only, and I think all their jurisdiction must be regarded as Federal jurisdiction. I therefore regard sec. 79 of the Judiciary Act as applying.[22]

Where the High Court is exercising appellate jurisdiction under section 73 of the Constitution, it is uncertain whether sections 79 and 80 of the Judiciary Act apply. The point was expressly left open in *Commissioner of Stamp Duties (N.S.W.)* v. *Owens (No. 2)*.[23] Where the appeal is from a decision of a court bound by sections 79 and 80, it would be curious if the appellate court could disregard those sections.

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[18] Lane, *The Australian Federal System with United States Analogues* (1972) 388-389.

[19] Under Constitution ss. 75 and 76. The former section confers jurisdiction, whereas the latter merely authorizes Parliament to confer jurisdiction. Parliament has done so piecemeal in, *e.g.* the Judiciary Act, s. 30, and the Income Tax Assessment Act, s. 196.

[20] (1937) 57 C.L.R. 514.

[21] (1921) 29 C.L.R. 596, 599, 601.

[22] (1937) 57 C.L.R. 514, 531-532. On appeal, none of Their Honours found it necessary to decide this point: 543 *per* Rich J., 547-548 *per* Dixon J., 550-551 *per* Evatt and McTiernan JJ. The doubt expressed by Higgins J. in the *Lady Carrington* case was also set aside by Dixon J. in *Huddart Parker Ltd* v. *The Ship Mill Hill* (1950) 81 C.L.R. 502, 507-508. Also *Cohen* v. *Cohen* (1929) 42 C.L.R. 91, 99; *Bainbridge-Hawker* v. *Minister for Trade and Customs* (1958) 99 C.L.R. 521, 536-537; *Pedersen* v. *Young* (1964) 110 C.L.R. 162; *John Robertson & Co.* v. *Ferguson Transformers* (1973) 47 A.L.J.R. 381, 389, 392.

[23] (1953) 88 C.L.R. 168, 170.

On the other hand, where the appeal is from a State court on a question of State law with no federal element, the High Court "sits . . . as a national court to unify State court decisions . . .; a literal reading of s. 79 might defeat this end".[24]

In most cases in which the interpretation of the words of a Commonwealth Act is in issue, the court will be exercising federal jurisdiction. However, there will be exceptional cases both in the High Court's appellate jurisdiction and in State courts in which this is not so. The widest grant of federal jurisdiction relevant to the present problem is in section 76(ii) of the Constitution, which provides:

> The Parliament may make laws conferring original jurisdiction on the High Court in any matter . . . arising under any laws made by the Parliament . . .

There has been no blanket conferral of this jurisdiction on the High Court, or other federal or State courts (under section 77). Even if there were, it would remain true that "if the interpretation of a federal statute is the only matter that does arise, no jurisdiction under s. 76(ii) is attracted".[25] While "the point at which interpretation of the federal statute, prima facie an apparently incidental consideration, may give rise to a matter rising under the statute is not readily expressed in universally valid terms", still "the distinction between the two situations must be maintained".[26] Lane provides examples of cases involving the interpretation of a Commonwealth Act, but not arising under that or any other Commonwealth Act.[27]

If we regard section 79 or 80 as resolving ambiguity in the words used in Commonwealth Acts, the same words may have to be interpreted differently on different occasions. When the court which considers them is exercising federal jurisdiction, one of the sections must be applied, but when federal jurisdiction is not being exercised, the court is at liberty to select that construction which appears most fitting having regard only to the words used and their statutory context.[28] The possibility of an undesirable divergence of interpretation is an argument against allowing sections 79 and 80 to have any relevance in the first place.

The second argument relates to validity. Section 15A of the Acts Interpretation Act demands that every Commonwealth Act must be

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[24] Lane, *op. cit.* 389, n. 23. Professor Lane's use of the word "literal" suggests that in his view, the words "federal jurisdiction" literally apply to the High Court's whole appellate jurisdiction, but that a court may adopt something other than a literal approach where such an approach would mean that the High Court's unifying force would be inhibited.

[25] Lane, *op. cit.* 543.

[26] *Felton* v. *Mulligan* (1971) 45 A.L.J.R. 525, 527 *per* Barwick C.J.

[27] Lane, *op. cit.* 543.

[28] Of course, if the statute was enacted after coming into operation of ss. 79 and 80, and Parliament has, by express words or necessary implication, exhibited an intention inconsistent with the application of ss. 79 and 80, those sections will be inapplicable in any case.

read and construed so as not to exceed the legislative power of the Commonwealth. In one respect[29] a question of constitutional validity might be raised if sections 79 and 80 are read in the manner earlier suggested. Sections 51(ii), 99 and 117 of the Constitution deal with discrimination between States and residents of States. Since the effect of applying section 79 or 80 in the interpretation of a Commonwealth Act would be that rights and obligations under the Commonwealth Act would vary from State to State, to the extent that relevant State laws vary, is the Commonwealth Act unconstitutional for discrimination?

It seems fairly clear that section 117 has no application here. It provides:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Notwithstanding its apparent relevance in the present situation, the section has been construed narrowly. In *James* v. *The Commonwealth*[30] a Commonwealth Dried Fruits Act prohibited delivery of dried fruit for inter-state carriage without a licence issued by a "prescribed authority". Regulations defined "prescribed authority" as meaning boards in named States. Queensland and Tasmania were not named. Counsel's argument based on section 117 was dismissed since "that section relates to discrimination on the basis of residence".[31] Under sections 79 and 80, if they apply in the present situation, discrimination is based on the application of the law of the State in which jurisdiction is exercised. If that State's domestic law does not extend to the case before the court, reference is made to the private international law of the forum State. None of this discrimination is based on residence alone.

Sections 51(ii) and 99 are more difficult.[32] It should be noted that they only apply when the Commonwealth Act in question deals with "taxation" (section 51(ii) or is a "law or regulation of trade, commerce, or revenue" (section 99). The application of section 79 or 80 to a Commonwealth Act outside these fields will not give rise to invalidity on the grounds of discrimination.

Where the Commonwealth Act is within one of these fields, does it "in terms"[33] discriminate between States by using an ill-defined word which, by sections 79 and 80, will take its meaning from laws which vary from State to State? The issue is uncertain, but it could be argued that there is no discrimination in the Commonwealth Act, and what discrimination there is arises out of State laws. The combined effect

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[29] Apart from the more general constitutional difficulties raised by Phillips "Choice of Law in Federal Jurisdiction" (1961) 3 M.U.L.R. 170, 348.

[30] (1928) 41 C.L.R. 442.

[31] *Id.* 457 *per* Higgins J. Also 464 *per* Starke J. Also *Davies* v. *State of Western Australia* (1904) 2 C.L.R. 29.

[32] Both sections prohibit the same kind of action: Lane, *op. cit.* 61.

[33] Lane, *op. cit.* 62.

of sections 79 and 80 and the Commonwealth Act in question is that the Commonwealth Parliament has intended its words to take their meaning from State laws, according to what those laws may provide at the time when the question of interpretation arises.[34]

Thirdly, the result of applying section 79 or 80 in the present situation would be that, whenever words used in a Commonwealth Act are inadequately defined, "applicable" State law *must* be applied, even though the consequences might be so curious that, were it not for the sections, one would have to conclude that Parliament could not have intended to invoke the State law which the sections require the court to apply.

Fourthly, in the United States it appears that section 34 of the Judiciary Act of 1789 has no application in the interpretation of the words used in a federal Act. In *Clearfield Trust Co.* v. *United States*[35] it was held that the rule applicable to determine the rights of parties in respect of a forged federal government cheque was a federal rule (though there was no relevant federal legislation) and section 34 was inapplicable. Uniformity of rights and obligations in respect of federal government cheques was thought desirable, and would not be achieved by applying State law. This reasoning has some persuasive force.

Fifthly, the combined effect of sections 79 and 80 is that a court exercising "jurisdiction in a State in a matter which might have been litigated in a court of that State [is to apply] the same law as the State court would apply in like case",[36] and should apply the decisional law of that State whether it agrees with it or not.[37] This may mean that the High Court interpreting an ill-defined Commonwealth Act and exercising federal jurisdiction must give effect to a decision of a State court on the interpretation of an applicable State Act, even though it disagrees with the State court's decision and would overrule it if a direct appeal from the State court came to the High Court.[38]

Other approaches

If it is to be concluded that sections 79 and 80 have no application in the present situation, the problem becomes one of interpreting the Commonwealth Act in which the uncertain words are used. This interpretation will depend upon individual statutory contexts, and it may

[34] The situation is thus analogous to *Colonial Sugar Refining Co. Ltd* v. *Irving* [1906] A.C. 360, rather than *Conroy* v. *Carter* (1968) 118 C.L.R. 90.

[35] (1943) 318 U.S. 363.

[36] *Suehle* v. *The Commonwealth* [1967] A.L.R. 572, 574.

[37] Nygh, *op. cit.* 780, citing *Parente* v. *Bell* (1967) 41 A.L.J.R. 52. In that case Windeyer J. did not expressly refer to s. 79 or s. 80, but followed an "unusual" decision of the Supreme Court of Queensland on the basis that the Supreme Court's reasoning was "highly persuasive", and "sitting as I am in Queensland to exercise the original jurisdiction of [the High] Court, I think I need not further consider the question". Note, 41 A.L.J. 210, 213 (P.H.L.).

[38] As pointed out *supra* p. 183, it appears that the High Court sitting as a court of appeal on questions of domestic State law is not exercising federal jurisdiction within ss. 79 and 80.

be futile to attempt to state any general rules. What can be said, however, is that the interpretation chosen by the court in a particular case is likely to fall within one of two broad approaches. We can make some observations about each of these approaches.

The first approach accepts that Parliament, in using without adequate definition, words which have a meaning in State law, intended reference to *the general law and relevant State statutes.* In *Musgrave* v. *The Commonwealth*[39] Dixon J. took this approach in interpreting section 56 of the Judiciary Act,[40] and there is some support for it in Canadian decisions.[41] In most cases the result is the same as that achieved by applying sections 79 and 80, but the rigidity of those sections is avoided. There are, however, four areas of special difficulty.

First, where the relevant statutes vary from State to State the court must invoke a conflicts principle to determine which State's law to apply to the instant case. Where is that conflicts principle to be found? It cannot be found in the law of the States, because it is a principle which lays down for all courts, including peripatetic federal courts, which State laws (including State conflicts laws) are to be applied. The principle must be created for the occasion, and will be a supra-State law.

This problem is, of course, avoided if section 80 is applied, because then the principle is a Commonwealth statutory law, which directs the court to apply the law of the State in which jurisdiction is exercised.

Secondly, do we apply up-to-date State law, or the State law in force at the time of the Commonwealth enactment? Orthodox canons of interpretation suggest the latter.[42] If so, there is a contrast between this approach and the application of section 79 or 80, which in this respect produces a more sensible result.

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[39] (1937) 57 C.L.R. 514.

[40] *Id.* 547-548.

[41] One of the issues in *Jackson* v. *Jackson* (1972) 29 D.L.R. (3d) 641, 647, was whether the meaning of the phrase "children of the marriage" in the federal Divorce Act, 1967-1968, which authorized courts to order maintenance in respect of children of the marriage was affected by the Age of Majority Act, 1970, of British Columbia, which reduced the age of majority "for the purposes of any rule of law" from 21 to 19 years. The Supreme Court of Canada held that the words "children of the marriage" in the federal Act did not create any age barrier, and were capable of applying to a child of any age who fulfilled the conditions laid down in s. 2 of the federal Act. Provincial laws as to age of majority were therefore irrelevant. It was thus not necessary for the Court to determine whether a provincial law could have been invoked had the federal Act been ambiguous, and it did not do so, *id.* 650. However, both Ruttan J. of the British Columbia Supreme Court (1971) 21 D.L.R. (3d) 112 and the British Columbia Court of Appeal (1971) 22 D.L.R. (3d) 583 held that the provincial Act deprived the Court of jurisdiction to order maintenance under the federal Act in respect of a nineteen-years-old child.

[42] However, in *Jackson* v. *Jackson, supra* n. 41, both the British Columbia Supreme Court and the British Columbia Court of Appeal applied a 1970 provincial Act in construing a 1967 federal Act. The judgments do not directly indicate the basis for doing so, but perhaps they relied upon the Canadian Interpretation Act, s. 10 which states that "the law shall be considered as always speaking".

Thirdly, will the court interpreting the Commonwealth statute feel bound to accept the rulings of State courts as to relevant State statutes? There are no clear guidelines on this issue. The problem is one of ascertaining the intention of the Commonwealth Parliament in using the contentious words. It may be that State decisions prior to the Commonwealth enactment will be followed, but later State decisions will not be automatically accepted.

Fourthly, this approach, like the application of sections 79 and 80, involves the consequence that rights and obligations under a Commonwealth statute will vary from State to State, if State laws vary. The constitutional problem of discrimination discussed in relation to sections 79 and 80 must be raised here as well. A stronger case for invalidity under sections 51(ii) and 99 of the Constitution could be made here, than arises when sections 79 and 80 are applied. If the Commonwealth Parliament uses an ill-defined word in laying down rights and liabilities, and intends that the word should take its meaning from the varying State laws in force at the time of the Commonwealth enactment (so that the provision is not ambulatory), it seems more likely that the consequent discrimination arises out of the Commonwealth Act than the State provisions, which are at that time static.

The second approach would be to allocate a single, uniform meaning to the words used by the Commonwealth, notwithstanding variations in relevant State law. The meaning would be determined by applying a formula like this: the words are to be given their normal meaning in the States and in legal systems based on the British model. However, this approach raises three areas of difficulty.

First, it may not always be possible to attribute a "normal meaning" to the words used. What would be the normal meaning of words like "minor", "defamation", "unlawful termination of pregnancy", or "liability for personal injury caused by or arising out of the use of a motor vehicle", in situations where the States' laws vary or are in flux? This is not an objection where the words used have a settled meaning, but it may give rise to a difficulty in some cases at least.

Secondly, to adopt this interpretation may not be to implement Parliament's intention. When Parliament used the word "tort" in section 56 of the Judiciary Act, it intended that claims be determined by reference to the law of a State selected on some choice of law or statutory principle. It was not intended that the law to be applied to all claims was "normal" tort law. Similarly, it would be strange if the word "shareholder" in section 44(i) of the Income Tax Assessment Act was to be given a "normal" meaning irrespective of State variations. In a case, all of the elements of which occurred in New South Wales, the person named as executor of a deceased shareholder would not before grant of probate be regarded as a shareholder for the purposes of the law of that State (which is peculiar in this respect), yet if the "normal" law of executorship is applied, he may be assessed to income tax as a "shareholder" who has been "paid" a dividend. He is

liable to be assessed, though he may have no access to the dividend.[43]

Thirdly, there will also be a question of determining whether the "normal" meaning to be attributed to Parliament's words is their normal meaning at the time of the Commonwealth Act, or at some later time.

It is submitted that these approaches, notwithstanding their difficulties, provide on balance a more useful and practical solution than can be offered by recourse to sections 79 and 80.

[43] Austin, "The Tax Treatment of Dividends in a Deceased Estate" (1974) 3 Australian Tax Review 3.