EXTRATERRITORIAL STATE LAWS AND THE AUSTRALIA ACTS

CHRISTOPHER D GILBERT*

INTRODUCTION

In 1971, FA Trindade argued that the doctrine of extraterritorial legislative incompetence (hereafter the doctrine of extraterritoriality) no longer applied to Australian State Parliaments.[1] His general thesis was that the doctrine no longer applied, either because it had virtually ceased to exist at common law after the Privy Council decision in *Croft* v *Dunphy*[2] in 1933, or because the doctrine had been impliedly repealed so far as the States were concerned by s 5 of the Colonial Laws Validity Act 1865 (UK) (CLVA). Since 1971, the High Court of Australia has had occasion to consider the extraterritoriality rule several times, and now the topic has received express legislative provision in the Australian Commonwealth and United Kingdom statutes that are collectively known as the Australia Acts 1986.[3] The overall purpose of these statutes is to eliminate any residual legislative, executive, or judicial authority of the United Kingdom over Australia and its States. Part of this legislative plan involves the extraterritoriality doctrine as it applied to the Australian States. It is the aim of this article to examine the impact of the Australia Acts upon the extraterritoriality principle.

1 THE COMMON-LAW BACKGROUND

Put in its simplest and most restrictive form, the doctrine of extraterritoriality prevents a State Parliament from attaching legal consequences within the State's boundaries to acts, circumstances or events which occur beyond those

---

* BA (Qld), LLM (Qld), D Jur (York), Senior Lecturer in Law, University of Queensland. I would like to express my appreciation of the assistance from the office of Senator David MacGibbon, Senator for Queensland in the Commonwealth Parliament. However, the views expressed in this article are those of the writer alone.

[1] FA Trindade, "The Australian States and the Doctrine of Extra-territorial Legislative Incompetence" (1971) 45 ALJ 233.

[2] [1933] AC 156.

[3] There are two substantive enactments, the Australia Act 1986 (Cth) and the Australia Act 1986 (UK). With the exception of their formal parts, the two Acts are identical in language and the numbering of sections. The Commonwealth version was enacted in reliance on s 51(xxxviii) of the Commonwealth Constitution. All six Australian States passed Acts requesting and consenting that the Commonwealth enact the Australia Act 1986 (Cth), under the procedure laid down in s 51 (xxxviii) of the Constitution. See the Australia Acts (Request) Act 1985 (Qld) for a representative example of the States' "requesting" legislation. The Australia Act 1986 (UK) was passed by the British Parliament following the passage of Commonwealth legislation that requested and consented to the UK Parliament passing the Australia Act 1986 (UK). See the Australia (Request and Consent) Act 1985 (Cth). The Commonwealth request to the UK was an exercise of the procedure contained in s 4 of the Statute of Westminster 1931 (UK). The States had previously legislatively asked the Commonwealth to pass the Australia (Request and Consent) Act 1985 (Cth); see, *eg* the Australia Acts (Request) Act 1985 (Qld). This tripartite UK-Commonwealth-State scheme of legislation had its origins in a Commonwealth-State agreement dating back to 1982: see H Reps Deb 1985 2685 (13 November).

boundaries.[4] The doctrine's origins are not entirely clear. It probably had its genesis in various opinions given by the Law Officers of the Imperial Government during the nineteenth century concerning the scope of the powers conferred upon British colonial legislatures.[5] It was suggested in an early, and still classic, Privy Council decision[6] on the doctrine that the colonial extraterritoriality principle flowed from a supposed similar limitation on the powers of the United Kingdom Parliament itself — a view which cannot be supported because the United Kingdom Parliament is not restricted by any such incapacity.[7] At one time, there was a strand of thinking that the extraterritoriality rule had its beginnings in the principles of international law.[8] During the twentieth century, another strand of opinion has suggested strongly that, in respect of the Australian States, the doctrine stemmed from the language in which law-making powers were conferred upon the Australian colonial (now State) Parliaments. These powers were usually given in general terms; *eg* the colonial legislature was empowered "within the Colony of Queensland . . . to make laws for the peace welfare and good government of the colony in all cases whatsoever".[9] This form of words was thought to mean that colonial legislative powers could be used, speaking generally, only within the particular colony concerned.[10]

Yet a number of modern Australian judges have repudiated the traditional view that the Australian colonies possessed little or no power in the nineteenth century to legislate with extraterritorial effect.[11] Indeed, Mason J opined in *Wacando* v *The Commonwealth*[12] that the pre-Federation colonies enjoyed a substantial measure of extraterritorial legislative power because of their grants of power to make laws for the peace, order (or welfare) and good government of the

---

[4] Trindade, *supra* n1, 233. The doctrine should not be confused with the presumption in statutory interpretation that, in the absence of factors indicating otherwise, general words in an Act are read as being prima facie restricted in their operation to the territory within the political boundaries of the enacting jurisdiction: see DC Pearce, *Statutory Interpretation in Australia* (2nd ed 1981) 81-82. The presumption against extraterritoriality assumes constitutional capacity to pass extraterritorial laws if so worded. The doctrine of extraterritoriality, on the other hand, denies that capacity at the outset. A useful case illustrating the distinction between presumption and doctrine is *Ex parte Iskra* [1963] SR (NSW) 538.

[5] See the account in DP O'Connell, "The Doctrine of Colonial Extra-Territorial Legislative Incompetence" (1959) 75 LQR 318, 319-322; *Pearce* v *Florenca* (1976) 135 CLR 507, 514 *per* Gibbs J.

[6] *Macleod* v *Attorney-General (NSW)* [1891] AC 455, 458-459 *per* Lord Halsbury. See also O'Connell, *supra* n5, 320.

[7] *Croft* v *Dunphy* [1933] AC 156, 162, 164 *per* Lord Macmillan; *Pearce* v *Florenca* (1976) 135 CLR 507, 515 *per* Gibbs J; *Robinson* v *Western Australian Museum* (1977) 138 CLR 283, 294 *per* Barwick CJ.

[8] See O'Connell, *supra* n 5, 320-322.

[9] Constitution Act 1867-1986 (Qld) s 2.

[10] *Pearce* v *Florenca* (1976) 135 CLR 507, 515 *per* Gibbs J. Windeyer J has rejected this explanation: *R* v *Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 308.

[11] *Bonser* v *La Macchia* (1969) 122 CLR 177, 189, 191-192 *per* Barwick CJ; 202, 203 *per* Kitto J; 209, 211 *per* Menzies J; 225, 227-229 *per* Windeyer J; *New South Wales* v *The Commonwealth* (1975) 135 CLR 337, 367, 369, 371 *per* Barwick CJ; 468-469 *per* Mason J; 494-495 *per Jacobs J; Pearce* v *Florenca* (1976) 135 CLR 507, 512 *per* Barwick CJ; 518-520 *per* Gibbs J; 522 *per* Stephen J; 522, 524 *per* Mason J; 526-527 *per* Jacobs J; *Robinson* v *Western Australian Museum* (1977) 138 CLR 283, 294-295 *per* Barwick CJ; 303-305 *per* Gibbs J; 330-331 *per* Mason J.

[12] (1981) 148 CLR 1, 21.

colony. With the greatest of respect, it is hard to escape the conclusion that the view of Mason J in *Wacando* is a useful judicial fiction to solve a difficulty posed by the High Court's decision in the *Seas and Submerged Lands* case.[13] The majority's conclusion in that case that the fringing oceans and sea-beds did not lie within the territory of the Australian States required a new theory to explain the many instances of colonial legislative excursions beyond colonial borders.[14] A retrospective rediscovery of colonial extraterritorial legislative powers fitted the bill nicely.[15] The opinion of Mason J in *Wacando* is hardly bolstered by Wilson J in the same case, who apparently accepted the view that the colonies in the nineteenth century had no extraterritorial legislative competence.[16] On balance, the preferable view of "peace, order and good government" is that, if the words gave rise to anything at all, they probably created the extraterritoriality doctrine in colonial constitutional law.[17]

In any event, the Australian courts, and even the Privy Council, long ago abandoned the notion that the extraterritoriality rule meant that a colony's legislative jurisdiction was merely coterminous with its geographical and political boundaries. Thus, the Privy Council in the 1893 case of *Ashbury* v *Ellis*[18] upheld a New Zealand law that permitted a plaintiff who was party to a contract made or to be performed in New Zealand to seek the court's leave to commence breach-of-contract proceedings against a defendant who was absent from New Zealand. In the 1937 case of *Broken Hill South Ltd* v *Commissioner of Taxation (NSW)*[19] a New South Wales taxing statute provided that interest received on loans secured by a mortgage over New South Wales property was income derived in New South Wales and hence taxable. A Victorian company had lent money to another Victorian company. The latter paid interest to the former, the payments being made in Victoria. The latter also mortgaged its property as security for the loan. Some of this mortgaged property was situated in New South Wales. The High Court held that the New South Wales statute validly taxed the interest payments received by the first-mentioned Victorian company.

It was in the *Broken Hill South* case that Dixon J gave his famous definition of the extraterritorial doctrine that has heavily influenced Australian courts from that day to this.[20] His Honour said:

> The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicil, residence or otherwise. But it is within the competence of the

---

[13] *New South Wales* v *The Commonwealth* (1975) 135 CLR 337.

[14] For some examples of these, see *ibid* 404-405, 442-443.

[15] Gibbs J effectively admits this in *Pearce* v *Florenca* (1976) 135 CLR 507, 518-519.

[16] *Wacando* v *The Commonwealth* (1981) 148 CLR 1, 29.

[17] *Supra* n10.

[18] [1893] AC 339.

[19] (1937) 56 CLR 337.

[20] *Johnson* v *Commissioner of Stamp Duties* [1956] AC 331, 353 *per* Lord Keith of Avonholm; *Ex parte Iskra* [1963] SR (NSW) 538, 550 *per* Brereton J; *Welker* v *Hewett* (1969) 120 CLR 503, 512-513 *per* Kitto J; *Thompson* v *Commissioner of Stamp Duties* [1969] 1 AC 320, 335 *per* Lord Pearson; *Cox* v *Tomat* (1972) 126 CLR 105, 109-110, 111, 113 *per* Barwick CJ; 114-115 *per* Menzies J; 127, 129 *per* Gibbs J; *Pearce* v *Florenca* (1976) 135 CLR 507, 517; *per* Gibbs J; *Traut* v *Rogers* (1984) 70 FLR 17, 19-20 *per* Forster CJ, Muirhead and O'Leary JJ.

> State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory.[21]

Several years before *Broken Hill South*, the Privy Council had indicated a major relaxation of the extraterritoriality rule, at lease in the case of colonies that had achieved full Dominion status. In the 1933 case of *Croft* v *Dunphy*,[22] the Board had to consider the validity of the Canadian Federal Parliament's anti-smuggling legislation which permitted the Canadian customs authorities to confiscate any vessel (and its cargo) which was engaged in smuggling and found within twelve miles of the Canadian coast. The Privy Council refused to invalidate the law:

> Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate . . . their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State.[23]

Since it was traditional for the customs laws of sovereign nations to include provision for the seizure of vessels suspected of smuggling, the Board thought it perfectly appropriate for the Canadian Federal Parliament to have an extraterritorial power to seize smugglers' ships off Canadian coasts.

While the High Court had affirmed several times that the liberalizing effects of *Croft* v *Dunphy* apply to the Australian States,[24] the Court also continued to require that extraterritorial State laws meet the "connecting factors" criteria of Mr Justice Dixon's *Broken Hill South* definition of extraterritoriality, *viz* that validity demands a relevant, territorially-related factor connecting the extraterritorial operation of the law to the enacting State.[25] This meant that State laws would still occasionally be struck down for excessive extraterritoriality, even though in the 1976 case of *Pearce* v *Florenca*[26] Gibbs J had expressed some doubts about whether the extraterritoriality doctrine had survived s5 of the CLVA.[27]

Accordingly, in the 1972 decision of *Cox* v *Tomat*[28] the High Court invalidated a provision in a Western Australian statute that imposed upon an out-of-state director of an out-of-state company an obligation to keep records and pay charges concerning journeys on state roads by company-owned vehicles. In the absence of any indication that the director had been personally involved in the company's decision to operate their vehicle on Western Australian roads, a

---

[21] (1937) 56 CLR 337, 375.

[22] [1933] AC 156.

[23] *Ibid* 163, *per* Lord Macmillan.

[24] *R* v *Bull* (1974) 131 CLR 203, 231 *per* Barwick CJ; 263 *per* Gibbs J; 271 *per* Stephen J; 280-281 *per* Mason J; *Pearce* v *Florenca* (1976) 135 CLR 507, 516 *per* Gibbs J; 522 *per* Mason J; *Robinson* v *Western Australian Museum* (1977) 138 CLR 283, 305 *per* Gibbs J; 331 *per* Mason J: See also *Barnes* v *Cameron* [1975] Qd R 128, 136 *per* Lucas J.

[25] *Supra* n20.

[26] (1976) 135 CLR 507.

[27] *Ibid* 515. It appears that Trindade and Gibbs J arrived independently at this conclusion, since the former is not cited by the latter: P Hanks, *Australian Constitutional Law* (3rd ed 1985) 291.

[28] (1972) 126 CLR 105.

majority of the High Court held that the connection between the director and the vehicle's being on Western Australian roads was too remote. In the 1977 High Court decision of *Robinson* v *Western Australian Museum,*[29] one of the reasons that led some members[30] of a statutory majority of the Court to reject a Western Australian legislative claim to a historic Dutch shipwreck lying fewer than five kilometres off the State's coast was that the State law was perceived as having an invalid extraterritorial operation.

Thus, as far as the Australian States were concerned, the doctrine of extraterritoriality had lost much of its substantive bite since the bad old days of *Macleod* v *AG (NSW).*[31] Nevertheless, despite the advent of *Croft* v *Dunphy* and despite Trindade's arguments of 1971, the continued adherence by Australian courts to the "connecting factors" dictum by Dixon J in *Broken Hill South* meant that the extraterritoriality rule still occasionally inflicted painful nips on the Australian States. It is doubtful that the views of Mason J in *Wacando* would have changed this position greatly before the passage of the Australia Acts.

2 THE ARRIVAL OF THE AUSTRALIA ACTS

Such was the position before the Australia Acts came into force by royal proclamation on 3 March 1986. The Acts deal with various matters while terminating the residual colonial links between Australia and the United Kingdom. The United Kingdom Parliament's powers to pass any more laws for Australia and its States are abolished.[32] So too are all remaining appeals from Australian courts to the Privy Council.[33] All "suspension", "reservation" and "disallowance" requirements attached to any remaining classes of State parliamentary Bills and Acts are repealed.[34] The United Kingdom Government is henceforth removed from any involvement whatever in the government of any State.[35] The States are given full power to override existing or future UK paramount Acts.[36] However, some State legislative "manner and form" requirements are retained.[37] The extraterritoriality principle is specifically provided for in s 2 of the Australia Acts 1986. It is necessary to set it out in full:

> Legislative powers of Parliaments of States
>
> 2. (1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.
>
> (2) It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the

---

[29] (1977) 138 CLR 283.
[30] Barwick CJ and Murphy J.
[31] [1891] AC 455.
[32] Section 1.
[33] Section 11.
[34] Sections 8 and 9.
[35] Sections 7(5) and 10.
[36] Section 3(2).
[37] Section 6. This provision is substantially a re-enactment of the "manner-and-form" proviso in s 5 of the Colonial Laws Validity Act.

> peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

Has this section abolished the doctrine of extraterritoriality in relation to the States, even in its attenuated form as exemplified in Dixon J's dictum in the *Broken Hill South* case? Or is the section to be interpreted as doing no more than adopting, declaring and enacting the Dixonian re-interpretation of the extraterritoriality rule, attenuated but nonetheless still existing?

3 THE EFFECT OF SECTION 2(1)

It is highly likely that, by itself, s 2(1) does no more than restate the law as it was immediately before the Australia Acts came into force. Notwithstanding the reference to State Parliaments having "full power to make laws . . . that have extra-territorial operation", the States have not thereby acquired the sort of extraterritorial power that would enable them to pass a statute that, for example, penalized residents of New Caledonia who discarded litter in the streets of Noumea. Such a law would, pre-Australia Acts, have been beyond the power of any Australian State Parliament because there is no territorial connection with the enacting State. It is probable that this will continue to be the case, even now that the Australia Acts have come into force. In my opinion, s 2(1) is merely declaratory of the rules about State extraterritoriality as developed in *Croft* v *Dunphy, Broken Hill South* and their successors.

There are two reasons for taking this restrictive view of the sub-section. First, the prefatory words "It is hereby declared and enacted . . ." suggest that the sub-section merely intends to restate, not reform, the law. This aspect of s 2(1) should be compared with s3 of the Statute of Westminster 1931 (UK),[38] which uses identical opening words. Some judicial opinion in the High Court indicates that the use of these words in s3 demonstrates the declaratory rather than reforming nature of this provision in the Statute of Westminster.[39] It is possible that these same words in s 2(1) of the Australia Acts would be similarly interpreted as intended to be merely declaratory in effect.[40]

Secondly, and far more importantly, the words "full power to make laws . . . that have extra-territorial operation" do not stand unqualified. After "laws" comes the phrase "for the peace, order and good government of that State". According to s 2(1), State laws having an extraterritorial operation must also be for "the peace, order and good government of that State". It is instructive again to compare s 2(1) of the Australia Acts with its counterpart in the Statute of Westminster, s 3, which conferred full extraterritorial power upon the Australian

---

[38] Section 3: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

[39] See *Trustees Executors and Agency Co Ltd* v *Federal Commissioner of Taxation* (1933) 49 CLR 220, 239 *per* Evatt J. However, the more accepted view of s 3 is probably that it effected a real reform of this branch of the law: see *R* v *Foster: ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 267 *per* Dixon CJ (Fullagar and Kitto JJ concurring); 305 *per* Windeyer J.

[40] Particularly if the Statute of Westminster is regarded as a statute "prior to" or "*in pari materia*" with the Australia Acts for the purposes of statutory interpretation: see DC Pearce, *supra* n4 67, 70-71.

Federal Parliament.[41] Section 3 merely declares and enacts that a Dominion Parliament has full power to make laws having extraterritorial operation. There is no requirement that these laws must also be for the peace, order and good government of the Dominion. The "peace, order and good government" criteria have apparently been deliberately inserted into s 2(1) of the Australia Acts. What do they mean?

The words "peace, order and good government", and the similar "peace, welfare and good government", were the traditional formulae used by the Imperial Parliament when conferring legislative powers on colonial legislatures.[42] Most of the Australian state legislatures even today still possess their law-making powers pursuant to this time-honoured formula.[43] The catalogue of legislative powers given to the Australian Federal Parliament by s 51 of the Commonwealth Constitution is prefaced with the words "for the peace, order, and good government of the Commonwealth" and the phrase turns up in the Constitutions of some overseas Commonwealth nations.[44] Traditionally, the words simply mean that the legislative power conferred upon the particular Parliament is of a plenary, full, and sovereign nature, even if the power is subject to certain limitations contained in the relevant Constitution.[45] Usually, they do not mean that a court of law is empowered to decide whether or not, as a matter of fact and policy, a given law actually does bring about peace, order, or good government within the relevant political community.[46] If the legislature in its wisdom decides that a particular law is for the peace, order and good government of its community, normally the legislature's opinion is conclusive and unexaminable. This is probably the case with the words "peace, order, and good government" in the Commonwealth Constitution, subject, of course, to the Commonwealth law falling within a head of power.[47] The Privy Council has expressed a similarly wide opinion of the meaning of "peace, welfare and good government" in s 2 of the Constitution Act 1867–1986 (Qld).[48]

---

[41] The Commonwealth's extraterritorial legislative powers are total, and quite untrammelled by even the mild, Dixonian restraints upon extraterritorial powers — at least since the Commonwealth's adoption of the Statute of Westminster in 1942. The Commonwealth Parliament's extraterritorial powers, within its fields of constitutional competence, are equal to those of the United Kingdom Parliament: see *R* v *Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 267-268 *per* Dixon CJ (Fullagar and Kitto JJ concurring); 305, 306-307 *per* Windeyer J; *Pearce* v *Florenca* (1976) 135 CLR 507, 515-516 *per* Gibbs J; and *Robinson* v *Western Australian Museum* (1977) 138 CLR 283, 294 *per* Barwick CJ. The Commonwealth's extraterritorial powers may also be located in s 51(xxix) of the Federal Constitution. In the *Seas and Submerged Lands* case, Barwick CJ, Mason and Jacobs JJ thought that s51(xxix) enabled the Commonwealth to pass laws concerning any matter, place, thing or person geographically external to Australia: *New South Wales* v *Commonwealth* (1975) 135 CLR 337, 360, 471, 497.

[42] PW Hogg, *Constitutional Law of Canada* (2nd ed 1985) 370 n7; *R* v *Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 308 *per* Windeyer J.

[43] For a detailed list of the relevant statutory provisions, see RD Lumb, *The Constitutions of the Australian States* (4th ed 1977) 81.

[44] *Eg* the opening words of s 91 of the Constitution Act 1867 (as amended) UK. This statute, formerly known as the British North America Act 1867 (UK), was renamed by the Canada Act 1982 (UK) and contains the major part of the Canadian Constitution.

[45] *Cobb & Co Ltd* v *Kropp* [1967] 1 AC 141, 154 *per* Lord Morris of Borth-y-Gest.

[46] *Riel* v *R* (1885) LR 10 App Cas 675, 678 *per* Lord Halsbury.

[47] *R* v *Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 308 *per* Windeyer J. Menzies J may have disagreed: *ibid* 300.

[48] *Cobb & Co Ltd* v *Kropp* [1967] 1 AC 141, 154-156.

However, there has not been unanimous acceptance of the traditional, *Riel* v *R* interpretation of "peace, order (welfare) and good government" by Australian State and Territory Supreme Courts. In *Grace Bible Church* v *Reedman,*[49] Zelling, White and Millhouse JJ of the South Australian Supreme Court rejected a challenge to a state law requiring registration of non-government schools. The challenge asserted an inalienable right to freedom of religious worship which could not be limited by any South Australian statute. In rejecting this, White J said, in classic, *Riel*-type terms:

> the opinion of the Parliament as to what laws are for the peace, welfare and good government of the State is paramount and conclusive as a matter of law. . . . If the Court could substitute its own opinion for the Parliament's opinion as to what is a law for the peace, welfare and good government of the State . . . we would not be living under the rule of law but in a state of chaos.[50]

On the other hand, Forster CJ, Muirhead and O'Leary JJ of the Northern Territory Supreme Court seem to have implied in *Traut* v *Rogers*[51] that the court could enquire whether an impugned Northern Territory law was really for the Territory's peace, order and good government. This possible rejection of the *Riel*-style approach to "peace, order (welfare) and good government" has received further support in the New South Wales Court of Appeal's 1986 decision in *Building Construction Employees' and Builders' Labourers Federation* v *Minister for Industrial Relations* (hereafter the *BLF* case).[52]

The case concerned a challenge to the validity of New South Wales legislation passed in order to cancel the industrial registration of the Builders' Labourers Federation. Several grounds of constitutional invalidity were argued, including that the legislation did not relate to the peace, welfare and good government of the State. Although the court ultimately upheld the validity of the legislation, several members of the Court of Appeal expressed views on the meaning of "peace, welfare and good government" as those words appear in s5 of the Constitution Act 1902 (NSW).

Only Mahoney JA adopted the traditional view that it is the conclusive and unexaminable right of the legislature to decide whether a given law is or is not for the peace, welfare and good government of the State.[53] Kirby P and Glass JA expressly reserved their positions on the question.[54] In clear contrast, Street CJ and Priestley JA were prepared to depart radically from the *Riel*-style interpretation of "peace, welfare and good government". Street CJ was the most definite:

> For my own part, I prefer to look to the constitutional constraints of "peace, welfare and good government" as the source of power in the courts to exercise an ultimate authority to protect our parliamentary democracy, not only against tyrannous excesses

---

[49] (1984) 36 SASR 376. The case is discussed by G Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 ALJ 276.

[50] *Grace Bible Church* v *Reedman* (1984) 36 SASR 376, 387. See also 383-384 *per* Zelling J; 389-390 *per* Millhouse J.

[51] (1984) 70 FLR 17, 20.

[52] (1986) 7 NSWLR 372. The case is noted on the "peace, welfare and good government" point, in (1987) 61 ALJ 53.

[53] (1986) 7 NSWLR 372, 413.

[54] *Ibid* 406 and 407 respectively. Kirby P, however, leaned noticeably towards a *Riel*-type view of "peace, welfare and good government".

> on the part of a legislature that may have fallen under extremist control, but also in a general sense as limiting the power of Parliament. I repeat what I have said earlier — laws inimical to, or which do not serve, the peace, welfare and good government of our parliamentary democracy perceived in the sense I have previously indicated, will be struck down by the courts as unconstitutional.[55]

Priestley JA was not quite so uncompromising. His Honour said that it was "at least arguable" that if a really extreme situation arose of an Act of Parliament that was obviously detrimental to the peace, welfare and good government of the State, the courts could hold it "ultra vires the written authority of the Parliament to make laws".[56]

The views of Street CJ and Priestley JA are clearly at variance with the more traditional, "hands off the legislature" approach in cases such as *Riel* v *R*, [57] *Cobb & Co Ltd* v *Kropp*,[58] and *Grace Bible Church* v *Reedman*.[59] Allied with the Northern Territory Supreme Court judges in *Traut* v *Rogers*,[60] Street CJ and Priestley JA in the *BLF* case demonstrate that the Australian judges are by no means unanimous in supporting the usual "plenary and unexaminable power" meaning of "peace, order (welfare) and good government" in Australian State constitutions.

Moreover, "peace, order (or welfare) and good government" have over many years additionally acquired a specific meaning in Australian law, when used in the context of State laws that contain extraterritorial elements. The High Court has consistently said in many of its decisions on extraterritorial State laws that such laws will be valid only if they relate to the peace, order (or welfare) and good government of the enacting State, and that this will be the case only if the extraterritorial elements in the law are not too remotely connected to the legislating State by facts, circumstances, things or persons concerned with that State.[61] As Mr Justice Jacobs summed it up succinctly in the *Seas and Submerged Lands* case[62] in 1975:

> A State can only legislate in respect of persons acts matters and things which have a relevant territorial connexion with the State, a connexion not too remote to entitle the law to the description of a law for the peace welfare and good government of the State.[63]

---

[55] *Ibid* 387.
[56] *Ibid* 421.
[57] (1885) LR 10 App Cas 675.
[58] [1967] 1 AC 141.
[59] (1984) 36 SASR 376.
[60] (1984) 70 FLR 17.
[61] For a pre-*Broken Hill South* intimation of this view, see *Trustees Executors and Agency Co Ltd* v *Federal Commissioner of Taxation* (1933) 49 CLR 220, 236, 240 *per* Evatt J. Post-*Broken Hill South* examples are *R* v *Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 307-308 *per* Windeyer J; *Welker* v *Hewett* (1969) 120 CLR 503, 512 *per* Kitto J (Barwick CJ and Menzies J concurring); *Bonser* v *La Macchia* (1969) 122 CLR 177, 226 *per* Windeyer J; *Cox* v *Tomat* (1972) 126 CLR 105, 109-110 *per* Barwick CJ, 114 *per* Menzies J; *Pearce* v *Florenca* (1976) 135 CLR 507, 517-518 *per* Gibbs J; and *Robinson* v *Western Australian Museum* (1977) 138 CLR 283, 294-295 *per* Barwick CJ. See also *Barnes* v *Cameron* [1975] Qd R 128, 136 *per* Lucas J (for the Qld FC).
[62] *New South Wales* v *Commonwealth* (1975) 135 CLR 337.
[63] *Ibid* 498.

Even Mr Justice Dixon in his famous judgment in the *Broken Hill South* case expressly linked his classic definition of a valid extraterritorial State law to the question of whether that law is for the peace, order and good government of the State.[64]

In other words, when one asks whether an extraterritorial State law is for the peace, order and good government of that State, High Court doctrine requires that the question be answered in terms of whether the Dixonian "territorially connecting factors" test has been met. This appears to be what was meant by Gibbs J when he said in *Pearce* v *Florenca:*

> the test whether a law is one for the peace, order and good government of the State is, as so stated, exceedingly vague and imprecise, and a rather more specific test has been adopted; it has become settled that a law is valid if it is connected, not too remotely, with the State which enacted it . . . .[65]

His Honour then quotes Mr Justice Dixon's *Broken Hill South* dictum on extraterritoriality. These words of Gibbs J seem to have been misinterpreted by Forster CJ, Muirhead and O'Leary JJ of the Northern Territory Supreme Court in *Traut* v *Rogers*.[66] Their Honours apparently thought that Gibbs J in *Pearce* v *Florenca* was saying that — in the context of extraterritoriality — the "peace, order and good government" test was quite separate from the Dixonian "connecting factors" test.[67] With respect, this is not so, and Gibbs J should be interpreted as I have suggested at the beginning of this paragraph. This is more in accord with existing High Court authority on the meaning of Mr Justice Dixon's dictum.[68]

I contend, therefore, that the words "peace, order and good government" in s 2(1) of the Australia Acts are to be read in a specific, "connecting territorial factors" sense, and not solely in the traditional *Riel* v *R*[69] sense. Section 3 of the Statute of Westminster did not include the words "peace, order and good government", and the Commonwealth Parliament acquired complete and unfettered extraterritorial legislative powers. Section 2(1) of the Australia Acts retains those words, and the States thereby possess only the limited, Dixonian version of extraterritorial competence.

If resort is made to the various debates on the Australia Bills in the State, Commonwealth and British Parliaments,[70] it is not immediately clear whether the legislatures intended that s 2(1) of the Australia Acts should repeal the extraterritorial fetter completely, or that the Dixonian re-definition of the doctrine was being enacted. In the House of Commons debate[71] on the United Kingdom version of the Australia Act, the extraterritoriality doctrine was not

---

[64] *Broken Hill South Ltd* v *Commissioner of Taxation (NSW)* (1937) 56 CLR 337, 375.
[65] (1976) 135 CLR 507, 517.
[66] (1984) 70 FLR 17.
[67] *Ibid* 20.
[68] *Supra* n61.
[69] (1885) LR 10 App Cas 675.
[70] Under s 15AB(2)(f) of the Acts Interpretation Act 1901 (Cth) as amended. The Second Reading speeches by Ministers in either House of the Commonwealth Parliament are admissible to help explain ambiguous or obscure provisions in Commonwealth Acts. This would probably not allow resort to State or UK parliamentary debates to explain Commonwealth legislative provisions, but I include these references for interest's sake.
[71] House of Commons Debates 1986, 6th series, vol 91, 81-92.

mentioned at all. In both the Australian Senate[72] and House of Representatives[73] debates on the federal package of Australia Bills, it was merely stated enigmatically that clause 2(1) of the Bill declared and enacted that the powers of State Parliaments include power to legislate extraterritorially. However, debate in the Queensland Parliament on that State's Australia Acts (Request) Bill tends to indicate that it was intended to enact the Dixonian version of extraterritoriality. Delivering the Second Reading speech on the Bill, the Queensland Premier, Sir Joh Bjelke-Petersen, said of clause 2(1) that it gives to each State Parliament:

> full power to legislate extra-territorially, provided that the laws are for the peace, order and good government of the State.[74]

Indeed, it is rather hard to imagine that the Australian States would have agreed to the Australia Acts on any other basis. Neither conservative States such as Queensland nor Labor-governed States such as Victoria would be happy with the notion that the Australia Acts might be conferring on their sister States such unfettered legislative powers that there might be political temptations to embarrass a neighbour with unsolicited (even if largely unenforceable[75]) legislative interventions in that neighbour's domestic affairs. A Dixonian-style interpretation of the extraterritorial power in s 2(1) would soothe the sensibilities of all the States.

4 THE MEANING OF SECTION 2(2)

It is possible that s 2(2) of the Australia Acts provides grounds for disputing or at least amending the argument for the merely declaratory interpretation of s 2(1). In essence, sub-s (2) provides that State legislative powers now include all law-making powers that the United Kingdom Parliament might have had in relation to the States before the Australia Acts came into force. The one specific exception in sub-s (2) to this blanket conferral of legislative power is that the States do not thereby acquire any additional capacity to engage in foreign relations on their own account.

Several features of s 2(2) deserve preliminary comment. The sub-section says that "[i]t is hereby further declared and enacted" that State legislatures shall possess the power described. Thus the format of the sub-section is to some extent declaratory in tone. Also, s 2(2) describes the additional powers being given to State Parliaments in a particular way. The States are not being given the United Kingdom Parliament's powers *simpliciter* in respect of the States. The sub-section confers on each State those powers that the British Parliament could, before the Australia Acts, have exercised "for the peace, order and good government of that State". Our old friends from sub-s (1), "peace, order and

---

[72] Sen Deb 1985, 2552 (29 November).

[73] H Reps Deb 1985, 2686 (13 November).

[74] Qld Parl Deb 1985, vol 300, 1503. The Queensland Premier then went on to say that s 2(1) of the Australia Acts "corresponds" with s 3 of the Statute of Westminster. However, this paper argues that the latter has a far more sweeping effect than the former.

[75] In the sense explained by Windeyer J in *R* v *Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 306-307.

good government", are making a re-appearance. What kinds of powers formerly exercisable by the British Parliament are being conferred on the States by s 2(2)? What is the significance of "peace, order and good government" when used in s 2(2)? Finally, what impact might s 2(2) have on s 2(1)?

The widest interpretation of the grant of power to the States by s 2(2) is that the sub-section grants the full, sovereign and plenary legislative powers of the old Imperial Parliament to the States. It is undoubted that, before the Australia Acts, the British Parliament retained in theory the powers to pass laws for the Australian States. These powers were recognized by the Australian courts,[76] by statute,[77] and by convention.[78] It is possible that the words "peace, order and good government of that State" are to be interpreted in the plenary and unrestricted sense embodied in cases such as *Riel*[79] and *Kropp*.[80] There is no modern doubt that the British Parliament has, in theory, a power to pass extraterritorial laws in the fullest possible sense, unlimited even by the Dixonian criteria in *Broken Hill South*.[81] If "peace, order and good government of that State" in s 2(2) are to be interpreted in the *Riel* and *Kropp* sense, then the completely unfettered extraterritorial power of the United Kingdom Parliament may well have been transferred to the States by s 2(2) of the Australia Act. If this is the case, States now have power to pass laws, for example, taxing out-of-state deceased estates on the value of out-of-state shares in out-of-state companies simply because the latter carry on business in the taxing State, as in *Millar* v *Commissioner of Stamp Duties*[82] or requiring non-resident company directors of non-resident companies to pay charges and furnish returns in respect of journeys on the State's roads by company vehicles in the absence of personal involvement by the director in the company's decision to so operate the vehicle, as in *Welker* v *Hewett*[83] and *Cox* v *Tomat*[84] or imposing death duty on out-of-state personalty in which a mere life interest was held by a deceased person domiciled in the taxing State at the time of death, as in *Johnson* v *Commissioner of Stamp Duties*[85] or even (to take my earlier hypothetical example) penalizing residents of New Caledonia for littering the streets of Noumea.

There are several reasons why I would argue that this wide interpretation of the grant of power to the States in s 2(2) is incorrect. It would render s 2(1) pointless, assuming the latter is given the limited scope for which I have argued. Such a widening of State extraterritorial powers would sit ill with the declaratory nature of s 2(2). More importantly, if it had been wished to confer British parliamentary-style, untrammelled extraterritorial powers on State legislatures, then the purported conferral was couched in singularly inappropriate language.

---

[76] *Bistricic* v *Rokov* (1976) 135 CLR 552; *China Ocean Shipping Co Ltd* v *South Australia* (1979) 145 CLR 172; and *Southern Centre of Theosophy Inc* v *South Australia* (1979) 145 CLR 246.

[77] *Eg*, Statute of Westminster 1931 (UK) s 9(2).

[78] *Ukley* v *Ukley* [1977] VR 121.

[79] *Riel* v *R* (1885) LR 10 App Cas 675.

[80] *Cobb & Co Ltd* v *Kropp* [1967] 1 AC 141.

[81] *Pearce* v *Florenca* (1976) 135 CLR 507, 515 *per* Gibbs J; *Robinson* v *Western Australian Museum* (1977) 138 CLR 283, 294 *per* Barwick CJ.

[82] (1932) 48 CLR 618.

[83] (1969) 120 CLR 503.

[84] (1972) 126 CLR 105.

[85] [1956] AC 331.

The British Parliament's powers, derived from a largely unwritten constitution comprising common-law principles, hallowed usage, custom, and the historical growth of the power of the House of Commons, have never been traditionally limited or granted in terms of being for the peace, order and good government of the British political community. Historically, as has been shown earlier,[86] the formula of "peace, order (or welfare) and good government" was devised to describe and limit the Imperial Parliament's grants of law-making power to colonial legislatures. Since the formula is not (and never has been) normally used to describe the plenary, unfettered, and totally sovereign nature of the law-making powers of the British Parliament, it is highly unlikely that the words "peace, order and good government" would have been used in s 2(2) — particularly in association with the further limiting words "of that State" — to describe a grant of British-style power that was supposed to be full, untrammelled, and devoid of the restrictions expressed in the Dixonian definition of extraterritoriality in *Broken Hill South.*

Another argument against a wide interpretation of the grant of power in s 2(2) is that it is most unlikely that the phrase "peace, order and good government of that State" would have been used separately in two sub-sections of the same section, but possessing two different meanings, one wide and one narrow. The phrase should bear the same meaning in both sub-sections. In sub-s (1), the phrase has been used in the specific context of extraterritoriality, and I have argued that the words "peace, order and good government" in that context have acquired a particular meaning through judicial interpretation. That meaning should prevail in s 2(1). Thus, the same words appearing in sub-s (2) should take their general colour from their use and context in sub-s (1). Their effect in s 2(2) should harmonize with s 2(1), not override it.

I would argue that the true scope of s 2(2) is discoverable from the overall purpose of the Australia Acts. Generally, it is the legislation's aim that the constitutional arrangements governing Australia should properly reflect the country's status as an independent, sovereign nation.[87] The Acts seek to achieve this general aim in two ways; first, by terminating any powers of the United Kingdom Parliament to legislate for Australia in future, and secondly, by putting the Australian States into a similar position *vis-a-vis* the United Kingdom as that created by the Statute of Westminer 1931 for the Commonwealth of Australia *vis-a-vis* the United Kingdom — in effect, independence from London.

The first goal — ending all United Kingdom legislative and governmental powers over Australia — is achieved relatively simply by ss 1, 3 and 10 of the Australia Acts. These sections take that final step not taken in the Statute of Westminster, where limited Imperial legislative authority over Australia was expressly retained.[88] The second goal — granting the Australian States complete independence from the United Kingdom, but not from the Commonwealth of

---

[86] *Supra* n42, and accompanying text.

[87] See the preamble to the Australia Acts; House of Commons Debates 1986, 6th series, vol 91, 83; and Qld Parl Deb 1985, vol 300, 1500. See also the Acts Interpretation Act 1901 (Cth), as amended s 15AA which requires a purposive approach to the interpretation of Commonwealth statutes.

[88] See ss 4 and 9(2) of the Statute of Westminster. Incidentally, these sections of the Statute, along with ss 9(3) and 10(2), have been repealed by s 12 of the Australia Acts.

Australia — is achieved in several specific ways, some of them directly patterned on the Statute of Westminster. The Australian States are granted power to make extraterritorial laws;[89] they are expressly freed from any future operation of the Colonial Laws Validity Act 1865 (CLVA);[90] they are given power to overrule any existing or future United Kingdom Acts applying to a State;[91] and the operation in the States of several specific Imperial paramount statutes is expressly terminated.[92]

Those drafting the Australia Acts have tried to repeal every major specific constitutional link between the Australian States and Great Britain, other than the link with the Crown. It also seems to have been thought that it was not enough merely to repeal particular links between the States and the United Kingdom or to give the States the capacity to repeal particular remaining indicia of their former colonial status, *eg* the power to repeal paramount United Kingdom statutes. It appears to have been thought necessary to recognize that the States possess a general and almost plenary power of legislation, *ie* s 2(2).

The first probable reason for the inclusion of s 2(2) may be gleaned from the abolition by s 1 of all remaining powers exercisable over the Australian States by the United Kingdom Parliament. Section 2(2) confirms that ultimate and almost complete legislative power over the States now rests with the States themselves, and no longer with the old Imperial Parliament. It may well be that, apart from the express exception of external affairs, s 2(2) is little different from the provisions in most Australian States' Constitution Acts that already confer plenary and general power to make laws for the peace, order and good government of the State.[93] Yet, the sub-section is the final Imperial recognition of full, State law-making powers, free of any colonial fetters, and subject only to those exceptions specifically contained in the Australia Acts. If any colonial remnants of Imperial authority that have not been abolished in the Australia Acts are later found to affect the States, these can be fully dealt with by using the powers in s 2(2).[94]

A second reason for s 2(2) may be that it is intended to replace the constituent power[95] formerly found in the first limb of s 5 of the CLVA. This is because the Australia Acts have probably repealed the CLVA so far as it applied to the States. I say "probably", because the CLVA has been dealt with in the Australia Acts in a rather anomalous way. The CLVA is not in the list of United Kingdom paramount statutes repealed by ss 4, 11(3) and 12 of the Australia Acts.[96] On the other hand, s 3(1) of the Australia Acts states that the CLVA "shall not apply to any law made after the commencement of this Act by the Parliament of a State."

---

[89] Compare s 2(1) of the Australia Acts with s 3 of the Statute of Westminster.

[90] Compare s 3(1) of the Australia Acts with s 2(1) of the Statute of Westminster.

[91] Compare s 3(2) of the Australia Acts with s 2(2) of the Statute of Westminster.

[92] Sections 3(1), 4, 11(3) and 12 of the Australia Acts.

[93] *Eg*, Constitution Act 1867-1986 (Qld) s 2.

[94] This certainly seems to have been the legislative intention: see Sen Deb 1985, 2552 (29 November); H Reps Deb 1985, 2686 (13 November); and Qld Parl Deb 1985, vol 300, 1503.

[95] See the discussions of this aspect of the CLVA in *AG (NSW)* v *Trethowan* (1931) 44 CLR 394 (High Court), [1932] AC 526 (Privy Council).

[96] Section 4 repeals certain sections of the Merchant Shipping Act 1894 (UK); s 11(3) repeals various Imperial statutes concerning appeals to the Privy Council from Australian courts; while s 12 repeals several provisions of the Statute of Westminster.

The primary intention of s 3(1) is, perhaps, just to remove the restrictions formerly placed on the States by the CLVA. The heading of s 3 supports this view: "Termination of restrictions on legislative powers of Parliaments of States". However, s 3(2) goes on specifically to repeal for the States the "repugnancy" rule previously embodied in s 2 of the CLVA. The only other limitations placed by the CLVA on State legislative authority were in ss 4 and 5. The former said that colonial laws would not be void merely because they were inconsistent with instructions to the Governor contained in instruments other than Letters Patent or other instrument authorizing the Governor to assent to colonial laws. Yet this particular matter already seems to have been taken care of by ss 8 and 9 of the Australia Acts.[97] Section 5 of the CLVA contained the famous "manner and form" proviso. But this too has been separately provided for by s 6 of the Australia Acts, which partly re-enacts s 5 of the CLVA. Thus, all the limitations on the States imposed by the CLVA have been expressly removed or otherwise provided for in particular sections (apart from s 3(1) of the Australia Acts). Section 3(1) of the latter Acts cannot therefore be limited to merely repealing the restrictive aspects of the CLVA. Such an interpretation would mean that the provision would be otiose.

In any event, the language of s 3(1) is quite general. It is not restricted to the limiting facets of the CLVA. Notwithstanding that the heading to s 3 tends to suggest a narrower approach to the section's meaning, the heading does not reflect the full impact of s 3(1) as revealed by the latter's wording and its place in the context of ss 3(2), 6, 8 and 9. To the extent that the heading suggests the contrary, it should be disregarded.[98] The better view of s 3(1) of the Australia Acts is that it prospectively repeals the entire CLVA so far as the States are concerned. This view is also supported by the Commonwealth parliamentary debates on the Australia Bills.[99] However, any loss[100] of State constituent law-making powers caused by the repeal of s 5 of the CLVA is fully compensated by s 2(2) of the Australia Acts.

The result is that since the Australia Acts, the States now have two sources of authority for their general law-making powers: their own, mostly locally-enacted Constitution Acts, and s 2(2) of the Australia Acts. Yet it must be remembered that the Australia Acts' grant of legislative independence to the States operates with respect to the United Kingdom but not the Commonwealth of Australia. Both s 2 and s 3(2) of the Australia Acts are expressly subject to the Commonwealth of Australia Constitution Act and the Commonwealth Constitution itself.[101] State independence from Great Britain is to operate within the confines of the Australian federal system.

I contend that s 2(2) of the Australia Acts should not be interpreted so as to legitimize State laws that would disturb the fabric of the Australian Federation.

---

[97] *Supra* n34, and accompanying text.

[98] DC Pearce, *supra* n4, 52-54.

[99] Sen Deb 1985, 2552 (29 November); H Reps Deb 1985, 2685 (13 November).

[100] Which would have been slight anyway. It appears that the States' "peace, order and good government" powers in their own Constitution Acts contain enough constituent elements to meet most State constitutional needs: see *Clayton* v *Heffron* (1960) 105 CLR 214.

[101] See s 5(a) of the Australia Acts. State legislative powers conferred by ss 2 and 3(2) of the Acts are also subject to the rest of the Australia Acts and the unrepealed provisions of the Statute of Westminster: s 5(b) of the Australia Acts.

This, after all, is the rationale for including s 5 in the Australia Acts.[102] Yet, if s 2(2) is interpreted as enabling the States to exercise an extraterritorial legislative power as unrestricted as that exercisable by the Commonwealth and United Kingdom Parliaments, this would open the way for individual States, if so minded, to meddle in the affairs of other Australian States. Such meddling might relate to matters that do not concern the enacting State in the slightest, apart from a desire to cause political embarrassment. Queensland might attempt to abolish Victoria's "random breath testing" scheme.[103] Victoria might attempt to reform Queensland's controversial electoral system. The examples given may be extreme and fanciful. Such laws may prove difficult or impossible to enforce beyond the legislating State.[104] But cases such as *Millar* v *Commissioner of Stamp Duties,*[105] *Cox* v *Tomat,*[106] and *Johnson* v *Commissioner of Stamp Duties*[107] show that sometimes the States do try to interfere excessively in the affairs of their neighbours, albeit in relatively minor matters. A full and unfettered power of extraterritorial law-making could, in the hands of the States, lead to disruptive and damaging conflicts within the Australian Federation. Such a power would not be consistent with the clear intention of the Australia Acts that State independence from the UK should not affect Australia's internal constitutional arrangements.[108] Section 2(2) should be interpreted as authorizing extraterritorial State laws only up to but not beyond the common-law limits laid down in *Broken Hill South* and later cases. These common-law restraints provide a flexible and effective control on States that may be tempted to abuse their newly-expanded powers at the expense of the Australian Federation.

The explicit subjection of the Australia Acts to the Commonwealth Constitution may provide another reason why the State powers mentioned in s 2(2) do not include a totally unfettered extraterritorial legislative power. The Commonwealth Constitution does not confer extraterritorial powers on State Parliaments. However s 106 of the Constitution would confirm and guarantee such powers if they existed independently under the States' own Constitutions.[109] Trindade[110] and Gibbs J[111] maintained separately that s 5 of the CLVA either repealed the extraterritorial limitation on State powers, or at least gave the States the ability to repeal it themselves. It is probable, if not certain, that s 5 of the CLVA was part of the State Constitutions for the purposes of the

---

[102] *Ibid,* and accompanying text.

[103] I give this unlikely example in a perhaps slightly humorous vein, because during 1986 the merits or otherwise of the Victorian scheme were vigorously discussed in Queensland, during a sometimes fierce debate on the latter State's drink-driving laws.

[104] *R* v *Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 306, 307 *per* Windeyer J.

[105] *Supra* n82, and accompanying text.

[106] *Supra* n84, and accompanying text.

[107] *Supra* n85, and accompanying text.

[108] Sections 5 and 15 of the Australia Acts.

[109] Section 106: "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

[110] *Supra* n1.

[111] *Supra* nn26, 27 and accompanying text.

guarantee in s 106 of the Commonwealth Constitution.[112] However if, as I have argued, the Australia Acts have repealed the CLVA for the States, s 5 of the CLVA no longer forms part of the State Constitutions for the purposes of s 106 of the federal Constitution. This means that the States' power to repeal the extraterritorial fetter by using the CLVA (if Trindade and Gibbs J are right) has itself been repealed by the Australia Acts, a repeal which is in accordance with the State constitutional processes guaranteed by s 106. Section 106 is accordingly now guaranteeing State Constitutions that are shorn of the possibility of any unlimited extraterritorial powers.[113] This guarantee is then made superior to s 2(2) of the Australia Acts by s 5 of the same Acts. Section 2(2) cannot thus confer unrestricted extraterritorial powers on the States because this would defeat the assertion in s 5 of the Australia Acts of the paramountcy of the Commonwealth Constitution, including s 106.[114]

In summary then, the purpose and meaning of s 2(2) are as follows. It is a residuary and confirmatory provision, inserted not only to give the States power to clear up any remnants of their former colonial status that might have been inadvertently left unprovided for in the Australia Acts, but also as a final confirmation of their general law-making powers derived from their own Constitution Acts and the CLVA. In the truest sense of the phrase, s 2(2) was inserted out of "an abundance of caution". The sub-section is akin to the guarantee of residual State powers in s 107 of the Commonwealth Constitution,[115] or to the Tenth Amendment of the United States Constitution.[116] The drafters of s 2(2) wanted to ensure that it was the States, not the Commonwealth of Australia nor the United Kingdom nor any other jurisdiction, that were the repositories of this residual general power. At the same time, the drafters wanted to make it very clear that this wide residual power ("all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act") would be used only in respect of matters related to the territory of the enacting State, and not to the detriment of the Australian

---

[112] The meaning of "Constitution of the State" in s 106 has been discussed in CD Gilbert, "Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme Courts" (1978) 9 FL Rev 348, 350-357. See also *Western Australia* v *Wilsmore* (1981) 33 ALR 13.

[113] There appear to be no judicial utterances supporting any suggestion that legislative power to remove the extraterritorial fetter resided in the State Constitution Acts apart from the constituent power in s 5 of the CLVA. Indeed, Gibbs J in *Pearce* v *Florenca* (1976) 135 CLR 507, 515, seems to have thought that such a State power could come only from s 5 of the CLVA.

[114] This argument may be negated by s 107 of the Commonwealth Constitution. This section guarantees residual State powers as of 1 January 1901. The Australia Acts may have prospectively abolished the CLVA so far as the States are concerned. However, any additional extraterritorial powers that the States might have acquired from the CLVA may well survive, because of s 107. Section 106 is subject, *inter alia*, to s 107, and s 5(a) of the Australia Acts ensures that the guarantees of, *inter alia*, s 107 of the Commonwealth Constitution take precedence over s 2 of the Australia Acts. Both arguments ultimately depend on whether Trindade and Gibbs J are right in their views on s 5 of the CLVA and the extraterritoriality doctrine.

[115] Section 107: "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

[116] The Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Federation. It is submitted that this is the reason for using the time-hallowed words "for the peace, order and good government of that State" in s 2(2).

5 THE COMBINED EFFECT OF SUB-SECTIONS 2(1) AND 2(2)

Interpreted in this way, s 2(2) dovetails perfectly with the extraterritoriality provisions of s 2(1), and indeed with the whole intent of the Australia Acts. The aim of the statutes is to confer complete independence on the States *vis-a-vis* the United Kingdom, but not *vis-a-vis* the Commonwealth. The States, by s 2(2), are re-confirmed as having full and plenary powers to make laws on almost any topic, provided they do not infringe the Commonwealth Constitution, the Statute of Westminster or the Australia Acts. In s 2(1), the States are recognized as having capacity to give their laws a substantial extraterritorial operation, if they so choose. But the words "peace, order and good government of that State", appearing in both sub-sections, show that the State legislative powers comprehended in s 2 are not the world-encompassing, sovereign and fully extraterritorial ones that the British Parliament might have exercised. Instead, the words show that State law-making powers are to be understood in the Dixonian or common-law sense that validity always requires a sufficient relationship between the particular law and the territorially-based interests of the enacting State. Not only does this use of the restrictive formula "peace, order and good government" in sub-ss (1) and (2) ensure that State laws will relate only to matters that relevantly concern the legislating State. It also helps ensure that State plenary and extraterritorial powers will not unnecessarily rend the fabric of the Australian Federation.

6 CONCLUSION

The interpretation that I have advocated for s 2 of the Australia Acts is, as of April 1987, still largely untested in the courts. However, the matters of the Australia Acts and extraterritoriality are not entirely devoid of judicial comment. Both have received brief references by three members of the New South Wales Court of Appeal in the recent *BLF* case.[117] Kirby P and Mahoney JA merely noted the existence of the doctrine of extraterritoriality and the then-recent enactment of the Australia Acts, but made no substantive comments on how the Acts might affect the doctrine.[118] Priestley JA, though, said that the Acts have "enlarged" the legislative competence of the New South Wales Parliament "by adding to its existing power" the ability to make laws "having extraterritorial operation".[119]

It must be admitted that His Honour's language is hardly consistent with the essentially declaratory interpretation of s 2 of the Australia Acts that is argued for in this article. Yet, with the greatest respect, not too much should be read into the dictum of Priestley JA. It was purely *obiter*, since extraterritoriality was not

[117] (1986) 7 NSWLR 372.
[118] *Ibid* 397 and 408 respectively.
[119] *Ibid* 415.

an issue in the *BLF* case. The interpretation and effect of the Australia Acts in general, let alone on specific points, were obviously not questions which were either relevant to the issues in the *BLF* case or argued before the Court of Appeal: Kirby P expressly noted in his judgment that the parties to the litigation had agreed that nothing in the Australia Acts affected, one way or the other, the validity of the New South Wales statute being challenged in the *BLF* case.[120] His Honour then said that he was "content" to approach the case on the basis of this agreement between the parties.[121] The comments of Priestley JA thus seem to have been, at least in part, of a "throwaway" nature. Finally, with respect, this writer would argue that this dictum by Priestley JA is against the weight of modern High Court thinking on the meaning of "peace, order and good government" in the context of Australian State extraterritorial laws.[122]

As previously stated, the interpretation of s 2 of the Australia Acts argued in this paper is mainly declaratory, even conservative. It is maintained that the section makes little change to the common-law rules governing the doctrine of extraterritoritality and State Parliaments. The words "peace, order and good government" in both sub-sections of s 2 will undoubtedly continue to be interpreted widely in one traditional sense, *viz* that they authorize a virtually complete and unfettered discretion in the legislature's choice of means, ends and purposes, into the sufficiency or merit of which the courts will not enquire. Provided the Australia Acts, the Statute of Westminster and the Commonwealth Constitution are not infringed, the legislative powers exercised by the Australian States pursuant to s 2 of the Australia Acts will, to all intents and purposes, be the same as the powers of any sovereign legislature. But this plenary breadth of legislative discretion will be modified when State Parliaments try to attach legal consequences to facts, circumstances or occurrences taking place beyond the boundaries of the State. Then, the words "peace, order and good government" will acquire their more limited, Dixonian sense and will require that any State extraterritorial law exhibit a relevant and sufficient connection with the legislating State. The courts will continue to have the power to judge the relevance and sufficiency of that connection.

Perhaps it may not make a great deal of practical difference whether one adopts Priestley JA's apparently wide interpretation of s 2, or the narrow one which retains the very gentle restraints of the Dixonian version of extraterritoriality. After all, in recent years, many of the pressing problems that have arisen partly from the modern, more liberal doctrine of extraterritoriality have now been solved by Commonwealth-State agreements. Particularly where Australia's off-shore maritime areas are concerned, the Federal-State agreements embodied in such federal legislation as the Crimes at Sea Act 1979, the two Coastal Waters Acts of 1980,[123] as well as the earlier Petroleum (Submerged

[120] *Ibid* 397.

[121] *Ibid.*

[122] *Supra* nn 61-63.

[123] The Coastal Waters (State Powers) Act 1980 (Cth) which, in general terms, gave the States full powers to pass laws operating off-shore in adjacent fringing territorial waters; and the Coastal Waters (State Title) Act 1980 (Cth) which conferred certain proprietary rights and title upon the States in respect of their adjacent fringing sea-beds.

Lands) Acts of 1967,[124] demonstrate fruitful co-operation between the Commonwealth and the States in sorting out many or indeed most of the problems that can arise when the modern, common-law rules of extraterritoriality permit the laws of different jurisdictions to overlap at sea. The confirmation of the Dixonian approach to extraterritoriality in s 2 of the Australia Acts may accordingly have little practical effect in Australia's off-shore areas. Commonwealth-State arrangements have largely removed most major problems there.

Nonetheless, cases such as *Millar* v *Commissioner of Stamp Duties*,[125] *Cox* v *Tomat*[126] and *Johnson* v *Commissioner of Stamp Duties*[127] show that difficulties still continue to arise when States attempt to attach legislative consequences to facts or circumstances occurring within the land borders of other States. In this area there is still potential for conflict between the colliding policies of different States. Here there is still a need for some mechanism to determine when an extraterritorially-legislating State has gone too far. As argued in this paper, simply to allow States an unfettered power to legislate within the borders of their neighbours would be a recipe for political and legal confusion, ruffled sensibilities, and inter-State conflict. The contemporary common-law rules of extraterritoriality provide a relatively flexible if not always predictable means of adjusting State claims to extraterritorial legislative power. Section 2 of the Australia Acts should be interpreted as rightly retaining those rules.[128]

[124] One Commonwealth and six State statutes identically named and dovetailed so as to implement a joint regime over Australia's off-shore petroleum resources.

[125] (1932) 48 CLR 618 and *supra* text at n82.

[126] (1972) 126 CLR 105 and *supra* text at n84.

[127] [1956] AC 331 and *supra* text at n85.

[128] It is instructive to note that, even after the "patriation" of the Canadian constitution by the Canada Act 1982 (UK) an extraterritorial fetter still applies to Canadian provincial legislatures: see PW Hogg *supra* n42, 267-282. Section 3 of the Statute of Westminster was never extended to the Canadian provinces. It should be remarked that the Canada Act contains no equivalent of the Australia Acts s 2.