HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

PERMANENT TRUSTEE AUSTRALIA LIMITED APPELLANT

AND

COMMISSIONER OF STATE REVENUE RESPONDENT

Permanent Trustee Australia Limited v Commissioner of State Revenue
[2004] HCA 53
12 November 2004
M277/2003

ORDER

Questions in the Case Stated answered as follows:

1.

Q. *Is the* Stamps Act *1958 (Vic), or the Assessment, invalid to the extent that the Act or the Assessment purports to charge the Development Agreement with stamp duty as a lease or an agreement for lease, on the basis that:*

(a) *the* Stamps Act *is invalid to the extent that it purports to charge a lease or an agreement for lease of land or tenements situated within a Commonwealth place with stamp duty, on the basis that section 52(i) of the Constitution gives to the Commonwealth exclusive legislative power with respect to Commonwealth places; and*

(b) *any agreement to lease contained in the Development Agreement is an agreement for lease of land or tenements situated within a Commonwealth place?*

A. *Yes.*

2.

Q. *If Yes to (1), is the* Commonwealth Places (Mirror Taxes) Act *1998 (Cth) invalid or ineffective to permit the assessment of duty under the Assessment:*

(a) *on the ground that it is a law imposing taxation and deals with:*

(i) *a subject matter or subject matters other than the imposition of taxation;*

(ii) *more than one subject of taxation,*

contrary to section 55 of the Constitution?

(b) *on the ground that it impermissibly delegates the legislative power of the Commonwealth?*

(c) *on the ground that it discriminates between States or parts of States contrary to section 51(ii) of the Constitution or an implied limitation in the Constitution to that effect?*

(d) *on the ground that, by a law of trade, commerce or revenue, it gives a preference to one State or any part thereof over another State or any part thereof, contrary to section 99 of the Constitution?*

(e) *otherwise?*

A.

(a) *No.*

(b) *No.*

(c) *No.*

(d) *No.*

(e) *Inappropriate to answer.*

3.

Q.

(a) *If Yes to (1), is the notice given by the Treasurer of the State of Victoria on or about 23 January 2001 ... ineffective to make any duty payable under the* Commonwealth Places (Mirror Taxes) Act *payable to the Crown in right of the Commonwealth?*

(b) *If Yes to (a), is the* Commonwealth Places (Mirror Taxes) Act *ineffective to impose and permit an assessment of duty in respect of the Development Agreement?*

A.

(a) *No.*

(b) *Unnecessary to answer.*

4.

Q. *Save for those otherwise dealt with by order, who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court?*

A. *Permanent Trustee Australia Limited.*

Representation:

J W de Wijn QC with M K Moshinsky for the appellant (instructed by Allens Arthur Robinson)

P J Hanks QC with C J Horan for the respondent (instructed by State Revenue Office of Victoria)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with G Witynski intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor's Office Western Australia)

M G Sexton SC, Solictor-General for the State of New South Wales with I Mescher intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with R D De Palma intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office South Australia)

CATCHWORDS

Permanent Trustee Australia Limited v Commissioner of State Revenue

Constitutional law (Cth) – Taxation – Whether s 55 of the Constitution applies to a law made in exercise of the power conferred by s 52(i) of the Constitution – Where Commonwealth law applies State taxing laws to Commonwealth places within that State – Whether invalid as a law imposing taxation and dealing with matters other than the imposition of taxation – Whether invalid as a law imposing taxation and dealing with more than one subject of taxation.

Constitutional law (Cth) – Commonwealth laws of regulation of trade, commerce or revenue not to give preference to one State or any part thereof over another State or any part thereof – Revenue laws – Where Commonwealth law applies State taxing laws to Commonwealth places within that State – Where effect of law is that different rates of tax apply in Commonwealth places depending on the State in which place is located – Whether prohibition in s 99 of the Constitution applies with respect to revenue laws supported by s 52(i) of the Constitution – Whether the Commonwealth law infringed the prohibition in s 99 of the Constitution.

Constitutional law (Cth) – Places acquired by Commonwealth for public purposes – Exclusive legislative power of Commonwealth Parliament – Extent of power – Whether decisions in *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 and *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 should be re-opened.

Constitutional law (Cth) – Exclusive legislative power of the Commonwealth – Delegation – Whether Commonwealth law permitting State Treasurer to modify applied State taxing law confers the legislative power of the Commonwealth on the Executive Governments of the States.

Constitution, ss 52(i), 53, 54, 55 and 99.
Commonwealth Places (Mirror Taxes) Act 1998 (Cth), ss 3, 6, 8, 9 and Sched 1.
Commonwealth Places (Mirror Taxes Administration) Act 1999 (Vic), s 7.
Stamps Act 1958 (Vic), ss 17, 17A and Third Schedule.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. This case stated by a Justice of the Court asks whether the *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth) ("the Mirror Taxes Act") is "invalid or ineffective" to permit an assessment to stamp duty under the *Stamps Act* 1958 (Vic) ("the Stamps Act") as a State taxing law which applies by reason of the Mirror Taxes Act in relation to "Commonwealth places"[1]. The reference here is to s 52(i) of the Constitution which states:

> "The Parliament shall, *subject to this Constitution*, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes". (emphasis added)

2 The use in the case stated of the phrase "invalid or *ineffective*" reflects the distributive operation given the Mirror Taxes Act by s 6(3). This limits to the range of the power of the Parliament what otherwise would be the application pursuant to the Mirror Taxes Act of State taxing laws to places in States that are, at the relevant time, Commonwealth places.

3 The validity of the Mirror Taxes Act was called into question in *Paliflex Pty Ltd v Chief Commissioner of State Revenue*[2] and *South Sydney City Council v Paliflex Pty Ltd*[3], but the cases were decided on grounds which made it unnecessary to answer the present question.

Allders

4 The enactment of the Mirror Taxes Act was a sequel to the decision in *Allders International Pty Ltd v Commissioner of State Revenue (Vict)*[4]. This Court delivered judgment in *Allders* on 14 November 1996. The case concerned

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1 The Stamps Act was repealed by s 284 of the *Duties Act* 2000 (Vic) with effect from 1 July 2001. For present purposes, nothing turns on that.

2 (2003) 78 ALJR 87 at 90 [14]-[15], 100 [63]; 202 ALR 376 at 380, 394.

3 (2003) 78 ALJR 101; 202 ALR 396.

4 (1996) 186 CLR 630.

an assessment to *ad valorem* duty under the Stamps Act of a lease of shop premises on land at Tullamarine which had been acquired by the Commonwealth in 1961 for use as an airport. Pursuant to the *Federal Airports Corporation Act* 1986 (Cth), the land was then held by that corporation for and on behalf of the Commonwealth. This Court held that s 52(i) of the Constitution denied any operation of the Stamps Act to charge the lease with stamp duty. It further held that the circumstance that the Stamps Act had general application and was not limited in operation to a Commonwealth place did not necessarily deny to the law the character of a law with respect to a Commonwealth place. In that regard, the earlier decision in *Worthing v Rowell and Muston Pty Ltd*[5] was applied.

5 During the course of the hearing of the present matter, the Court refused an application by the respondent, the Commissioner of State Revenue ("the Commissioner"), to re-open *Worthing*, and thus *Allders*.

6 To a very large degree, the consequences of *Worthing* were resolved by Parliament, after consultation with and the agreement of the States, in the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) ("the 1970 Act"). However, the general application provision in the 1970 Act was qualified by the statement in s 4(5) that this did not have effect "so as to impose any tax". Of s 4(5), Dawson J observed in *Allders*[6]:

> "The wording of the exception suggests that its purpose was to avoid offending s 55 of the Constitution which requires laws imposing taxation to deal only with the imposition of taxation, but it is sufficient to exclude the [Stamps Act], which is clearly an Act imposing a tax, from being applied by the [1970 Act]."

7 In *Allders*, an application was made to re-open *Worthing*, but this was refused[7]. Gaudron J said in *Allders* of the refusal to re-open *Worthing* and other decisions concerned with s 52(i) of the Constitution[8]:

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5 (1970) 123 CLR 89.

6 (1996) 186 CLR 630 at 646. That Dawson J dissented as to the outcome in *Allders* is immaterial for present purposes.

7 (1996) 186 CLR 630 at 635.

8 (1996) 186 CLR 630 at 661-662.

> "That being so, s 52(i) must, in my view, be approached in this case on the basis that it is primarily a grant of legislative power and not, as I suggested in *Svikart v Stewart*[9], a provision which is primarily concerned with the exclusivity of powers found elsewhere in the Constitution."

The consequences of *Allders* with respect to State taxation laws have, in turn, been dealt with by the legislation now under challenge, again after consultation with and the agreement of the States.

8 Section 17 of the Stamps Act charges upon dutiable instruments and for the use of the Crown in right of Victoria the duties specified in the Third Schedule, and s 17A deems the duty to be a debt due to the Crown and payable to the Commissioner. The present dispute should be approached on the footing that, were it not for the effective operation of the Mirror Taxes Act, the reasoning in *Allders* would produce the result that the Commissioner would fail in an assessment to stamp duty based solely upon the operation of the Stamps Act.

The facts

9 On 27 March 2001, the Commissioner made an assessment to stamp duty (identified as having been made under the Stamps Act, "being a corresponding applied law pursuant to the [Mirror Taxes Act]") in respect of an instrument of lease identified in the case stated as "the Development Agreement". The instrument was assessed to duty in the sum of $762,583.20. The Development Agreement is dated 1 July 1998 and concerns the development of a hotel at Tullamarine Airport. Since 2 July 1997, this place, which is land registered under the provisions of the *Transfer of Land Act* 1958 (Vic), has been vested in the Commonwealth[10] and leased by the Commonwealth to Australia Pacific Airports (Melbourne) Pty Ltd ("APAM") for a period of 50 years on terms that the land be used as an airport. Other uses not inconsistent with use as an airport are permitted, but any sub-lease must be consistent with regulations made under the *Airports Act* 1996 (Cth).

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9 (1994) 181 CLR 548 at 577.

10 By virtue of a declaration made by the Minister for Finance under s 11 of the *Airports (Transitional) Act* 1996 (Cth) and dated 1 July 1997.

10 The appellant ("Permanent") and APAM are two of the three parties to the Development Agreement. Clause 5.2 of the Development Agreement contains an agreement between APAM and Permanent for entry into a lease to Permanent on completion of the development on terms attached as Sched G. Clause 2.1 of the Development Agreement states the intent that Permanent will procure Hilton International Co to conduct a four star hotel on the leased premises.

11 The reasons for decision given by the Commissioner for the assessment indicate that the assessment was made on the basis that the Development Agreement was an agreement for lease required by s 77 of the Stamps Act to be charged under the Third Schedule as if it were a lease. There is a disputed issue concerning the method of computation of the duty but that is not before this Court.

12 Permanent's objection to the assessment was, pursuant to s 33B of the Stamps Act, set down for hearing before the Supreme Court of Victoria. On 3 October 2003, this Court ordered that that part of the objection concerning the validity of the Mirror Taxes Act be removed into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth). There followed the case stated for consideration of the Full Court.

The case stated

13 Question 1 asks whether the State legislation is invalid in so far as of its own force it purports to sustain the assessment of Permanent to duty in respect of the Development Agreement. In the light of the dismissal of the application to re-open *Worthing* and *Allders*, question 1 must be answered "Yes".

14 The critical question is question 2. This is in the following terms:

> "If Yes to [the above], is the [Mirror Taxes Act] invalid or ineffective to permit the assessment of duty under the Assessment:
>
> (a) on the ground that it is a law imposing taxation and deals with:
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> (i) a subject matter or subject matters other than the imposition of taxation;
>
> (ii) more than one subject of taxation,
>
> contrary to section 55 of the [Constitution]?

(b) on the ground that it impermissibly delegates the legislative power of the Commonwealth?

(c) on the ground that it discriminates between States or parts of States contrary to section 51(ii) of the Constitution or an implied limitation in the Constitution to that effect?

(d) on the ground that, by a law of trade, commerce or revenue, it gives a preference to one State or any part thereof over another State or any part thereof, contrary to section 99 of the Constitution?

(e) otherwise?"

Paragraph (a) conceals a threshold question concerning the force of the phrase in s 52(i) "subject to this Constitution" and the subjection of the exclusive power conferred by s 52(i) to the requirements of s 55 respecting "[l]aws imposing taxation".

15 Before turning to consider the varied issues raised by question 2, it is necessary to refer more closely to the provisions of the Mirror Taxes Act and inter-governmental arrangements made thereunder.

The Mirror Taxes Act

16 The central provision is s 6(2). This states:

"Subject to this Act, the excluded provisions of a State taxing law, as in force at any time before or after the commencement of this Act, apply, or are taken to have applied, according to their tenor, at that time, in relation to each place in the State that is or was a Commonwealth place at that time."

The operation of s 6(2) is comprehended only by regard to a definitional chain. The phrase "excluded provisions" in relation to a State taxing law means (s 6(1)):

"provisions of that law to the extent that they are excluded by paragraph 52(i) of the Constitution".

The phrase "excluded by paragraph 52(i) of the Constitution" means (s 3):

"inapplicable by reason *only* of the operation of section 52 of the Constitution in relation to Commonwealth places" (emphasis added).

The force of the requirement of inapplicability by reason only of the operation of s 52 is readily apparent. Laws may be inapplicable for other constitutional reasons, for example, the exclusive federal legislative power with respect to customs and excise conferred by s 90, and the protection given by s 114 against the imposition by the States, without the consent of the Parliament of the Commonwealth, of tax on property of any kind belonging to the Commonwealth. In cases where one or other of these provisions of the Constitution also provided an invalidating cause, s 6(2) of the Mirror Taxes Act would not apply the State law to any Commonwealth place.

17 Section 6(2) applies the excluded provisions "of a State taxing law". That term is defined in s 3 as follows:

> "***State taxing law***, in relation to a State, means the following, as in force from time to time:
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> (a) a scheduled law of the State;
>
> (b) a State law that imposes tax and is prescribed by the regulations for the purposes of this paragraph;
>
> (c) any other State law of the State, to the extent that it is relevant to the operation of a law covered by paragraph (a) or (b)."

The scheduled State taxing laws in respect of Victoria include the Stamps Act. Paragraph (a) of the definition thus governs this case.

18 An applied law does not have effect in relation to amounts which have become due for payment before 6 October 1997 under that applied law (s 7). That is the date on which the public was notified by the federal Treasurer that legislation to the effect of the Mirror Taxes Act would be enacted[11].

19 Section 6(6) provides that that section, and thus the central provision in s 6(2), does not have effect in relation to a State unless there is in operation in relation to that State an arrangement under s 9. Section 9 empowers the Governor-General to make an arrangement with the Governor of a State in relation to the exercise or performance of a power, duty or function (not being a

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11 Explanatory Memorandum to the Commonwealth Places (Mirror Tax) Bill 1998 and other Bills, at 31 ("the Explanatory Memorandum").

power, duty or function involving the exercise of judicial power) by an authority of the State under the applied laws of the State. Section 9(2) implements the operation of such an arrangement by stating:

> "Where such an arrangement is in force, the power, duty or function may or must, as the case may be, be exercised or performed accordingly."

20 By instrument dated 13 December 2000[12], there was made an arrangement between the Governor-General and the Governor of the State of Victoria, the former acting with the advice of the Federal Executive Council and the latter with the advice of the Premier of the State. The arrangement was in the following terms:

> "[W]here, under a law of the State to which a part of the applied laws [being State taxing laws applied under the Mirror Taxes Act] corresponds, an authority in relation to the State ... may or must, as the case may be, exercise or perform a power, duty or function (not being a power, duty or function involving the exercise of judicial power), the corresponding power, duty or function under that part of the applied laws may or must, as the case may be, be exercised or performed by that authority."

21 Further, a statute of Victoria, the *Commonwealth Places (Mirror Taxes Administration) Act* 1999 (Vic), provides in s 7:

> "Despite any State law, a State authority has any power, duty or function that the [Mirror Taxes Act] authorises or requires the authority to exercise or perform."

22 Section 6(4) of the Mirror Taxes Act stipulates that "[a]n applied law has effect subject to any modifications under section 8". In turn, s 8(2) states:

> "The Treasurer of a State may, by notice in writing, prescribe modifications of the applied laws of the State, other than modifications for the purpose of overcoming a difficulty that arises from the requirements of the Constitution."

By Notice dated 23 January 2001, the Treasurer of the State of Victoria declared modifications to certain State laws, including the Stamps Act, with effect from

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12 *Commonwealth of Australia Gazette*, GN50, 20 December 2000.

the later of 6 October 1997 or the date of commencement of the provision to which the modification relates.

23 As a result of the modifications made to the Stamps Act, s 17(1) thereof is applied to the Development Agreement by charging the duty "for the use of the Crown in right of the Commonwealth", and s 17A is applied by deeming duty to be a debt due to the Crown in that right and payable to the Commissioner.

24 All amounts so received under the Stamps Act as an applied law must be credited to the Consolidated Revenue Fund as required by s 81 of the Constitution. Section 23(1) of the Mirror Taxes Act so provides. That section also appropriates that Fund for payments to a State of amounts so credited under an applied law of a State (s 23(4)). Thus, there is a significant interest of the States in upholding the validity of the Mirror Taxes Act.

25 Moreover, the appropriation made by s 23 is a standing rather than annual appropriation. In that respect, "the Parliament forgoes its annually-exercised power over expenditure by government", because "[s]tanding appropriations need not be included in annual appropriations"[13].

Stated case question 2(a) – ss 52(i) and 55 of the Constitution

26 We turn now to consider question 2 in the stated case, beginning with par (a), concerning the operation of s 55 of the Constitution. The threshold issue is whether s 55 has any application at all to a law made in exercise of the power conferred by s 52(i). The Commissioner, and the Attorney-General of the Commonwealth who intervened in support, submitted that s 55 has no such application.

27 The Explanatory Memorandum recited[14] the receipt of advice by the Government:

> "that the constitutional limitations on laws imposing taxation, requiring laws imposing taxation to deal with no other matter, and requiring such laws to deal with one subject of taxation only (Constitution, section 55), do not apply to the Bill. As these principles do not usually restrict State

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13 *Brown v West* (1990) 169 CLR 195 at 207.

14 at 7-8.

drafting of State taxing laws, the task of adopting relevant State drafting by reference could have been made more difficult if those principles applied."

28 Section 4 of the Mirror Taxes Act states:

"This Act has effect only to the extent that it is an exercise of the legislative powers of the Parliament under the following provisions of the Constitution:

(a) paragraph 52(i);

(b) section 73;

(c) paragraph 77(iii);

(d) paragraph 51(xxxix), so far as it relates to paragraph 52(i), section 73 or paragraph 77(iii)."

29 The reliance placed upon ss 73 and 77(iii), and in that regard s 51(xxxix), supports provisions of the Mirror Taxes Act such as s 10 which invests federal jurisdiction and restricts appellate access to this Court. It is unnecessary to canvass the question whether s 51(xxxix) aids the exercise of the exclusive legislative power conferred by s 52 of the Constitution.

30 The Mirror Taxes Act in its essential respects founds upon s 52 of the Constitution. That is designedly so. Reliance upon a head of power in s 51 would immediately attract the operation of s 55 and deprive the Commonwealth of the cover against s 55 which it asserts is afforded by the reasoning in *Buchanan v The Commonwealth*[15]. To recognise this is not to gainsay the proposition that validity is a question not of intention but of power from whatever source derived[16].

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15 (1913) 16 CLR 315.

16 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 135 per Starke J; *R v Hughes* (2000) 202 CLR 535 at 548 [15], 581 [112].

Buchanan

31 This was an action brought in this Court to recover moneys demanded *colore officii* and paid under protest to the Commonwealth. The moneys were paid for probate and succession duties assessed on assets in the Northern Territory of an estate of which the plaintiffs were the executors under a grant of probate in New South Wales. A reseal was required in the Territory before the assets there could be administered by the plaintiffs.

32 The Territory had been surrendered by the State of South Australia to and accepted by the Commonwealth within the meaning of s 122 of the Constitution. In the exercise of the legislative power conferred by s 122, s 7(1) of the *Northern Territory Acceptance Act* 1910 (Cth) ("the Acceptance Act") specified that "[a]ll laws in force in the Northern Territory at the time of the acceptance shall continue in force, but may be altered or repealed by or under any law of the Commonwealth". Further, s 5 of the *Northern Territory (Administration) Act* 1910 (Cth) ("the Administration Act") provided that any law continued in force under s 7 of the Acceptance Act was to "have effect in the Territory as if it were a law of the Territory". In the generality of these application of laws provisions, this legislation foreshadowed the scheme later adopted with the 1970 Act to meet the exigencies not of s 122 but of s 52 of the Constitution.

33 Among the laws of South Australia so applied to the Territory in the fashion just described were the *Succession Duties Act* 1893 (SA) and the *Administration and Probate Act* 1891 (SA), the first imposing succession duty and the second probate duty. The submission of the plaintiffs in *Buchanan* was that there were thus at least two separate subjects of taxation dealt with by the Acceptance Act and the Administration Act, and the legislative power of the Parliament under s 122 had been subject to the requirement in s 55 that a law imposing taxation (as each of the federal statutes was) deal with one subject of taxation only.

34 That argument was rejected. Two reasoned judgments were delivered by Barton ACJ and Isaacs J; Gavan Duffy and Rich JJ concurred in the conclusion arrived at by the other Justices[17]. The reasons given emphasised (i) the absence from the Parliament of any representation of the people of the Territories[18];

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17 (1913) 16 CLR 315 at 335.

18 (1913) 16 CLR 315 at 327-328 per Barton ACJ.

(ii) the design of s 55 as a protection for the Senate "which represents the States as such"[19]; (iii) the "taxation" with which s 55 is concerned is that found in s 51(ii), "the taxation of a Commonwealth whose component parts are the States"[20]. Isaacs J also considered at length but did not rule upon the further argument that, even if s 55 otherwise might apply to Territory laws, the effect of the surrender and acceptance process provided for in s 122 was that "all municipal laws" in force at the time of the surrender remained in force until negatived by the Commonwealth, and the South Australian taxing laws of 1891 and 1893 were such "municipal laws"[21].

35 Things have changed since *Buchanan* was decided. Proposition (i) has not held good for many years, in particular since legislation providing for full representation of the Northern Territory and the Australian Capital Territory in each chamber of the Parliament was upheld in *Western Australia v The Commonwealth*[22] and *Queensland v The Commonwealth*[23]. Propositions (ii) and (iii) do not address the situation of Commonwealth places. These, unlike territory surrendered under s 122, remain within the area of the respective States[24]. Hence the interest of the States in achieving by dint of the Mirror Taxes Act the application of the Stamps Act in those places.

36 Thus, whatever may be the continuing strength of *Buchanan* respecting the relationship between s 122 and s 55, a matter not here in issue, *Buchanan* provides no binding authority respecting Commonwealth places. Moreover, the text of the Constitution in terms subjects the exercise of the legislative power conferred by s 52 to the Constitution as a whole. As with s 51, the conferral of legislative power by s 52 is made "subject to this Constitution". Section 122 contains no such express statement. Once it be concluded, as it has been in

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19 (1913) 16 CLR 315 at 328 per Barton ACJ; see also at 335 per Isaacs J.

20 (1913) 16 CLR 315 at 330 per Barton ACJ; see also at 332-333 per Isaacs J.

21 (1913) 16 CLR 315 at 332-334.

22 (1975) 134 CLR 201.

23 (1977) 139 CLR 585.

24 *R v Phillips* (1970) 125 CLR 93 at 100-101, 110-111, 112, 124, 131-132; *Paliflex Pty Ltd v Chief Commissioner of State Revenue* (2003) 78 ALJR 87 at 95 [41]; 202 ALR 376 at 388.

Allders, that s 52(i) is a grant of legislative power not a statement of the exclusivity of powers found in s 51, such as the taxation power in s 51(ii)[25], then the phrase "subject to this Constitution" aligns s 52(i) with the requirements of s 55.

37 It follows that, contrary to what was said in the Explanatory Memorandum, it was not permissible to draft the Mirror Taxes Act unconstrained by the requirements of s 55 of the Constitution. To those requirements we now turn.

The requirements of s 55 of the Constitution

38 In *Osborne v The Commonwealth*[26], where the validity of the *Land Tax Act* 1910 (Cth) and the *Land Tax Assessment Act* 1910 (Cth) was unsuccessfully challenged on grounds invoking s 55 of the Constitution, Higgins J made prescient observations. His Honour said[27]:

> "The course of a great part of the argument for the plaintiff must seem to any outsider rather grotesque. Learned counsel have taken the two Acts and have examined every nook and cranny with microscopic care, in order to find, if possible, some provision which has transgressed the Constitution in any particular, even the most insignificant, and then they have applied great industry and ingenuity to demonstrate that if such and such a provision be treated as invalid, the remainder of the Acts would be 'substantially different' from what Parliament intended, and must be invalid also. It is not pretended that the impugned provisions affect the plaintiff; but if the plaintiff can show that the whole of the legislation is bad because of some provision which does not concern him, he will be free from obligation to pay the tax. Into such barren intellectual gymnastics we are forced in this case, and probably in cases to come."

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25 (1996) 186 CLR 630 at 679-680.

26 (1911) 12 CLR 321.

27 (1911) 12 CLR 321 at 371-372.

39 Section 55 states:

> "Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only."

The section is to be read with the immediately preceding provisions of ss 53 and 54. These deal with proposed appropriation laws as well as with proposed tax laws. The need for legislative control of the former was a "logical consequence" of control of the latter[28]. For the present case, it is important to read s 55 with those parts of s 53 reading:

> "Proposed laws ... imposing taxation, shall not originate in the Senate. ...
>
> The Senate may not amend proposed laws imposing taxation ...
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. ...
>
> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

40 The text of s 53 plainly may be used to assist in the construction of s 55. Thus, the only proposed law which is excepted from the Senate's power to amend is the Bill that purports to impose the tax, and it is only the Act that imposes the tax that is subject to the prohibition in the first part of s 55[29].

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28 Durell, *The Principles and Practice of the System of Control over Parliamentary Grants*, (1917) at 3.

29 cf the remarks of Higgins J in *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 210.

41 However, there is a significant difference between the two sections. The received opinion in this Court is expressed in the joint judgment in the *Native Title Act Case*[30]:

> "Section 53 is a procedural provision governing the intra-mural activities of the Parliament. The traditional view is that this Court does not interfere in those activities[31]. That view was stated by Mason CJ, Deane, Toohey and Gaudron JJ in *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*[32] in reference to s 54 of the Constitution:
>
> > 'a failure to comply with the dictates of a procedural provision, such as s 54, dealing with a "bill" or a "proposed law" is not contemporaneously justiciable and does not give rise to invalidity of the resulting Act when it has been passed by the two Houses of the Parliament and has received the royal assent.'
>
> The traditional view accords both with the text of s 53, which speaks of 'proposed laws' rather than 'laws'[33] and with the intention manifested in the Convention Debates[34]."

42 On the other hand, as was noted in the *Native Title Act Case*, s 57 stands in a different position. This is so although s 57, in specifying the procedures for the resolution of differences between the two chambers of the Parliament with respect to a "proposed law", uses that same term as ss 53 and 54.

43 It was held in *Victoria v The Commonwealth and Connor*[35] that the *Petroleum and Minerals Authority Act* 1973 (Cth) was not a valid law of the

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30 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 482.

31 s 57 apart; see *Cormack v Cope* (1974) 131 CLR 432 at 454; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 184.

32 (1993) 176 CLR 555 at 578.

33 *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336, 352, 355.

34 *Official Report of the National Australasian Convention Debates*, (Adelaide), 13 April 1897 at 472-473.

35 (1975) 134 CLR 81.

Commonwealth. The Bill for that statute was not a "proposed law" which could have been submitted to a joint sitting under the procedures of s 57 of the Constitution and as a result the Bill had not become a valid statute. Failure in the conditions precedent to the exercise of the power conferred by s 57 upon the Governor-General to dissolve both chambers simultaneously thus may tender a justiciable issue of the validity of the passage at a subsequent joint sitting of a "proposed law" whose passage was the subject of disagreement between the two chambers. Both Gibbs J[36] and Mason J[37], who, with Barwick CJ and Stephen J, constituted the majority, expressly rejected the submission that the use of the expression "proposed law" in s 57 should lead to a similar conclusion in relation to that section to the conclusion that the phrase "proposed laws" in s 53 was directed only to the internal affairs of the Parliament.

44 Like s 55, s 54 uses the phrase "shall deal only with" but in respect of "[t]he proposed law which appropriates revenue or moneys for the ordinary annual services of the Government". However, the terms of s 55 are directed to "laws" not to "proposed laws". The issue of compliance with s 55 may provide a matter arising under the Constitution or involving its interpretation within the meaning of s 76(i) of the Constitution. That is well settled (over the contrary opinion of Higgins J in *Osborne*[38]) and not disputed. However, as things stood in 1951, Dixon J was able to speak in his judgment in *Moore v The Commonwealth*[39] of "the hitherto ineffectual menaces of s 55".

45 That was said with respect to a long line of cases. That had commenced even before the establishment of this Court. The enactment of the *Customs Act* 1901 (Cth) preceded that of the *Customs Tariff Act* 1902 (Cth). Part VIII of the former statute ("the Customs Act") contained provisions for the computation and payment of duties, including s 153 which constituted duties Crown debts recoverable by court proceedings in the name of the Collector of Customs[40]. The

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36 (1975) 134 CLR 81 at 161.

37 (1975) 134 CLR 81 at 184.

38 (1911) 12 CLR 321 at 373-374. Higgins J had noted the difference in the language of s 54 and s 55 but then asked "[w]hy is an Appropriation Act not invalid by reason of its substance if a taxation Act is invalid by reason of its substance?"

39 (1951) 82 CLR 547 at 569.

40 See *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290.

latter statute ("the Tariff Act") stated that it imposed duties of customs in accordance with the Schedule (s 5), and that the Customs Act was "incorporated" and to be "read as one" with it (s 2). In *Stephens v Abrahams (No 2)*[41], the Full Court of the Victorian Supreme Court held that Pt VIII of the Customs Act was not a "law imposing taxation" within the meaning of s 55 of the Constitution. The result was the upholding of the conviction of the respondent under ss 234 and 236 of the Customs Act (which were located in Pt XIII) for having been unlawfully concerned in making false statements in a customs declaration.

46 In *Stephens*, the Full Court heard full arguments by Deakin and by Isaacs KC on the question whether, on the assumption that the first limb of s 55 did apply to Pt VIII, ss 234 and 236 were "other matter" which was "of no effect" or whether they were saved as within the description of laws dealing with the imposition of taxation. The Full Court did not rule on this question, but views were expressed upon it. Williams J said of ss 234 and 236[42]:

> "These sections cannot be said to be matter foreign to the imposition of taxation; they are parts of the machinery provided for the enforcement of the tax, and, if so, they may be held to be an almost essential part of an effective measure of taxation."

Hood J was of the opinion that[43]:

> "[s 55] would only regulate the manner in which the legislation should be carried out, and I think it is not to be read so as to include any and every section that increases the orbit of taxation. Such a mode of reading it would include the [*Acts Interpretation Act* 1901 (Cth)], and probably many others that I, for one, would never dream of calling taxing Acts."

47 The line of cases continued in this Court with *Osborne*[44], and included *Federal Commissioner of Taxation v Munro*[45] and *Cadbury-Fry-Pascall Pty Ltd*

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41 (1903) 29 VLR 229.

42 (1903) 29 VLR 229 at 250.

43 (1903) 29 VLR 229 at 255.

44 (1911) 12 CLR 321.

45 (1926) 38 CLR 153.

v Federal Commissioner of Taxation[46]. This Court continued to draw the distinction between laws imposing taxation and pecuniary and other obligations cast in terms of a penalty or even (as in *Moore*) as "additional taxation" which were for the protection of the revenue or which provided "legal machinery" by which the obligation declared by the imposition of taxation was effectuated. That line of authority continued after *Moore* with *Commissioner of Taxation v Clyne*[47], *Re Dymond*[48], *Collector of Customs (NSW) v Southern Shipping Co Ltd*[49], and *MacCormick v Federal Commissioner of Taxation*[50].

48 The legislation under challenge in these cases had been enacted by following what, in *Moore*, Dixon J called the "tried and venerated procedure" of framing a general statute ("an assessment Act") and a statute dealing specifically with the imposition of liability ("a taxing Act")[51].

49 In these cases, undoubtedly a tax was imposed by the taxing Act; the issue was whether the provisions in the relevant assessment Act imposed a further tax and did so in a statute dealing with a range of matters allegedly beyond the imposition of tax. These attacks all failed because of the "protective" character ascribed to the provisions of the assessment Act. Thus, it was not necessary to decide the issue, vital to the party contesting validity, that would arise if the assessment Act did contravene s 55, namely whether the "machinery" provisions which were relied upon by the revenue could be disregarded as "other matter" within the concluding words of the first sentence of s 55[52]. This was the issue raised at the outset but unresolved in *Stephens* in 1903.

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46 (1944) 70 CLR 362.

47 (1958) 100 CLR 246.

48 (1959) 101 CLR 11.

49 (1962) 107 CLR 279.

50 (1984) 158 CLR 622 at 644.

51 (1951) 82 CLR 547 at 569.

52 cf *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 260-261, 262-263.

50 However, there is a second category of case. On two occasions, in *Air Caledonie International v The Commonwealth*[53] and *Australian Tape Manufacturers Association Ltd v The Commonwealth*[54], statutes amending respectively the migration and copyright laws and which were not split between a tax Act and an assessment Act were held to impose taxation and to deal with "other matter" within the meaning of s 55 of the Constitution. The result of the application of s 55 was to deny effect to that "other matter". In particular, *Air Caledonie*[55] established with respect to the relationship between the principal statute and the amending statute on the one hand, and s 55 on the other, that both the amending statute imposing taxation and the thus amended principal statute deal only with the imposition of taxation. However, attacks based on the first limb of s 55 failed with respect to the service charges and child maintenance payments recovery scheme respectively at stake in *Airservices Australia v Canadian Airlines International Ltd*[56] and *Luton v Lessels*[57].

The Mirror Taxes Act and s 55

51 The Mirror Taxes Act transverses these two classes of case. Undoubtedly the legislation is concerned with the imposition, assessment and collection of taxation by the Commonwealth. But, in apparent reliance upon a view taken of the relationship between s 52(i) and s 55 of the Constitution, and the significance for that purpose of *Buchanan*, there has been no splitting of the legislation into a tax Act and an assessment Act.

52 The result is that the scope of the Mirror Taxes Act is said to fall foul of s 55 in two respects. The first complaint (to reverse the order in which they appear in the constitutional text) is that the Mirror Taxes Act does not meet the requirement that it "shall deal with one subject of taxation only"; the consequence is said to be that the whole of the statute is invalid by analogy with

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53 (1988) 165 CLR 462.

54 (1993) 176 CLR 480.

55 (1988) 165 CLR 462 at 471-472.

56 (2000) 202 CLR 133.

57 (2002) 210 CLR 333.

Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation[58]. The second respect in which s 55 is said to operate is that the Mirror Taxes Act is a law "imposing taxation" but does not "deal only with the imposition of taxation", with the result that "any provision therein dealing with any other matter shall be of no effect".

53 The first ground of challenge fails. The applicable principles are those indicated by Dixon J in *Resch v Federal Commissioner of Taxation*[59], subsequently applied in *State Chamber of Commerce and Industry v The Commonwealth*[60] and, most recently, in *Austin v Commonwealth*[61].

54 It is unnecessary to repeat here what is there said. The Parliament clearly understood that the application of State taxation laws to Commonwealth places was a single legislative initiative and the legislation had as its primary purpose the protection of State revenues following what would otherwise be the consequences of the decision in *Allders*. Looking at the subject-matter dealt with by the statute, it may fairly be regarded within the sense of the authorities as a unit rather than as a collection of distinct and separate matters.

The first limb of s 55

55 Greater difficulty arises with the objection based upon alleged failure to comply with the first limb of s 55. This task of construction requires regard to the place of s 55 in that part of the Constitution dealing with the relations between the two chambers of the Parliament. It often has been remarked that in this respect the Constitution represents a compromise without which federation could not have been achieved[62].

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58 (1992) 173 CLR 450. This case was concerned with that portion of s 55 which requires that laws imposing duties of excise deal only with those duties.

59 (1942) 66 CLR 198 at 223.

60 *The Second Fringe Benefits Tax Case* (1987) 163 CLR 329 at 344.

61 (2003) 215 CLR 185 at 272-273 [190]-[192].

62 See, for example, *Luton v Lessels* (2002) 210 CLR 333 at 341 [8].

56 Reference to the history of s 55 may be made, as established by *Cole v Whitfield*[63]:

> "not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged".

In considering the earlier decisions construing the first limb of s 55, it should be borne in mind that there then applied constraints upon interpretative technique which *Cole v Whitfield* was to remove. From such an examination as is now permitted, indeed required, several presently germane considerations appear.

57 First, the importance attached in the drafting of the Constitution to the restrictions imposed upon what otherwise was to be the equal power of the Senate with respect to all proposed laws[64] preceded that final and profound crisis in relations between the House of Lords and House of Commons respecting money Bills which was resolved by the *Parliament Act* 1911 (UK). But what the delegates to the Conventions that led to federation would have had well in mind was the turbulent relations concerning financial measures between the variously constructed colonial bicameral legislatures after the grants to the Australian colonies of responsible and representative government.

58 In 1893, it was said in the United Kingdom that, while "[i]n former times" the Commons had abused their right to grant supplies without interference from the Lords, by tacking to a Bill the Lords had no right to amend provisions to be accepted unconsidered or rejected with the supply measure, save for an instance in 1807, there was "no recent occasion" of irregular tacking[65]. However, in his submissions in *Stephens*[66], Deakin referred to three cases of attempted "tacking"

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63 (1988) 165 CLR 360 at 385.

64 See *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 121, 143-144, 168, 185.

65 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 552-553.

66 (1903) 29 VLR 229 at 234.

in Victoria between 1865 and 1877[67]. Hence the force of the observation by Professor McMinn[68]:

> "The various constitutions did not lay down firm and comprehensive rules on relations between the Houses: it was assumed that the colonial parliaments would follow the pattern of compromise popularly considered to be typical of the imperial Parliament. In fact such a pattern hardly existed; from 1832 to 1911 the British Constitution was in a state of highly unstable equilibrium, with the House of Lords occupying an essentially anomalous position. What happened in the colonies was that disputes between the Houses, very bitter disputes, became a recurrent theme. So when the House of Lords began its campaign of opposition to the Campbell-Bannerman government in 1906 it could almost be said to have been following the colonial pattern."

59 Secondly, this state of political ferment had meant that, as Harrison Moore was to put it[69]:

> "Australian experience has abundantly shown that no opinion upon financial powers is too wild to obtain some currency".

Moreover, the response in the text of ss 53-55 of the Constitution was to insert terms which, as Moore said[70]:

> "serve well enough to express the flexible ideas of political and popular thought, but are without legal precision".

That last point became significant once it was accepted that, contrary to the intra-mural disputes respecting s 53, s 55 could give rise to justiciable

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67 See also Todd, *Parliamentary Government in the British Colonies*, (1880) at 487-490; Jenks, *The Government of Victoria (Australia)*, (1891) at 256-258; McMinn, *A Constitutional History of Australia*, (1979) at 66-70; Twomey, *The Constitution of New South Wales*, (2004) at 572-573.

68 *A Constitutional History of Australia*, (1979) at 65.

69 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 143.

70 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 150.

controversies. Hood J was surely correct when in 1903 he described[71] "[t]he subject-matter" of s 55 as "Parliamentary practice" and "[t]he evils to be remedied" as "disputes between the Houses, leading possibly to what I may call 'strikes'". The difficulty with the text settled upon for s 55 was pinpointed by Mr Higgins when he spoke in committee at the Melbourne session in 1898. He said[72]:

> "The whole difficulty arises from the word 'imposition,' which may be said to involve a certain number of things."

60 Thirdly, some qualification is required to the general proposition respecting s 55 which was stated as follows in *Air Caledonie*[73]:

> "An obvious purpose of the constitutional requirement that a law imposing taxation deal only with the imposition of taxation was to confine the impact of the limitations upon the Senate's powers with respect to proposed taxing laws to provisions actually dealing with the imposition of taxation, that is to say, to prevent 'tacking'."

"Tacking" was said by Deakin to have[74]:

> "consisted invariably in the attempt to pass some foreign and usually very important measure by including it in some measure with regard to which the will of the people is believed to lie in a particular direction; and in the one legislative body seeking to take advantage of that to put the other in the position that it must either reject something which the people desire, or, if it accepts it, must accept also some other measure to which it has objections, and which it would reject if sent up as a separate measure".

When s 55 is seen as directed to alleviating the mischief thereby indicated, a point made in the Convention Debates at Melbourne in 1898 by Mr R E O'Connor and Mr Kingston is of some force. This is the need for a construction

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71 *Stephens v Abrahams (No 2)* (1903) 29 VLR 229 at 255.

72 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 March 1898 at 2056-2057.

73 (1988) 165 CLR 462 at 471.

74 *Stephens v Abrahams (No 2)* (1903) 29 VLR 229 at 235 *arguendo*.

of the first limb of s 55 that, while acknowledging the mischief against which it was directed, namely the abuses through "tacking" by the House of Representatives of its powers with respect to taxation, at the same time guards against abuse by the Senate of the protection given against tacking of non-taxation measures by assertion of a power in the Senate to frustrate the enactment of effective taxation laws. O'Connor said[75]:

> "We all know from experience that the machinery of taxation, which involves its incidence, the exceptions to be made, and a number of matters of that kind, may be so altered as to cut down the collectable value of a tax by one-half. It might be that a machinery Bill would be so altered as to make the tax which was sought to be imposed not worth collecting. If we want to hand over to the House of Representatives the sole power of dealing with the financial policy, as I think we do, we ought to see that they get it wholly, and that no one else is allowed to fritter it away."

Kingston spoke more bluntly[76]:

> "It occurs to me that to negative the power of amendment in the Senate with regard to the imposition of taxation, while giving them full power, if they so desire, of mutilating the machinery necessary for the collection of the taxation, would be to give them, by a side-wind, control over the policy of taxation of the Commonwealth, and that they ought not to possess."

61 Fourthly, it follows that the narrower the meaning given the phrase "shall deal only with the imposition of taxation", the greater the scope for the Senate by amendment (not forbidden by s 53) of so-called machinery provisions to denude a taxing measure of its full efficacy.

62 Fifthly, what was meant by "laws imposing taxation" a century ago was informed by then current legislative practice. This varied. As to New South Wales, Mr Barton said that, in that colony[77]:

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75 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 March 1898 at 2059.

76 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 March 1898 at 2058.

77 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 March 1898 at 2056.

> "as well as in other countries[,] [b]ills providing purely for the amount and limit of the tax have been separated from measures which dealt with the assessment and collection, and in many cases very properly separated."

On the other hand, in his argument in *Stephens*, Deakin made the point[78]:

> "For more than a century in England every new Act imposing a tax has included all the machinery to collect or otherwise connected with it. Take the Statute of 1901, 64 Vict, c 7, which imposes a new tax on coal. It not only includes that tax, but also contains in an appendix the provisions as to the exportation of coal, modifications of the *Customs Act*, the new tax, and a new procedure."

63 More recently, in *Re Dymond* Menzies J observed[79]:

> "[A]s appears from *Erskine May's Parliamentary Practice*[80], the parliamentary convention, upon which ss 53 to 55 of the Constitution were unquestionably based, prevented the Lords from amending Bills which they received from the Commons dealing with aids and supplies, so as to alter, whether by increase or reduction, the amount of a rate or charge – its duration, mode of assessment, levy, collection, appropriation, or management; or the persons who pay, receive, manage, or control it; or the limits within which it is leviable."

How, one might ask, is the mischief of "tacking", with which the first limb of s 55 is particularly concerned, involved at all by denying a power of amendment of provisions for the assessment and collection of revenue raised by the one legislative measure? It is that consideration which guides a construction of s 55 to deal with any ambiguity in the expression of political thought it contains.

64 The statements by O'Connor, Kingston and Barton which have been set out above were made in debate on a motion by Barton in committee that after the word "imposition", the words "and collection" be inserted in the first sentence of

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78 (1903) 29 VLR 229 at 237-238.

79 (1959) 101 CLR 11 at 27-28.

80 10th ed (1893) at 542.

what by then was cl 55 of the 1897 draft Bill. In the form in which it was first adopted, in the 1891 draft Bill, cl 55(3) had stated[81]:

> "Laws imposing taxation *except Laws imposing duties of Customs on imports* shall deal with one subject of taxation only."

The words emphasised had been omitted from the 1897 draft Bill. It appears that Mr Isaacs, relying upon an opinion attributed to Sir Samuel Griffith, had questioned whether, as the clause now stood in the 1897 draft Bill, "a law providing for the collection of taxation as well as the imposition would not be *ultra vires*"[82]. The motion was lost. In understanding what happened, the speech of Mr Symon is significant. He spoke of the "compromise of 1891" and of the danger of reviving a discussion upon the relations between the House of Representatives and the Senate[83] and continued[84]:

> "If the words 'laws imposing taxation,' and the subsequent words, 'the imposition of taxation only,' cover machinery – and I am not prepared to say that they do not – then the object is accomplished, and we must submit. I do not wish to move any limitation on these words. If, on the other hand, they do not cover machinery, I say that this is not the time to re-open the discussion and to take away from the Senate the power it would otherwise have of expressing an opinion as to the establishment of a new department in the Executive Government. That is a new attack on the powers of the Senate. It is an effort to reduce further the powers of the Senate in dealing with Bills."

The result was to leave for the future an authoritative pronouncement as to the construction of s 55.

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81 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 9 April 1891 at 954.

82 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 March 1898 at 2056 per Mr Barton. See also Twomey, *The Constitution of New South Wales*, (2004) at 553-554.

83 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 March 1898 at 2062-2063.

84 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 March 1898 at 2063.

"Dealing with the imposition of taxation"

65 In the line of cases in this Court to which reference has been made, there were expressed differing opinions on the question of construction of the first limb of s 55. None was essential to the outcome in any of these decisions.

66 Isaacs J alone was of opinion that there was no distinction between "imposing taxation" and "dealing with the imposition of taxation" in s 55 so that a law providing machinery for assessment, levying, collection and recovery of tax was not a law dealing with the imposition of taxation[85]. That involved reading s 55 as if it stated "laws imposing taxation shall only impose taxation". On the issue of construction alone, the view of Isaacs J should not be accepted.

67 It may be noted that, in *Commissioner of Taxation v Clyne*[86], which was decided shortly before *Re Dymond*, Dixon CJ, with the agreement of McTiernan, Williams, Kitto and Taylor JJ, said that probably Isaacs J would not have gone so far as to regard as no part of the imposition of taxation within s 55[87]:

> "any process for requiring provisional payment of the proportion of income as part of a scheme of taxation in which the burden or incidence of the tax, the source from which the burden should be borne, and the ultimate ascertainment of the tax finally payable formed a closely associated congeries of liability".

In *Re Dymond*, Menzies J said[88] that a contrary view to that of Isaacs J was part of the decision in *Moore*.

68 If the construction advanced by Isaacs J be rejected, the question then becomes one of the scope of the phrase "dealing with" the imposition of taxation.

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85 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 184-193.

86 (1958) 100 CLR 246.

87 (1958) 100 CLR 246 at 263.

88 (1959) 101 CLR 11 at 27.

As to this, it was accepted by Dixon CJ, Fullagar J, Kitto J and Windeyer J in *Re Dymond*[89] that[90]:

> "[an Act] would not be 'dealing with' anything other than the imposition of taxation if it prescribed the persons who were to pay the tax and the classes of income in respect of which they were to be taxed. It may very well be that an Act imposing an income tax could, without offending against s 55, contain all or most of the provisions in fact contained in Pt III of the *Income Tax and Social Services Contribution Assessment Act* [1936 (Cth)], which is headed 'Liability to Taxation'. Such provisions do not impose taxation, but they deal with the imposition of taxation, because the specification of the persons who are to be liable to taxation and the definition of their liability is part of the denotation of the term 'imposition of taxation'."

The other view goes further and accepts that provisions for the assessment, collection and recovery of tax are provisions which deal with the imposition of taxation. That proposition, with which the above majority disagreed, was accepted by McTiernan J, Taylor J and Menzies J in *Re Dymond*[91]. This conclusion follows from a construction of the words "dealing with" as allowing "the insertion of any provision which is fairly relevant or incidental to the imposition of a tax on one subject of taxation" and the inclusion "in a taxing Act [of] provisions incidental and auxiliary to the assessment and collection of the tax". The former formulation is that of Higgins J in *Osborne*[92] and the latter that of Starke J in *Munro*[93].

Conclusions respecting the first limb of s 55

69 These formulations by Higgins J and Starke J should be accepted. They are consistent with the evident purpose of s 55, supported by its history, of restraining abuse by the House of Representatives of its powers with respect to

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89 (1959) 101 CLR 11 at 17, 20-21, 23, 29.

90 (1959) 101 CLR 11 at 20-21.

91 (1959) 101 CLR 11 at 17, 23-25, 26-28.

92 (1911) 12 CLR 321 at 373.

93 (1926) 38 CLR 153 at 215.

taxing measures by the tacking of other measures and so placing the Senate in the invidious position of which Deakin spoke in his argument in *Stephens*[94]. "Tacking" is quite a different matter to the insertion in a taxing statute of provisions for the assessment, collection and recovery of that tax.

70 To accept these propositions means that a law containing added provisions of this nature is still a "law imposing taxation" to which there attaches the stipulation in s 53 of the Constitution denying to the Senate a power of amendment but enabling a return of Bills with a request, by message, for omission or amendment of any items or provisions therein.

71 However, the construction of the first limb of s 55 which should be accepted does not foreclose further observance of a practice or convention of splitting Bills between a taxing Act and an assessment Act. An assessment Act of the character of those in the numerous decisions of this Court discussed earlier in these reasons will not be a law imposing taxation with respect to which s 53 will restrict the powers of the Senate.

72 The Mirror Taxes Act is an example of a legislative purpose of the House of Representatives which could only be achieved with difficulty by the splitting of Bills. In these and other cases where the House of Representatives decides upon a like course, the law which imposes taxation may deal with the assessment, collection and recovery of taxation without falling foul of the first limb of s 55.

73 The provisions of the Mirror Taxes Act including the application of the Stamps Act in its modified form appear to answer the description of laws providing for the assessment, collection and recovery of taxation, and so to be valid. No detailed submission to the contrary effect was made. Were such a point to be taken, a further issue would arise. This would be whether the impugned provisions nevertheless answered the more general expressions used by Higgins J and Starke J as to the width of the term "dealing with". These questions do not presently arise and may be put to one side.

74 The result is there should be answered "No" the question in par (a)(i) of question 2 of the case stated, namely whether the Mirror Taxes Act is invalid or ineffective to permit the assessment of duty under the assessment on the ground

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94 (1903) 29 VLR 229 at 235.

that, contrary to s 55 of the Constitution, it is a law imposing taxation and deals with a subject-matter or subject-matters other than the imposition of taxation.

Question 2(b) – impermissible delegation

75 The appellant refers to the provision of s 6(4) of the Mirror Taxes Act that "[a]n applied law has effect subject to any modifications under section 8" and to the provision in s 8(2) that the Treasurer of a State may by notice in writing prescribe modifications of the applied laws of the State in question, other than modifications for the purpose of overcoming a difficulty that arises from the requirements of the Constitution. As indicated earlier in these reasons, it was pursuant to these provisions that by Notice dated 23 January 2001 the Treasurer of the State of Victoria declared modifications to the Stamps Act which, among other things, produced the result that duty is charged for the use of the Crown in right of the Commonwealth and the duty is a debt due to the Crown in that right.

76 The appellant complains that s 8 confers upon the Executive Governments of the States a delegated law-making power in contradiction of the conferral by s 52(i) of power on the Parliament of the Commonwealth which is exclusive of that of the State Parliaments.

77 However, the Parliament of the Commonwealth retains the power to repeal or amend at any time any provision of the Mirror Taxes Act. That being so, there is no "abdication" of the legislative power of the Parliament[95].

78 Further, s 8(3) of the Mirror Taxes Act must be taken into account in assessing the status of the modifications made to the Stamps Act by the Notice dated 23 January 2001. Section 8(3) provides that this Notice was a disallowable instrument for the purposes of s 46A of the *Acts Interpretation Act* 1901 (Cth)[96], thereby attracting powers of disallowance exercisable by each of the House of

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95 *Cobb & Co Ltd v Kropp* [1967] 1 AC 141 at 156-157; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 263-265; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 484; *Gould v Brown* (1998) 193 CLR 346 at 485-487 [284]-[287]; *Byrnes v The Queen* (1999) 199 CLR 1 at 10-11 [4]; *R v Hughes* (2000) 202 CLR 535 at 574-575 [94].

96 Section 46A is repealed with effect from 1 January 2005 by Sched 1, Item 6 of the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act* 2003 (Cth) but nothing turns on this for present purposes.

Representatives and the Senate. The submissions respecting impermissible delegation should be rejected.

Question 2(c) – s 51(ii) of the Constitution and discrimination

79 Section 51(ii) confers a power upon the Parliament of the Commonwealth to make laws with respect to:

> "taxation; but so as not to discriminate between States or parts of States".

It was held in *Allders* both that s 52(i) included a power to make a law imposing taxation, providing the law was otherwise one with respect to Commonwealth places and, further, that such a law was not subject to the prohibition against discrimination in s 51(ii)[97]. The refusal of leave to re-open *Allders* has the consequence that the argument the appellant presents respecting s 51(ii) must fail at the threshold.

80 Question 2(c) also refers to "an applied limitation in the Constitution to that effect". However, no argument was presented or developed under this head independently of reliance upon s 51(ii) of the Constitution.

Question 2(d) – s 99 of the Constitution

81 Does the Mirror Taxes Act give a preference of the kind prohibited by s 99? This provides:

> "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

82 In *The Tasmanian Dam Case*[98], Mason J said of s 99 that with ss 98, 100, 101 and 102 it was one of a group of sections dealing with laws with respect to trade and commerce, and continued[99]:

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97 (1996) 186 CLR 630 at 662, 678-680.

98 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 153.

99 (1983) 158 CLR 1 at 153-154.

> "In this context the concept of laws with respect to trade and commerce signifies laws made, or perhaps capable of being made, under ss 51(i) and 98 for that is the relevant power conferred on the Parliament to make laws with respect to trade and commerce. The prohibitions are naturally directed to laws which may be made in the exercise of that power, with the addition in the case of s 99 of revenue laws because the exercise of the taxation power might otherwise result in the giving of a preference to a State or to part of a State."

83 The first step in the submissions by the appellant respecting s 99 is that, in its aspect concerned with laws or regulations of "revenue", the prohibition in s 99 is not limited to laws supported by s 51(ii) of the Constitution. That submission should be accepted.

84 The application of s 99 to a law supported by s 51(ii) of the Constitution was considered in *Commissioner of Taxation v Clyne*[100] but with no suggestion that the prohibition in s 99 was limited to laws supported by s 51(ii). The significance of the choice of the word "revenue" in s 99 is indicated as follows by Quick and Garran[101]:

> "[T]he use of the wider word 'revenue' extends the prohibition to all revenues other than those arising out of taxation, and prevents any preference being given by the Commonwealth in respect of any revenue charges whatsoever; such as fees for postal, telegraphic, and telephonic services, or rates on railways of the Commonwealth."

That being so, and given the presence in s 52 of the expression "subject to this Constitution", there is no reason to restrict s 99 in such a fashion as would deny to the Mirror Taxes Act the character of a law of "revenue" by reason of its source in s 52(i) rather than s 51(ii) of the Constitution.

85 The second submission by the appellant on this head of argument concerns the existence and nature of the prohibited preference. The appellant accepts that there would be no infringement of s 99 by the imposition by federal law of a stamp duty which applied to all Commonwealth places whatever their location, even though the result could be that within the one State different rates would apply depending on the situation of a locality inside or outside a

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100 (1958) 100 CLR 246.

101 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 877.

Commonwealth place in that State. What the appellant does assert is that the Mirror Taxes Act has an effect of preferring one State over another State because different rates of taxation and exemptions from taxation apply depending solely on whether the relevant Commonwealth place is in one State rather than another. The rates of taxation and, indeed, the types of taxes that are imposed by federal law differ from State to State.

86 These submissions should not be accepted. Several points should be made. First, this is not the occasion to seek to disentangle the reasoning in all the disparate authorities in the first 50 years of the Court which concern s 99 in its operation upon "any law or regulation of trade, commerce ...".

87 Secondly, the critical phrase in s 99, "give preference ... over", expresses, as Dixon J put it in *Elliott v The Commonwealth*[102], "a conception necessarily indefinite". As a consequence, in a given case, much will depend upon the level of abstraction at which debate enters upon the particular issue. Hence the statement by Latham CJ in *Elliott*[103] that the words "give preference to A over B" are not to be construed as meaning "make a distinction or differentiation between A and B". *Elliott* itself held, by majority[104], that the specification by the regulations challenged by the plaintiff of ports in some States only where unlicensed persons were not to be engaged as seamen did not give preference to any State or part thereof over another State or part thereof.

88 Thirdly, in *Elliott*, Latham CJ (one of the majority) remarked[105] that, while preference necessarily involves discrimination or lack of uniformity, the latter does not necessarily involve the former. In the same case, Dixon J (one of the minority) expressed the same idea, saying[106]:

> "To give preference to one State over another State discrimination or differentiation is necessary. Without discrimination between States or parts of respective States, it is difficult to see how one could be given

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102 (1936) 54 CLR 657 at 682.

103 (1936) 54 CLR 657 at 670.

104 Latham CJ, Rich, Starke and McTiernan JJ; Dixon and Evatt JJ dissenting.

105 (1936) 54 CLR 657 at 668.

106 (1936) 54 CLR 657 at 683.

> preference over the other. But I agree that it does not follow that every discrimination between States is a preference of one over the other. The expressions are not identical in meaning. More nearly, if not exactly, the same in meaning, is the expression 'discrimination against.'"

Later, speaking of the term "discrimination" in s 117 of the Constitution, Gaudron J declared in *Street v Queensland Bar Association*[107]:

> "Although in its primary sense 'discrimination' refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is 'discrimination between'; the legal sense is 'discrimination against'."

89 This notion of discrimination as manifested in the text and interpretation of the Constitution was further considered in *Austin v Commonwealth*[108]. There, Gaudron, Gummow and Hayne JJ observed, with reference to recent authority[109]:

> "The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals[110], where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective[111]."

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107 (1989) 168 CLR 461 at 570-571.

108 (2003) 215 CLR 185.

109 (2003) 215 CLR 185 at 247 [118].

110 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 240; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480; *Cameron v The Queen* (2002) 209 CLR 339 at 343-344 [15].

111 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510-511, 548, 571-573, 582; *Cameron v The Queen* (2002) 209 CLR 339 at 343-344 [15].

90 In *Elliott* itself, some anticipation of this reasoning may be seen in the judgments of Rich J and Starke J (both members of the majority). Rich J said[112] that the imposition of a licensing system at a particular port was conditioned upon a view of the necessity of executive action to maintain order and regularity at particular localities where those conditions did not exist or were imperilled. Starke J declared[113]:

> "Special legislation may be required for some localities and special rules for various occupations. Such discriminations are often desirable, but they are by no means preferences prohibited by s 99. A licensing system applied to some ports in Australia and not to others is but an illustration of this kind of discrimination. In some ports the conditions may be such as to require some local regulation of labour whilst in others regulation may be wholly unnecessary. But this is not a preference of one locality over another, or of one State or part of a State over another: it is a regulation required for the circumstances of particular ports and the labour conditions of those ports."

91 Where then in the Mirror Taxes Act is there to be found the necessary element of discrimination between one State or any part thereof and another State or any part thereof? The scheme of the Mirror Taxes Act is to treat as relevantly of the same character the whole of the geographic area of each State, including those portions which are Commonwealth places; the taxation laws applying in the Commonwealth places are assimilated with those laws in the surrounding State. The scheme of the Mirror Taxes Act may produce differences in revenue outcomes between States, but that mirrors the differences that exist between the different taxation regimes from State to State. The differential treatment and unequal outcome that is involved here is the product of distinctions that are appropriate and adapted to a proper objective. There is no benefit or advantage enjoyed in or in relation to a Commonwealth place that is not shared by the remainder of the State in which it is located.

92 The nature of the power of modification conferred by s 8 of the Mirror Taxes Act is a significant pointer in the direction of the conclusions just stated. Modifications may be made for the purpose of enabling an applied law to operate so that the combined tax liability of a taxpayer under the applied law and the

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112 (1936) 54 CLR 657 at 678.

113 (1936) 54 CLR 657 at 680.

corresponding State taxing law is "as nearly as possible the same as the taxpayer's liability would be under the corresponding State taxing law alone if the Commonwealth places in the State were not Commonwealth places" (s 8(4)).

93 The appellant resisted these conclusions by reliance in particular upon *Cameron v Deputy Federal Commissioner of Taxation*[114]. In that case, the valuation placed by regulations made under the *Income Tax Assessment Act* 1915 (Cth) upon livestock differed according to the particular State in which the livestock was found and regardless of any other circumstances. The effect was held to discriminate between States or parts of States within the meaning of s 51(ii) of the Constitution. The appellant submits that, as with the regulations under challenge in *Cameron*, the criterion which gives rise to differential treatment here is location of the proposed hotel at Tullamarine Airport.

94 That involves several oversimplifications. The application of the Mirror Taxes Act produces the same revenue outcome as if the site were elsewhere in the State of Victoria. It is true that if the site were a Commonwealth place in another State the Mirror Taxes Act could produce a result differing from that obtained at Tullarmarine Airport. However, this would be a product of the assimilation of the other Commonwealth place to the situation of other localities in the other State in question. The differential outcome would reflect the policy expressed and implemented by s 8(4) of the Mirror Taxes Act. Even if all Commonwealth places, whatever their State location, are to be considered as relevantly "equal", their differential treatment to assimilate them in this way is a proper objective in the sense of the authorities.

95 The result is that there is no infringement of the prohibition in s 99 of the Constitution.

96 In argument reference was made to *Morgan v The Commonwealth*[115]. There the Court held that the references in ss 99, 100 and 102 of the Constitution to any law or regulation of trade or commerce must be read as restricted to laws that could be made under the power conferred by s 51(i)[116]. The correctness of

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114 (1923) 32 CLR 68.

115 (1947) 74 CLR 421.

116 (1947) 74 CLR 421 at 455, 458.

Morgan was challenged but not fully resolved in *The Tasmanian Dam Case*[117]. The present case concerns a law or regulation of "revenue" not of trade or commerce. *Morgan* may be put to one side.

Remaining questions

97 Question 2(e) asks whether the Mirror Taxes Act is "otherwise" invalid or ineffective. It is inappropriate to answer that question in the absence of specific submissions directed to any particular further invaliding cause.

98 Question 3(a) fixes upon the Notice under s 8(2) given by the Treasurer of the State of Victoria on 23 January 2001. The appellant repeats here the submissions earlier considered in dealing with the ground asserting impermissible delegation of legislative power. Question 3(a) should be answered to the same effect, that is to say, in the negative.

Orders

99 Question 1 should be answered, "Yes". Paragraphs (a), (b), (c) and (d) of question 2 should be answered, "No". It is inappropriate to answer question 2(e). Question 3(a) should be answered, "No". It is unnecessary to answer question 3(b). Question 4 asks who should pay the costs of the stated case and of the hearing of the stated case before this Court. That should be answered, "Permanent Trustee Australia Limited".

100 The issues raised by the case stated were co-extensive with that part of the cause removed into this Court, namely the constitutional grounds of objection taken in the pending proceeding in the Supreme Court of Victoria. It will be for a single Justice to deal with any remaining questions of costs in this Court and to remit the cause to the Supreme Court of Victoria for its consideration of the remaining issues.

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117 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 153-154, 248-249, 251.

101 McHUGH J. The first issue in this case stated by a Justice of the Court under s 18 of the *Judiciary Act* 1903 (Cth) is whether the *Stamps Act* 1958 (Vic), or an assessment made under it, is invalid to the extent that that Act, or the assessment, purports to charge stamp duty on an agreement for lease of land situated within Tullamarine Airport. The second issue assumes that the *Stamps Act* is invalid in its application to the agreement for lease; it is whether the *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth) is invalid or ineffective to permit the assessment of duty by applying the terms of the *Stamps Act* to the extent that Act is invalid.

Summary of reasons

102 In my opinion, the *Stamps Act* and the assessment made under it are invalid to the extent that that Act and assessment purport to charge stamp duty on the agreement for lease of land situated within Tullamarine Airport. That is because Tullamarine Airport is a Commonwealth place for the purposes of s 52(i) of the Constitution. Under that paragraph of the Constitution, the Commonwealth has the exclusive power to make laws with respect to Commonwealth places. A Victorian law cannot apply of its own force in such places. The *Commonwealth Places (Mirror Taxes) Act* ("the Mirror Taxes Act") is also invalid or ineffective to permit the assessment of duty on the agreement because that Act is a revenue law of the federal Parliament that prefers various States or parts of States over other States or parts thereof, contrary to s 99 of the Constitution.

103 The Mirror Taxes Act applies the taxing laws of each State as federal law in Commonwealth places in that State. As a result, at the relevant time, the duty rate on agreements for leases varied from 0.35% in New South Wales, Queensland and Western Australia to 0.6% in Victoria and 1% in South Australia and Tasmania. The rate of duty on what is claimed to be a premium in this agreement for lease varies from 0.35% in New South Wales to 1.2% in Victoria and 4.85% in Western Australia. Thus the total duty that is estimated to be payable on the present agreement for lease in Victoria varies significantly from what would be payable if Tullamarine Airport was in another State. The amount of the disputed assessment in Victoria is $762,583.20, whereas in New South Wales it would be $254,265.20. In Queensland, South Australia, Western Australia and Tasmania it would exceed $2m, the highest being in Western Australia where the estimated duty would be $2,699,320.20.

104 Having regard to these different rules for assessing duties in each State, I have the greatest difficulty in understanding how the Commissioner of State Revenue for Victoria and the Commonwealth can maintain that the Mirror Taxes Act does not breach s 99 of the Constitution which declares:

> "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

105 I think the Mirror Taxes Act involves multiple breaches of s 99 of the Constitution. It is a federal law that applies different rules for different parts of Australia. I do not think that it has ever been doubted that a federal law concerned with trade, commerce or revenue that gives an advantage or immunity or imposes a prejudice or burden in one State as the result of applying different rules based on State boundaries or localities gives preference to one or more States or parts thereof over other States or parts thereof.

106 Section 99 prohibits a federal law concerning trade, commerce or revenue from treating States or parts of States differently when such treatment prefers a State or one of its parts over other States or their parts. By reason of the circumstances that exist in various States or parts of States, a uniform federal law may produce effects which vary from State to State. The jurisprudence of this Court shows that such effects do not constitute preferences within the meaning of s 99 of the Constitution. However, the vice of the Mirror Taxes Act is not so much its effect – although that also breaches s 99 because it enables some States to raise more revenue than other States – but in laying down different rules for different States. Surely, no one would seek to say that s 99 would not be breached by a federal income tax law that imposed a tax of 20% on income in New South Wales, 10% in Queensland and 40% in Western Australia or a federal law that imposed different rates of excise duty on the same classes of goods depending on the State of manufacture. Yet, *mutatis mutandis*, that is what the Mirror Taxes Act does in applying stamp duty legislation. As a federal law, it applies different rates of tax to transactions and agreements in different States. For the purpose of s 99 of the Constitution, it is irrelevant that the object of the Mirror Taxes Act is to ensure that State residents pay the same stamp duties whether the subject of the duty concerns a Commonwealth place or some other place in the State. Consequently, it breaches s 99 of the Constitution.

The material facts

107 In March 2001, the Commissioner of State Revenue for Victoria assessed an instrument of lease that is identified in the case stated as "the Development Agreement" as liable to stamp duty in the sum of $762,583.20. The Commissioner assessed the Agreement as liable to stamp duty on the basis that it was an agreement for lease within s 77 of the *Stamps Act* and the Third Schedule of that Act. The Development Agreement relates to "the development of a Four Star Hotel" at Tullamarine Airport on land that at all material times has been vested in the Commonwealth and leased by it to Australia Pacific Airports (Melbourne) Pty Ltd for a period of 50 years. It is a term and condition of the lease that the land be used as an airport. However, other uses not inconsistent with use as an airport may be permitted on the land but any sub-lease has to be consistent with regulations made under the *Airports Act* 1996 (Cth).

108 Permanent Trustee Australia Limited ("Permanent") and Australia Pacific Airports (Melbourne) Pty Ltd ("Australia Pacific Airports") are two of the three

parties to the Development Agreement. Subject to certain conditions, Australia Pacific Airports and Permanent agreed to enter into a lease on the completion of the development with the intention "that Permanent will procure [Hilton International Co] to conduct a Four Star Hotel" on the land.

109 Permanent objected to the Commissioner's assessment. After the objection was set down for hearing before the Supreme Court of Victoria, this Court ordered that that part of the objection concerning the validity of the Mirror Taxes Act be removed into this Court under s 40 of the *Judiciary Act*.

110 Subsequently, a Justice of the Court reserved four questions for consideration by the Full Court of this Court. In the view I take of the case, it is only necessary to set out Question 1, part of Question 2 and Question 3. Those questions are as follows:

> "QUESTION 1:
>
> Is the *Stamps Act* 1958 (Vic), or the Assessment, invalid to the extent that the Act or the Assessment purports to charge the Development Agreement with stamp duty as a lease or an agreement for lease, on the basis that:
>
> (a) the *Stamps Act* is invalid to the extent that it purports to charge a lease or an agreement for lease of land or tenements situated within a Commonwealth place with stamp duty, on the basis that section 52(i) of the Constitution gives to the Commonwealth exclusive legislative power with respect to Commonwealth places; and
>
> (b) any agreement to lease contained in the Development Agreement is an agreement for lease of land or tenements situated within a Commonwealth place.
>
> QUESTION 2:
>
> If Yes to 1, is the *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth) invalid or ineffective to permit the assessment of duty under the Assessment:
>
> ...
>
> (d) on the ground that, by a law of trade, commerce or revenue, it gives a preference to one State or any part thereof over another State or any part thereof, contrary to section 99 of the Constitution?
>
> ...

QUESTION 3:

(a) If Yes to 1, is the notice given by the Treasurer of the State of Victoria on or about 23 January 2001, referred to in paragraph 9 above, ineffective to make any duty payable under the *Commonwealth Places (Mirror Taxes) Act* payable to the Crown in right of the Commonwealth?

(b) If Yes to (a), is the *Commonwealth Places (Mirror Taxes) Act* ineffective to impose and permit an assessment of duty in respect of the Development Agreement?"

Question 1

111 Given the decision of this Court in *Allders International Pty Ltd v Commissioner of State Revenue (Vict)*[118], Question 1 must be answered, "Yes". In *Allders*, the Court held that the *Stamps Act* could not validly make a lease of shop premises on land at Tullamarine Airport liable to ad valorem duty under the Act. That was because Tullamarine was a Commonwealth place, and s 52(i) of the Constitution precludes a State law from operating in respect of a Commonwealth place.

112 The decision in *Allders* applied the seminal decision of this Court in *Worthing v Rowell and Muston Pty Ltd*[119]. In *Worthing*, the Court held that s 52(i) of the Constitution precluded State laws from operating in Commonwealth places. Section 52(i) of the Constitution provides:

> "The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes ..."

113 After the decision in *Worthing*, the Parliament of the Commonwealth enacted the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) which applied State laws to Commonwealth places. However, that Act contained an important exception in s 4(5) with the result that that Act does not apply a State law if it would have the effect of imposing "any tax". Because the *Stamps Act* imposed a tax, it was not a law applied by the *Commonwealth Places (Application of Laws) Act*. Accordingly, s 52 of the Constitution precluded the

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118 (1996) 186 CLR 630.

119 (1970) 123 CLR 89.

Stamps Act from operating in a Commonwealth place such as Tullamarine Airport.

114 In every relevant respect, the assessment made in the present case cannot be distinguished from the assessment made in *Allders*. Because that is so, the decision in *Allders* is indistinguishable and Question 1 must be answered, "Yes".

Question 2

115 In response to the decision in *Allders*, the Parliament of the Commonwealth enacted the Mirror Taxes Act for the purpose of putting the States in the same position in respect of State taxing laws as they would have been if s 52 was not in the Constitution. This has had the practical result that State taxing laws operating in relation to Commonwealth places differ from State to State. Those who drafted the Mirror Taxes Act obviously took the view that s 99 of the Constitution had no application to laws enacted under s 52 of the Constitution. In this they were mistaken. Probably they relied on the statement of four members of this Court in *Morgan v The Commonwealth*[120] who said that s 99 only applied to laws made under s 51 of the Constitution. As a result, the Mirror Taxes Act is invalid because it breaches s 99 of the Constitution. Although a majority of this Court hold that s 99 does not invalidate the legislation, the Explanatory Memorandum suggests that those who were responsible for advising the Commonwealth were under no illusion that the Mirror Taxes Act was valid if s 99 applied to laws made under s 52[121].

The Mirror Taxes Act

116 Section 4 of the Mirror Taxes Act declares:

> "This Act has effect only to the extent that it is an exercise of the legislative powers of the Parliament under the following provisions of the Constitution:
>
> (a) paragraph 52(i);
>
> (b) section 73;
>
> (c) paragraph 77(iii);

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120 (1947) 74 CLR 421 at 455.

121 House of Representatives, Explanatory Memorandum to the Commonwealth Places (Mirror Tax) Bill 1998 (and cognate Bills) at 7.

(d) paragraph 51(xxxix), so far as it relates to paragraph 52(i), section 73 or paragraph 77(iii)."

117 The key provision of the Mirror Taxes Act is s 6(2) which enacts:

"Subject to this Act, the excluded provisions of a State taxing law, as in force at any time before or after the commencement of this Act, apply, or are taken to have applied, according to their tenor, at that time, in relation to each place in the State that is or was a Commonwealth place at that time."

118 Section 6(1) defines "excluded provisions" of a State taxing law to mean:

"provisions of that law to the extent that they are excluded by paragraph 52(i) of the Constitution".

119 And s 3 defines "excluded by paragraph 52(i) of the Constitution" to mean:

"inapplicable by reason only of the operation of section 52 of the Constitution in relation to Commonwealth places".

120 Section 3 also defines a "State taxing law". It declares:

"***State taxing law***, in relation to a State, means the following, as in force from time to time:

(a) a scheduled law of the State;

(b) a State law that imposes tax and is prescribed by the regulations for the purposes of this paragraph;

(c) any other State law of the State, to the extent that it is relevant to the operation of a law covered by paragraph (a) or (b)."

121 The *Stamps Act* is a scheduled law of the State and is therefore within the definition of "State taxing law".

122 Section 6(4) of the Mirror Taxes Act declares that an "applied law has effect subject to any modifications under section 8". That section, inter alia, authorises the Treasurer of a State to prescribe modifications of the applied laws of the State "other than modifications for the purpose of overcoming a difficulty that arises from the requirements of the Constitution" (s 8(2)). In January 2001, the Treasurer of Victoria declared modifications to the *Stamps Act* with effect from 6 October 1997 or the date of the commencement of the provision to which the modification related. Among the sections modified were ss 17, 17A and 24. Section 17A of the *Stamps Act* makes duties payable under that Act a debt due to

the Crown payable to the Commissioner of State Revenue. In ss 17, 17A and 24, the term "Her Majesty" is omitted and the phrase "the Crown in right of the Commonwealth" is inserted in its place. As a result, the duty charged under s 17 of the *Stamps Act* now becomes under s 17A a debt due to the Crown in right of the Commonwealth but payable to the Commissioner of State Revenue. However, s 23 of the Mirror Taxes Act declares:

> "(1) Notwithstanding anything in the terms of an applied law, there must be credited to the Consolidated Revenue Fund all amounts received under an applied law that are required by section 81 of the Constitution to be so credited.
>
> (2) The Commonwealth is liable to pay to a State amounts equal to amounts that are credited to the Consolidated Revenue Fund as mentioned in subsection (1) in relation to an applied law of the State.
>
> (3) Amounts payable by the Commonwealth under subsection (2) are to be reduced by amounts paid by the Commonwealth under any applied law of the State concerned. For this purpose, ***amounts paid by the Commonwealth*** does not include amounts paid by way of tax.
>
> (4) The Consolidated Revenue Fund is appropriated for the purpose of:
>
> (a) payments under this section; and
>
> (b) payments by the Commonwealth under an applied law.
>
> (5) The *Financial Management and Accountability Act 1997* does not apply to amounts received under an applied law."

123 By force of s 6(6) of the Mirror Taxes Act, the excluded provisions of the State taxing law do not have effect in a State unless the Governor-General and the Governor of the State have arranged under s 9 for "the exercise or performance of a power, duty or function ... by an authority of the State under the applied laws of the State" (s 9(1)). In December 2000, the Governor-General of the Commonwealth of Australia and the Governor of the State of Victoria made such an arrangement. Section 7 of the *Commonwealth Places (Mirror Taxes Administration) Act* 1999 (Vic) gives a State authority "any power, duty or function that the [Mirror Taxes] Act authorises or requires the authority to exercise or perform".

124 Although the Mirror Taxes Act relies on four legislative powers for its validity, s 52 of the Constitution is its chief support. No doubt the reason that the Commonwealth did not seek to rely on the taxing power or other provisions of s 51 is that it would have to show that the Mirror Taxes Act complied with ss 55

and 99 of the Constitution. For my purposes, it is unnecessary to decide whether s 55 applies to laws made under s 52 and, if so, whether the Mirror Taxes Act infringes the requirements of s 55 of the Constitution. That is because, in my opinion, the Mirror Taxes Act is invalid because it breaches s 99 of the Constitution.

Section 99

125 The exclusive power of the Parliament to make laws with respect to "all places acquired by the Commonwealth for public purposes" is conferred "subject to this Constitution". Section 99 of the Constitution must therefore apply to s 52. That is to say, it must apply to laws made with respect to places acquired by the Commonwealth for public purposes. Nothing in s 99 or in s 52(i) itself indicates that s 99 is not intended to apply or is incapable of applying to places acquired by the Commonwealth. The majority of places acquired for such purposes are in the various States of the Commonwealth. Because that is so, the federal nature of the Constitution as well as the language of ss 52 and 99 show that s 99 applies to places acquired by the Commonwealth for public purposes. If that were not so, the Parliament of the Commonwealth could enact laws that gave State residents in such Commonwealth places preferences over residents in other States. The purpose of s 99 is to protect each State or any part of it from being disadvantaged by another State or part of a State receiving a preference in trade, commerce or revenue. Regions of States, including Commonwealth places in those States, are parts of States. If a law of the Commonwealth concerning trade, commerce or revenue prefers one region in the State to another State or one of its regions, s 99 is breached. There is no federal reason for confining the protection given by s 99 to those regions that are defined on State lines. In *Elliott v The Commonwealth*[122], Evatt J said that "it is preposterous to suggest that, before the prohibitions of s 51(ii) or s 99 of the Constitution can apply, the name of one or more States must be branded upon the face of the offending legislation".

The case law

126 Despite the apparent simplicity of s 99, it has given rise to significant differences of judicial opinion. After almost a century of judicial interpretation, its meaning cannot be regarded as settled. Nevertheless, decisions and reasons of this Court directly support, and in other cases are consistent with, the view that the Mirror Taxes Act is invalid because it imposes different rates of stamp duty based on State locality.

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122 (1936) 54 CLR 657 at 691.

127 The first reported case dealing with s 99 is *Colonial Sugar Refining Company v Irving*[123], a decision of the Judicial Committee of the Privy Council. In *Irving*, the Judicial Committee examined a law of the Parliament that allowed an exemption from excise duty for goods on which customs or excise duty had been paid under State legislation before the imposition of Commonwealth duties. The Judicial Committee held that the law did not breach s 99 of the Constitution. Lord Davey, who delivered the advice of the Judicial Committee, said[124]:

> "The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves."

128 *Irving* laid down the rule, which has not been doubted since, that, as long as the legal rule contained in the law of the federal Parliament is uniformly applicable to persons irrespective of their State, it will not offend s 99 simply because the effect of applying the rule may differ from State to State, including by operation of State law.

129 The first reported case in this Court dealing with a law giving preference to a State or part of a State within the meaning of s 99 is *R v Barger*[125]. In *Barger*, a majority of the Court held that the *Excise Tariff* 1906 (No 16) was invalid on a number of grounds. One of them was that the Act offended s 99 of the Constitution. A proviso to a section of the *Excise Tariff* exempted from taxation goods that were manufactured by any person in any part of the Commonwealth under certain conditions relating to the remuneration of labour. Those conditions could be fixed by industrial tribunals or a resolution of both federal Houses of Parliament and could vary according to local circumstances, agreements and judicial opinion. The majority found that the Parliament intended, and indeed prescribed, "that discrimination according to locality might be made"[126]. They held that Parliament could not, by delegation to the tribunals or the Houses of Parliament, do that which it was forbidden to do directly. Consequently, the Act transgressed s 51(ii) and s 99 of the Constitution. In so far as *Barger* was an authority that the Constitution contains implied prohibitions against federal laws operating in the areas "reserved" for the States, it has long been overruled. However, in so far as it dealt with s 99, the reasoning of the

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123 [1906] AC 360.

124 [1906] AC 360 at 367.

125 (1908) 6 CLR 41.

126 (1908) 6 CLR 41 at 80.

majority Justices is in my opinion correct. Griffith CJ, Barton and O'Connor JJ said[127]:

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

However, Isaacs J, in his dissenting judgment, rejected the notion that s 99 is infringed because a law of the Parliament "discriminates between localities as parts of the Commonwealth"[128]. As will appear, over the years this dissenting view has had the support of a majority of Justices of this Court and the Judicial Committee[129]. But it is a view that was strenuously opposed by Dixon J and Evatt J[130]. In *Commissioner of Taxation v Clyne*[131], four Justices in addition to Dixon CJ also seem to have disagreed with it. It is not necessary to resolve this question in this appeal. Even if the approach of Isaacs J is adopted, the Mirror Taxes Act would infringe s 99 by applying the different State taxing laws to Commonwealth places in different States, solely by reference to their location in those States.

130 Isaacs J went on to say[132]:

> "If for instance, discrimination were made in favour of one part of a State against the rest of it, the discrimination, though nominally between parts of the same State, might easily and materially benefit an adjoining State. This, I say, may very possibly and reasonably be included within the prohibition. I have not to determine that finally now; but, in any case, the pervading idea is the preference of locality merely because it is locality,

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127 (1908) 6 CLR 41 at 78.

128 (1908) 6 CLR 41 at 109.

129 *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68; *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 at 348; [1940] AC 838 at 856-857.

130 *Elliott v The Commonwealth* (1936) 54 CLR 657 at 682, 686.

131 (1958) 100 CLR 246.

132 (1908) 6 CLR 41 at 108.

> and because it is a particular part of a particular State. It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities ..."

131 In *Barger*, Higgins J, who also dissented, said[133]:

> "Now, there is certainly nothing on the face of this Act which makes any such discrimination. *There is not one rate of Excise for Queensland and another for West Australia. Nor is there one set of conditions of exemption for Tasmania and another for Victoria*. Each manufacturer is to be treated on his own merits; and all the four bases for exemption are applicable to all manufacturers, wherever they are found in Australia. It is not prescribed in the Constitution that taxation must be uniform – uniform in any of its numerous senses." (emphasis in original)

132 The next reported case is *Cameron v Deputy Federal Commissioner of Taxation*[134] where the Court (Knox CJ, Isaacs, Higgins, Rich and Starke JJ) unanimously held that regs 46 and 46A and Table III of the Income Tax Regulations 1917 discriminated between States and parts of States. In *Cameron*, the relevant regulation provided that, in determining the profits made on the sale of livestock for income tax purposes, different values should be placed on stock of the same class in different States. In New South Wales, for example, horses were valued at £8 and in Victoria at £15 a head[135]. In *Cameron*, Knox CJ applied[136] a dictum of Isaacs J in *Barger* where Isaacs J had said[137]:

> "Discrimination between localities in the widest sense means that, because one man or his property is in one locality, then, regardless of any other circumstance, he or it is to be treated differently from the man or similar property in another locality."

133 In *Cameron*, Isaacs J himself said[138]:

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133 (1908) 6 CLR 41 at 130-131.

134 (1923) 32 CLR 68.

135 (1923) 32 CLR 68 at 71.

136 (1923) 32 CLR 68 at 72.

137 (1908) 6 CLR 41 at 110.

138 (1923) 32 CLR 68 at 76-77.

"Stock in Queensland and stock in New South Wales are, by reason solely of their State situation, 'treated differently', by the mere fact that different standards are applied to them respectively. It does not matter whether those legal standards are arbitrary or measured, whether dictated by a desire to benefit or to injure, the simple fact is they are 'different', and those different legal standards being applied simply because the subject of taxation finds itself in one State or the other there arises the discrimination by law between States which is forbidden by the Constitution."

134 Higgins J said[139]:

"Two pastoralists may in fact make £1,000 net profit – one in New South Wales, the other in Queensland; and yet under these Rules they may be treated as making unequal profit, and be liable to pay unequal income tax. The only reason for this result is that one is in Queensland, the other in New South Wales. This, in my opinion, is clearly a discrimination between States as to taxation."

135 Higgins J had said in *Barger*[140]:

"Parliament does not discriminate between States when it applies the same rule to all the States ... Parliament may not discriminate between States; but the facts may, and often must ..." (emphasis omitted)

136 Starke J said[141]:

"A law with respect to taxation applicable to all States and parts of States alike does not infringe the Constitution merely because it operates unequally in the different States – not from anything done by the law-making authority, but on account of the inequality of conditions obtaining in the respective States. On the contrary, a law with respect to taxation which takes as its line of demarcation the boundaries of States or parts of States necessarily discriminates between them, and gives a preference to one State or part thereof over another State or part thereof ..."

137 His Honour went on to say[142]:

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139 (1923) 32 CLR 68 at 78.

140 (1908) 6 CLR 41 at 131.

141 (1923) 32 CLR 68 at 79.

142 (1923) 32 CLR 68 at 80.

> "And if the law is not applicable to all States *alike*, then it operates unequally in the States and discriminates as a law between them." (emphasis added)

138 So far as discrimination between States or parts of States goes, the ratio decidendi of *Cameron* fully covers this case. Having regard to the obvious preference given to Commonwealth places that are subjected to a lower rate of stamp duty by reference to the State in which they are located, I do not see how the Mirror Taxes Act can be held to be valid without overruling *Cameron*.

139 On the issue of what constitutes a preference, in *James v The Commonwealth*[143], this Court unanimously held that regulations made under the *Dried Fruits Act* 1928 (Cth) infringed s 99 of the Constitution. The Act prohibited the delivery of dried fruits for carriage from State to State unless a licence had been issued under the Act permitting such carriage. Prescribed authorities were the only persons authorised by the Act to issue these licences. However, under the regulations no authority was prescribed for Queensland or Tasmania. The Court held that, because of these omissions, the regulations gave a preference to one State over another. Knox CJ and Powers J said[144]:

> "The mere fact that the dried fruits are held in the State of Queensland or the State of Tasmania prevents the owner from obtaining a licence which he might have obtained had his fruit been held in one of the other four States. In our opinion this affords a clear instance of discrimination between States or of a preference to one State over another State."

140 Starke J applied what he had said in *Cameron*, to which I have referred, and said that until Queensland and Tasmania could issue licences "the Regulations discriminate as a law in the issue of licences between the States of Victoria, New South Wales, South Australia and Western Australia on the one hand, and the States of Queensland and Tasmania on the other hand, and do not as a law treat all the States alike"[145].

141 A different result was reached in *Crowe v The Commonwealth*[146] where the Court unanimously held that a law of the Parliament gave no preference when it provided that a Dried Fruits Control Board should consist of two representatives elected by growers in Victoria and one representative elected by

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143 (1928) 41 CLR 442.

144 (1928) 41 CLR 442 at 457.

145 (1928) 41 CLR 442 at 464-465.

146 (1935) 54 CLR 69.

growers in New South Wales, South Australia and Western Australia. Rich J said[147]:

> "In this case it appears to me that the constitution of the board does not give to the growers of the States who are entitled to elect members any tangible advantage of a commercial character or any legal means of securing it."

Starke J said[148]:

> "The preferences prohibited by s 99 are advantages or impediments in connection with commercial dealings based upon distinctions of locality. The selection of the members of a board gives no preference to any State or part of a State in connection with such dealings, and confers no authority upon the board to grant any such preference."

142 Dixon J said[149]:

> "There can be no doubt that in the election of members of the board a distinction is drawn based on State boundaries. If the distinction amounts to or involves preference within the meaning of s 99, the provision cannot be supported."

His Honour went on to say[150]:

> "In relation to trade and commerce, as distinguished from revenue, the preference referred to by s 99 is evidently some tangible advantage obtainable in the course of trading or commercial operations, or, at least, some material or sensible benefit of a commercial or trading character. It may consist in a greater tendency to promote trade, in furnishing some incentive or facility, or in relieving from some burden or impediment. In the present instance nothing is given but a voice in the choice of the personnel of a board which itself is governed by the law, a law which does not and could not enable it to give preference to a State or part of a State as such. The seeming inequality of the voice given arises, no doubt, from the fact that dried fruit is grown more largely in Victoria than in the other States and that little or none is grown in Queensland and Tasmania."

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147 (1935) 54 CLR 69 at 83.

148 (1935) 54 CLR 69 at 86.

149 (1935) 54 CLR 69 at 91.

150 (1935) 54 CLR 69 at 92.

Evatt and McTiernan JJ said[151]:

> "Section 4 neither puts any State in possession of trading advantages over another State nor gives it the power to obtain any such advantages."

143 The next reported case is *Elliott v The Commonwealth*[152] which contains the most extensive discussion of the meaning of s 99. It is also authority for the proposition – which I think is wrong – that a law of the Parliament which gives an advantage to a particular city in a State over cities in other States does not breach s 99. Cities are surely parts of States for the purpose of s 99. Morever, in many – maybe most – cases, giving an advantage to a city in a State is to give an advantage to the State itself, as Dixon J thought in *Elliott*.

144 In *Elliott*, a majority of the Court (Latham CJ, Rich, Starke and McTiernan JJ, Dixon and Evatt JJ dissenting) held that s 99 of the Constitution was not infringed by a system for licensing seamen which was applicable only at ports in the Commonwealth specified by the Minister as ports in respect of which licensing officers should be appointed. Unlicensed persons were not allowed to engage or be engaged as seamen at ports so specified. The Minister specified ports in four States but not in the other two States.

145 Latham CJ held that the licensing regime did not either "give preference" nor operate on "States or parts of States" as such. As to the first of these issues, Latham CJ said[153]:

> "In the case now before the Court there is no doubt that the law which applies in, for example, Sydney, does not apply in Fremantle. The result of the legislation is to make a difference in the law applicable in these two places. It does not, in my opinion, follow from this fact that the law gives preference to one place over the other place. In the case of a law or regulation of trade and commerce the difference between the two places under consideration (whether they be States or parts of States) must be such as to amount to a trading or commercial preference which is definitely given to one State or part thereof over another State or part thereof."

Latham CJ went on to say that it was entirely a question of opinion which could not be settled upon legal grounds "whether all or some only of the seamen of Sydney or the seamen of Fremantle or the employers of seamen in Sydney or the

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151 (1935) 54 CLR 69 at 96-97.

152 (1936) 54 CLR 657.

153 (1936) 54 CLR 657 at 668-669.

employers of seamen in Fremantle receive an advantage by reason of the legislation in question"[154]. His Honour said he was unable to hold that there was "any tangible commercial advantage within the meaning of any of the expressions which I have quoted from *Crowe v The Commonwealth*[155]". Latham CJ also said[156]:

> "With all respect to those who differ from me, I cannot see that the imposition of a licensing system in employment in one State or a part of a State can fairly be described as something 'given' to that State or part of a State."

146 On the second issue, Latham CJ examined the statements of various Justices in *Barger*, *Cameron* and *James*. His Honour adopted the view of Isaacs J in *Barger* that had been accepted by a majority in *Cameron*. Latham CJ said[157]:

> "These authorities make it, in my opinion, proper to hold that the *discrimen* which s 99 forbids the Commonwealth to select is not merely locality as such, but localities which for the purpose of applying the *discrimen* are taken as States or parts of States. In the regulations in question the application of the regulations depends upon the selection of ports as ports and not of States or parts of States as such. In my opinion, s 99 does not prohibit such differentiation."

His Honour went on to say[158]:

> "It may be that a preference to Sydney and Newcastle in relation to trade and commerce may have a large effect in giving preference to the State of New South Wales as a whole, but I think that a law giving such preference must nevertheless be construed, according to its terms, as giving a preference to Sydney and Newcastle and not to the whole State."

147 Justices Rich and Starke took a similar view. Rich J said[159]:

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154 (1936) 54 CLR 657 at 670.

155 (1935) 54 CLR 69.

156 (1936) 54 CLR 657 at 671.

157 (1936) 54 CLR 657 at 675.

158 (1936) 54 CLR 657 at 675.

159 (1936) 54 CLR 657 at 678.

> "I find it quite easy to say that there is no preference given to a State or a part of a State over another State or part of a State by these regulations or by the action of the Minister under them. There is no discrimination against individuals as denizens of States. The licensing systems may involve a disability in the case of seamen. But the imposition is conditioned upon what is considered the necessity of legislative or executive action in particular localities. No account of State boundaries is taken. No benefit or advantage is given to a State or part of a State to the detriment of another State or part of it."

Starke J said[160]:

> "Special legislation may be required for some localities and special rules for various occupations. Such discriminations are often desirable, but they are by no means preferences prohibited by s 99. A licensing system applied to some ports in Australia and not to others is but an illustration of this kind of discrimination. In some ports the conditions may be such as to require some local regulation of labour whilst in others regulation may be wholly unnecessary. But this is not a preference of one locality over another, or of one State or part of a State over another ..."

148 As I said earlier, Justices Dixon and Evatt dissented and took a view contrary to that of Isaacs J in *Barger*. Dixon J said[161]:

> "I think that in specifying the chief ports in each of four States a course was taken which must be considered as affecting each of those States as a whole. We are concerned only with sea-borne trade of each State with other States and countries. For the most part that trade is done from the ports prescribed, namely, from the ports of the capital cities of each of these four States, and, in the case of New South Wales, the port second in importance, Newcastle."

149 Dixon J thought that the difficulty of the case arose from the words in s 99 "give preference ... over". His Honour said[162]:

> "I repeat that the preference may consist in a greater tendency to promote trade, in furnishing some incentive or facility, or in relieving from some burden or impediment. But it is, perhaps, desirable to notice that the

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160 (1936) 54 CLR 657 at 680.

161 (1936) 54 CLR 657 at 682.

162 (1936) 54 CLR 657 at 683.

> phrase is not 'give a preference' but 'give preference'. The difference may be slight, but the latter expression seems to bring out the element of priority of treatment, while the former has more suggestion of definite and actual advantage in the treatment. What is forbidden by s 99, is, in a matter of advantage to trade or commerce, the putting of one State or part of a State before another State or part thereof. But the section does not call upon the Court to estimate the total amount of economic or commercial advantage which does or will actually ensue from the law or regulation of trade or commerce. It is enough that the law or regulation is designed to produce some tangible advantage obtainable in the course of trading or commercial operations, or some material or sensible benefit of a commercial or trading character. To give preference to one State over another State discrimination or differentiation is necessary. Without discrimination between States or parts of respective States, it is difficult to see how one could be given preference over the other. But I agree that it does not follow that every discrimination between States is a preference of one over the other. The expressions are not identical in meaning. More nearly, if not exactly, the same in meaning, is the expression 'discrimination against'."

Dixon J went on to hold that the regulations were invalid. He said[163]:

> "[Section] 99 does establish a standard of validity which is concerned with the character of the law or regulation of commerce and not with the particular trading or economic consequences which may or may not in fact ensue from it at a particular place and time."

150 Evatt J rejected the view of Isaacs J in *Barger's Case*, saying[164]:

> "But s 99 says nothing about the motive animating the Commonwealth law; and it forbids preferences not merely to a State but to a part of it. Further, it would seem impossible to assert that a law preferring Sydney to Melbourne does not give preference to part of one State over part of another. However 'considered', Sydney and Melbourne *are* parts of States and s 99 prohibits a commercial law which gives preference to a part of one State over any part of another State. The 'considered as' theory, which I analyse later, is extremely difficult to understand or apply." (emphasis in original)

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163 (1936) 54 CLR 657 at 684.

164 (1936) 54 CLR 657 at 686.

Evatt J deduced six propositions from the text of s 99 and the case law upon it. His Honour said[165]:

> "The logical result of the above discussion of principle and authority is that, in relation to s 99, the following propositions should be accepted:-
>
> (I) [Section] 99 forbids four types of preferential legislation, viz, (*a*) giving preference to a State over another State; (*b*) giving preference to a State over any part of another State; (*c*) giving preference to any part of a State over another State; (*d*) giving preference to any part of a State over any part of another State.
>
> (II) [Section] 99 forbids laws or regulations which accord preferential treatment to persons or things as a consequence of local situation in any part of the six States, regardless of all other circumstances[166].
>
> (III) The section is not infringed if the preferential treatment is a consequence of a number of circumstances, including the circumstance of locality[167].
>
> (IV) The section operates objectively in the sense that the purpose or motive of the Legislature or Executive in giving preference by a law of commerce or revenue is not a relevant question, eg, it is irrelevant that the Legislature or Executive desires to facilitate or encourage inter-State or overseas trade, or to increase revenue[168].
>
> (V) [Section] 99 may apply although the legislation or regulations contain no mention of a State *eo nomine*, eg the section may be infringed if preference is given to part of a State (eg that part of New South Wales which is represented by the port of Sydney) over another State (eg Western Australia) or any part of another State (eg Fremantle or Brisbane).

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165 (1936) 54 CLR 657 at 692-693.

166 *R v Barger* (1908) 6 CLR 41 at 78-81 per Griffith CJ, Barton and O'Connor JJ.

167 *R v Barger* (1908) 6 CLR 41 at 107-111 per Isaacs J, 130-133 per Higgins J; *Cameron's Case* (1923) 32 CLR 68; *James v The Commonweath* (1928) 41 CLR 442.

168 *Cameron's Case* (1923) 32 CLR 68 at 74.

> (VI) To prove infringement of s 99 it is not sufficient to show discrimination based on mere locality; it must also be shown that, as a consequence of the discrimination, tangible benefits, advantages, facilities or immunities are given to persons or corporations[169]."

Evatt J also concluded that the regulations were invalid[170]:

> "Whatever the motive may have been for operating the licensing system in this manner, the differential treatment is a clear preference contrary to s 99 of the Constitution, because it gives a tangible advantage and furnishes an incentive or facility limited solely by reference to the locality of the place of engagement. It cannot be denied that one result of such regulations may be to facilitate trade and commerce, inter-State and overseas. But s 99 does not address itself either to the object, or even to the results flowing from, the forbidden regulations of trade, commerce and revenue. It is quite probable that an effective method of promoting inter-State and overseas trade would be to give preference to the States or parts thereof which are most suited to the development of such trade. But s 99 intervenes to forbid such method and to declare that four different means of regulating trade, commerce and revenue shall be absolutely prohibited to the Commonwealth Parliament and Executive, whether they promote or hinder trade and commerce, and whether they promote or hinder the revenue of the Commonwealth."

151 Notwithstanding the views of Dixon and Evatt JJ, in *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)*[171] the Judicial Committee of the Privy Council approved the following statement of Isaacs J in *R v Barger*[172]:

> "[T]he pervading idea is the preference of locality merely because it is locality, and because it is a particular part of a particular State. It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities; and there is nothing, in my opinion, to prevent the Australian Parliament, charged with the welfare of the people as a whole, from doing what every State in the Commonwealth has power to do for its own citizens, that is to say, from basing its taxation

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169 *Crowe v The Commonwealth* (1935) 54 CLR 69 at 92 per Dixon J.

170 (1936) 54 CLR 657 at 700-701.

171 (1940) 63 CLR 338 at 348; [1940] AC 838 at 856-857.

172 (1908) 6 CLR 41 at 108.

> measures on considerations of fairness and justice, always observing the constitutional injunction not to prefer States or parts of States."

In *Moran*, the Privy Council held that two laws of the Parliament that were part of a complex scheme for assistance to wheat growers did not offend s 99. However, neither the facts nor the legislation considered in that case throw any light on the present matter.

152 The meaning of s 99 again came before this Court in *Commissioner of Taxation v Clyne*[173]. Dixon CJ, adhering to his previous view, said that in *Elliott* "the majority of the Court gave to the words 'one State or any part thereof over another State or any part thereof' a restricted meaning"[174]. His Honour said[175]:

> "If legislation is attacked as violating that portion of s 99 it would appear that according to that interpretation the legislation will be good unless in some way the parts of the State are selected in virtue of their character as parts of a State. This view seems to accord with that expressed by Isaacs J in relation to s 51(ii) in *R v Barger*, a view, however, contrary to that taken by the majority of the Court in that case. ... For myself I have the greatest difficulty in grasping what exactly is the requirement that the selection of an area shall be as part of the State. No doubt it may be expressed in various ways, eg 'in virtue of its character as part of the State' or '*qua* part of the State' or 'because it is part of a State' or 'as such'. However it may be expressed I find myself unable to appreciate the distinction between the selection by an enactment of an area in fact forming part of a State for the bestowal of a preference upon the area and the selection of the same area for the same purpose 'as part of the State'."

153 His Honour went on to say that it was unnecessary to discuss the matter further because assuming that there was a preference given by the impugned section it did not invalidate the provisions of the legislation that applied to the defendant. McTiernan J agreed with the Chief Justice but affirmed the decision of the majority in *Elliott's Case*[176]. Williams, Kitto and Taylor JJ said in individual judgments that they agreed with the Chief Justice's reasons[177]. Webb J examined the decisions on s 99 at some length but said that in view of what the Privy Council had said in *Moran* "it would be useless to carry the discussion

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173 (1958) 100 CLR 246.

174 (1958) 100 CLR 246 at 265-266.

175 (1958) 100 CLR 246 at 266.

176 (1958) 100 CLR 246 at 268.

177 (1958) 100 CLR 246 at 268, 272.

further"[178]. He said that the impugned section was not invalid as constituting a preference contrary to s 99.

154 The meaning and application of s 99 came indirectly before the Court in *Conroy v Carter*[179] where a law of the Parliament imposed a levy on the owners of hens kept for commercial purposes. The law provided that, where the Commonwealth had entered into an arrangement with a State, the State could collect the levy and deduct it from money owed by the State to the owner. A relevant arrangement had been made between the Commonwealth and Victoria, but the evidence did not show whether like arrangements had been made by the Commonwealth with authorities in all States. Barwick CJ, McTiernan and Menzies JJ held that the relevant section discriminated contrary to the proviso in s 51(ii) of the Constitution. Kitto, Taylor and Windeyer JJ held to the contrary. Menzies J, with whose judgment Barwick CJ and McTiernan J agreed, said[180]:

> "What the more elaborate provisions of s 51(ii) forbid is a taxation law which would impose a taxation burden upon a person because of some connexion with a State or a part of a State, which would not fall upon other persons not having that connexion. Furthermore, in determining whether a law imposes such a discriminatory burden, it is to the law itself that attention must be paid, not to the laws of any State or States."

His Honour said that the relevant section exposed[181]:

> "a person liable to pay an amount of levy in respect of hens kept in a State with which the Commonwealth has made an arrangement pursuant to s 5 of the Act, to a particular disadvantage at law to which a person in respect of hens kept in a State which has made no arrangement with the Commonwealth under s 5, is not exposed, namely the retention of the levy out of moneys owing by a State Egg Board to the taxpayer."

His Honour said he thought that this differentiation amounted to unlawful discrimination. On the other hand, Taylor J, with whose judgment Kitto and Windeyer JJ agreed, said that the provision did not involve discrimination between the States because it merely provided "for the manner in which a liability for the levy may be discharged"[182].

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178 (1958) 100 CLR 246 at 272.

179 (1968) 118 CLR 90.

180 (1968) 118 CLR 90 at 103.

181 (1968) 118 CLR 90 at 103-104.

182 (1968) 118 CLR 90 at 102.

155 The purpose of this extended discussion of the cases and reasoning of Justices of this Court concerning s 99 is to show that, apart possibly from a dictum by Starke J in *Elliott*[183], there is nothing in the case law that supports the claim that the Mirror Taxes Act does not contravene s 99. To the contrary, the decisions in *Cameron* and *James* show that the Act does breach s 99. And, properly understood, I do not think that Starke J intended any more than that licensing systems do not necessarily constitute preference. Despite the considerable division of judicial opinion in the cases to which I have referred, one proposition appears uncontentious: a law of the Parliament that imposes different rates of taxes by reference to State boundaries breaches s 99 of the Constitution. That view is supported by all Justices of the Court including Starke J. My own view is that the construction that Dixon and Evatt JJ have placed on s 99 is the correct construction of that constitutional provision. But even if the view of Isaacs J as expressed in *Barger* is accepted, the Mirror Taxes Act breaches s 99 of the Constitution. It is a law of the Parliament that imposes differential rates of stamp duty in respect of instruments by reference to their locality in a particular State. In New South Wales, Queensland and Western Australia the lease duty rate is 0.35%. In Victoria it is 0.6% and in South Australia and Tasmania 1%. The rate of duty on any premium also varies from 0.35% in New South Wales and 1.2% in Victoria to 4.85% in Western Australia. Thus by operation of laws of the respective States the lessee of land in New South Wales, Queensland and Western Australia pays less duty than a person who leases land in Victoria, South Australia, Tasmania or in the case of duty on premiums, Western Australia. By the Mirror Taxes Act, the federal Parliament maintains this distinction in respect of Commonwealth places. The lessee of land in a Commonwealth place in New South Wales pays less duty than the lessee of such a place in Victoria. The federal legislation gives a clear preference to residents of New South Wales who must pay stamp duty on instruments concerned with Commonwealth places over those who reside in other States and must pay stamp duty on such instruments. This is done by a law of the Parliament by reference to the *State* in which the land is located.

156 Questions of preference under s 99 of the Constitution are not synonymous with the legal notion of discrimination although no doubt preference involves discrimination in one sense in treating one State or part differently from another State or part[184]. The correct meaning and application of s 99 is not informed by the jurisprudence that has developed in respect of discrimination in equal opportunity law in the last 50 years. In s 99, "give preference" means no

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183 (1936) 54 CLR 657 at 680.

184 *Elliott v The Commonwealth* (1936) 54 CLR 657 at 668 per Latham CJ, 683 per Dixon J.

more than give advantage or priority. It is not concerned with the objective or motive of the giver. The differential treatment of States or parts of States cannot be justified by saying that the difference is the product of a distinction which is appropriate and adapted to the attainment of some proper objective of the Parliament of the Commonwealth. The mischief to which s 99 is directed is not the fairness or unfairness of the effect of any preference given in a particular case. The section is contravened by the mere giving of a preference referable to the State or part of a State to which the law applies. Under the Mirror Taxes Act, two identical transactions, occurring in Commonwealth places, may be assessed for different amounts of stamp duty, solely by reference to the State in which the Commonwealth place is located. The relevant "equals" to compare for the purpose of identifying a preference in this case are those transacting in Commonwealth places, not those transacting in each State. That is because s 99 is concerned with preferences given *by the federal Parliament*. The federal law cannot prefer one Commonwealth place over another by reference to the State in which it is located. And yet that is what the Mirror Taxes Act purports to do. Consistently with s 99, the Parliament of the Commonwealth cannot levy an income tax of 65 cents in the dollar on all residents of Australia except those residing in the Kimberley or Cape York regions although the law has the worthy objective of encouraging development in remote areas of Australia. What s 99 says is that the Commonwealth "shall not ... give preference". It must not prefer one State or part of a State over another State or any part thereof.

157 Those who made the Constitution were well aware of the distinction between preference and discrimination, as they made plain in enacting s 102. They were also well aware that, in some cases, preference or discrimination might operate unduly, unreasonably or unjustly. That is why in s 102 the Parliament was empowered to make laws forbidding any preference or discrimination as to railways that was "undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways". They made no such qualification in s 99.

158 Nor is the application of s 99 determined by reference to whether any benefit or advantage enjoyed in relation to a Commonwealth place is not shared by the remainder of the State in which it is located. According to four Justices of this Court in *Morgan v The Commonwealth*, s 99 "does not purport to deal with preferences within a single State"[185]. The issue is not whether the Mirror Taxes Act produces the same revenue outcome as would be the case if the Commonwealth place was not a Commonwealth place. It is whether a law of the Parliament lays down a rule for Victoria that is different from the rule that it lays down in the same Act for other States and that rule benefits Victoria or the other

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185 (1947) 74 CLR 421 at 452.

States. If it does, it is invalid whatever its objectives or motives. Section 99 is concerned with the character of the law or regulation raising revenue and not with the objects of that law[186]. As Isaacs J pointed out in *Cameron*[187]:

> "It does not matter whether those legal standards are arbitrary or measured, *whether dictated by a desire to benefit or to injure*, the simple fact is they are 'different', and those different legal standards being applied simply because the subject of taxation finds itself in one State or the other there arises the discrimination by law between States which is forbidden by the Constitution." (emphasis added)

Regardless of the legislative objective, if, from a federal perspective, the application of those different legal standards results in a preference, as it does in this case, the Constitution forbids the federal law.

159 In my opinion Question 2(d) should be answered, "Yes". Questions 3(a) and 3(b) should then also be answered, "Yes". It is unnecessary to answer the other questions in Question 2.

Orders

160 Questions 1, 2(d), 3(a) and 3(b) should be answered: "Yes".

161 Questions 2(a), 2(b), 2(c) and 2(e) should be answered: "Unnecessary to answer".

162 Question 4 should be answered: "The Commissioner of State Revenue of the State of Victoria".

163 The matter should be remitted to a single Justice for any remaining issues to be dealt with accordingly.

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186 cf *Elliott v The Commonwealth* (1936) 54 CLR 657 at 693 (proposition IV) per Evatt J.

187 (1923) 32 CLR 68 at 76-77.

164 KIRBY J. A case stated[188] asks questions of the Court concerning the constitutional validity of the *Stamps Act* 1958 (Vic) ("the Stamps Act")[189] and of the *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth) ("the Mirror Taxes Act").

165 The Mirror Taxes Act was enacted by the Federal Parliament in response to the decision in *Allders International Pty Ltd v Commissioner of State Revenue (Vict)*[190]. By that decision, this Court held that a State revenue law, imposing stamp duty upon a lease or agreement to lease with respect to part of a Commonwealth place[191], was invalid. This was because s 52(i) of the Constitution reserves to the Federal Parliament "exclusive power" to make laws with respect to Commonwealth places.

166 The Commonwealth place in *Allders* was a portion of the Melbourne (Tullamarine) Airport. The State revenue authority was the Victorian Commissioner of State Revenue ("the Commissioner"). The dispute concerned the liability to tax of an instrument relating to the use of portion of the airport. In these proceedings, the same Commonwealth place is involved. The Commissioner again asserts his right to recover the revenue. Again, an instrument of lease is involved which, under the Stamps Act, would otherwise be liable in Victoria to assessment to duty in a substantial sum[192]. But now, the Commissioner relies for the validity of his assessment not only on the Stamps Act but also on the Mirror Taxes Act, a *federal* Act.

167 The scheme of the latter conforms to an announcement by the Federal Treasurer that federal legislation was "necessary to protect State revenues following the *Allders* decision"[193]. The legislation was described as forming

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188 By Gummow J, 30 January 2004.

189 The Stamps Act was replaced by the *Duties Act* 2000 (Vic) on 1 July 2001. The relevant legislation for these reasons is the Stamps Act.

190 (1996) 186 CLR 630.

191 Constitution, s 52(i).

192 $762,583.20. See reasons of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [9]; reasons of McHugh J at [103].

193 Federal Treasurer, Press Release No 109, 6 October 1997.

"part of an Inter-jurisdictional Taxation Agreement (IJTA) … settled between the Commonwealth, States and Territories"[194]. The Treasurer said[195]:

> "In fulfilling its commitment under the IJTA to protect State revenues, past and future, from the implications of the *Allders* decision I announce that from today, the Commonwealth will apply stamp duty, payroll tax, financial institutions duty and debits tax on businesses operating in or on Commonwealth places. The Commonwealth legislation will include provision for a credit to be given for any pre-payments made by taxpayers under existing State legislation.
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> ...
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> The Commonwealth legislation will mirror in Commonwealth places the taxes and thresholds of the State in which the Commonwealth place is located. This ensures that State Governments will continue to determine the taxes applying in Commonwealth places in their States. State Revenue Offices will be contracted to collect the Commonwealth revenue and enforce compliance."

168 Two essential questions are raised by the stated case. These are whether this Court should review the correctness of its decision in *Allders* (and the earlier decision in *Worthing v Rowell and Muston Pty Ltd*[196] upon which *Allders* relied); and, if not, whether the Mirror Taxes Act survives complaints as to its validity, raised in this case by Permanent Trustee Australia Ltd ("Permanent"). Permanent objects that, in several respects, the Mirror Taxes Act exceeds, or otherwise offends, the provisions of the Constitution.

The facts, legislation and issues

169 *The facts and legislation*: The facts necessary to understanding the issues are sufficiently stated in the reasons of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons")[197] and in the reasons of McHugh J[198]. Also described there are the relevant provisions of the Mirror Taxes Act[199], the

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194 Federal Treasurer, Press Release No 109, 6 October 1997.

195 Federal Treasurer, Press Release No 109, 6 October 1997.

196 (1970) 123 CLR 89.

197 Joint reasons at [9]-[12].

198 Reasons of McHugh J at [107]-[110].

199 Joint reasons at [16]-[19]; reasons of McHugh J at [116]-[123].

instruments (federal and State) made to implement the relevant intergovernmental agreement reflected in the Mirror Taxes Act[200] and applicable provisions of the Stamps Act[201].

170 The scheme of the intergovernmental and interstatutory arrangement so established, is to create a round-robin of funds by which the Commissioner recovers upon instruments applicable in or on a Commonwealth place revenue as if that place were part of the State; pays such revenue to the Commonwealth; and later receives it in return. Care has been observed in the legislation to conform to the fundamental requirement of the Constitution stated in s 81. By that provision, all revenues and moneys received by the Executive Government of the Commonwealth:

> "… shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

171 To this extent at least, the scheme of federal constitutional law is preserved by s 23(1) of the Mirror Taxes Act:

> "Notwithstanding anything in the terms of an applied law, there must be credited to the Consolidated Revenue Fund all amounts received under an applied law that are required by section 81 of the Constitution to be so credited."

172 A standing appropriation is made for the payment out of the federal Consolidated Revenue Fund in accordance with the Mirror Taxes Act and a State "applied law", such as the Stamps Act[202]. In this way, the State revenue receives the ultimate benefit of the federal taxation imposed by the Mirror Taxes Act, less some administrative charges. However, the federal legislation is careful to comply with the strictures in Ch IV of the Constitution ("Finance and Trade") governing payment to, and appropriation from, the Consolidated Revenue Fund. Moreover, there is another important provision in Ch IV to be complied with. This is s 99 forbidding federal preferences in revenue laws.

173 *The issues*: The questions asked in the stated case are set out, or described, in the joint reasons[203]. The first question attempts to raise again the

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200 Joint reasons at [20].

201 Joint reasons at [22]-[24].

202 Mirror Taxes Act, s 23(4).

203 Joint reasons at [13]-[14]. See also reasons of McHugh J at [110].

Commissioner's argument that the Stamps Act applies of its own force to the instrument executed by Permanent. If that argument were to succeed, it would render otiose the need of the Commissioner to rely on the Mirror Taxes Act and the associated federal[204] and Victorian[205] laws.

174 Question 2 concerns the substantive attacks by Permanent on the validity of the Mirror Taxes Act (upon the assumption that the State legislation is invalid of its own force to sustain the assessment to duty). In turn, the paragraphs of question 2 raise objections to the validity of the Mirror Taxes Act by reference to ss 55[206], 51(ii)[207] and 99[208] of the Constitution and a complaint that the Mirror Taxes Act impermissibly delegates to the Executive Governments of the States (relevantly here, to the Treasurer of the State of Victoria) lawmaking powers reserved by s 52(i) of the Constitution to the Federal Parliament[209].

175 Question 3 presents the argument of impermissible delegation in a different form. Question 4 concerns the costs of the proceedings.

The decisions in *Worthing* and *Allders* should apply

176 *The "requirement" of leave*: At the opening of his submissions, the Commissioner addressed question 1. However, the decisions of this Court in *Worthing* and *Allders* stand as an obstacle to a conclusion that State legislation, such as the Stamps Act, could apply of its own force in respect of an instrument applicable to a Commonwealth place.

177 The Commissioner sought leave to persuade the Court that the decision in *Worthing*, and the cases that had followed it, should be reconsidered[210]. Substantial written arguments had been addressed to the point by the parties and by the interveners. At the conclusion of oral argument on the point, limited to

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204 *Commonwealth Places (Application of Laws) Act* 1970 (Cth).

205 *Commonwealth Places (Mirror Taxes Administration) Act* 1999 (Vic), as amended by *Statute Law Revision Act* 2000 (Vic), s 3, Sched 1, item 23.

206 Question 2(a).

207 Question 2(c).

208 Question 2(d).

209 Question 2(b).

210 *Permanent Trustee Australia Ltd v Commissioner of State Revenue* [2004] HCATrans 043 at 1444-1446.

that made on behalf of the Commissioner, it was indicated that a majority of the Court was of the view that the application for leave should be refused[211]. I made it plain that it was my opinion that the Commissioner did not require leave to advance his first argument[212].

178 The opinion that I hold is identical to that expressed by Deane J in *Evda Nominees Pty Ltd v Victoria*[213]. His Honour there said that:

> "[A] party does not require the permission of the Court to present or to continue to present argument that is relevant to the decision in the case, including argument seeking to show that a previous decision of the Court is wrong and should not be followed."

Because this difference is fundamental, I will briefly state why I reject the supposed requirement of leave.

179 There is no express foundation in the Constitution (or, so far as it would help, any legislation) to support such an impediment to argument. Indeed, the text of the Constitution is inconsistent with the requirement. This Court is the ultimate guardian of the judicial power of the Commonwealth[214]. It derives its existence and functions from the Constitution and owes its duty to it. If the Constitution requires a result in a relevant contested matter, no rule of practice of the Court can impede that outcome. Judges of this Court have repeatedly stated that constitutional doctrine stands on a different basis to other holdings, so far as the requirements of the law of precedent are concerned[215]. In part, this is because the Constitution is itself the source of legal authority and thus is placed apart. In part, it is because of a recognition (affirmed by history) that different generations

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211 *Permanent Trustee* [2004] HCATrans 043 at 1484-1485.

212 *Permanent Trustee* [2004] HCATrans 043 at 1489-1492.

213 (1984) 154 CLR 311 at 316. See also *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 409; *Brownlee v The Queen* (2001) 207 CLR 278 at 312-315 [100]-[108]; *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566 at 1591 [134]; 200 ALR 403 at 437.

214 Constitution, s 71.

215 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 277-279; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 592-594; *Stevens v Head* (1993) 176 CLR 433 at 461-462; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; *Coleman v Power* (2004) 78 ALJR 1166 at 1219 [289], 1221-1222 [298], 1222 [301] per Callinan J; 209 ALR 182 at 255, 257-259.

read the Constitution in different ways according to the perceptions of different times[216]. The duty of the Justices to the Constitution is individual. No group or number of them can impede the discharge of that duty by one or a minority of them.

180 The supposed requirement of leave is an impediment to argument. Without argument, effective persuasion about error may be impossible. Procedural requirements are sometimes convenient for courts. However, in proceedings involving the meaning of the Constitution, it is erroneous to allow convenience to overwhelm the possibility of constitutional enlightenment. Courts have other means to prevent legal representatives or parties from wasting their time. Such means, and not a supposed threshold obligation to obtain "leave" from a majority, are the proper ways to prevent repetition of futile arguments.

181 As a consequence of the decision of the majority, this Court did not hear the oral arguments of the parties and interveners addressed to the first question in the stated case. For those who consider the procedure necessitating leave to be constitutionally valid, it thereby became unnecessary to make further reference to the primary argument of the Commissioner. However, because I do not take this view, I am required to state, in summary at least, why I consider that question 1 should be answered "Yes". I must do so on the basis of the written arguments.

182 *Worthing and Allders are correct*: The decision of this Court in *Worthing* was reached by a slim majority[217]. The reasons for each viewpoint were "finely balanced"[218]. However, neither of these considerations is an argument of incorrectness. It is the nature of constitutional interpretation that it will often produce contested, closely divided, outcomes[219] and be open to later revision.

183 I do not accept that the determinative opinion of Walsh J in *Worthing*[220] was so significantly different from those of the other judges of the majority as to

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216 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 395-397.

217 Barwick CJ, Menzies, Windeyer and Walsh JJ; McTiernan, Kitto and Owen JJ dissenting.

218 *Allders* (1996) 186 CLR 630 at 669, noting that Windeyer J stated that he had changed his mind during argument: *Worthing* (1970) 123 CLR 89 at 127.

219 See eg *Ha v New South Wales* (1997) 189 CLR 465; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203; 203 ALR 143.

220 (1970) 123 CLR 89 at 136-141.

cast doubt on the emerging principle. Nor do I accept (as the Commissioner suggested) that the majority in *Worthing* overlooked the primary question of characterisation of the State law, that is, whether it was a law "with respect to" a Commonwealth place. Given that characterisation of laws is such a common function performed by this Court, it would be astonishing if it had been misunderstood. Clearly, the task was one of classifying the law in question to determine whether it invaded the "exclusive" legislative powers marked out for the Federal Parliament[221]. This is the way that the majority in *Worthing* described what they were doing[222]. It was affirmed in a case that quickly followed[223]. It is the way the decision in *Worthing* was described and applied in *Allders*[224]. As I see it, *Worthing* involved nothing more than giving effect to the language of "exclusive" legislative power contained in s 52(i) of the Constitution.

184 It is true that, when *Worthing* was decided, it came to many as a surprise. But this is not an unusual feature of constitutional adjudication. Assumptions are made and then exploded when the light of analysis is shone on a corner of the Constitution not previously subjected to scrutiny[225]. By the time the present case came before this Court, the principle in *Worthing* appeared well and truly entrenched. It has been followed by the Court in numerous cases[226]. In others, it has been referred to without doubt, or assumed and applied[227]. Against the correctness of the principle of *Worthing*, no voice has since been raised in this Court[228]. Nor has doubt been stated in any other court.

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221 By the Constitution, s 52(i).

222 *Worthing* (1970) 123 CLR 89 at 102 per Barwick CJ, 131 per Windeyer J, 139 per Walsh J.

223 *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262 at 269 per McTiernan J.

224 (1996) 186 CLR 630 at 676-677.

225 *Sue v Hill* (1999) 199 CLR 462 is an example. See also *Gould v Brown* (1998) 193 CLR 346; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

226 *R v Phillips* (1970) 125 CLR 93; *Stocks and Holdings* (1970) 124 CLR 262; *Allders* (1996) 186 CLR 630. (Leave to reopen *Worthing* was denied in *Allders*.)

227 *Svikart v Stewart* (1994) 181 CLR 548 at 557; *Paliflex Pty Ltd v Chief Commissioner of State Revenue* (2003) 78 ALJR 87 at 90 [18], 92 [24], 95 [40]; 202 ALR 376 at 381, 383, 387-388.

228 In *Allders* (1996) 186 CLR 630 at 646 and 655 Dawson J and Toohey J dissented but accepted the authority of *Worthing*.

185 The supposed "inconveniences and complications" which were voiced in *Worthing* as a reason for resisting the interpretation that the majority adopted have, as Windeyer J predicted, proved "less serious than would be those that would come from any other of the suggested constructions of s 52"[229]. After *Worthing* was decided, the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) was enacted. That federal Act was supplemented by associated State legislation[230]. Together these laws alleviated most of the "inconveniences" whilst faithfully upholding the language of the Constitution. To overrule *Worthing* would now require unthreading the federal and State legislation that ensued. It would necessitate change of many judicial decisions, legal instruments and private actions made on the basis of the *Worthing* construction of the requirements of s 52(i).

186 In the end, it is impossible to escape the force of the word "exclusive" appearing in s 52(i). That word expels a State Parliament, including by the enactment of a law cast in general terms, from making a law "with respect to the conduct of persons within a place, or transactions there"[231]. And that is that.

187 *Conclusion: first question*: It follows that the answer to the first question in the stated case is "Yes". The Stamps Act is invalid in so far as, of its own force, it purports to sustain the assessment of Permanent to duty in respect of the lease on and in the Commonwealth place in question.

188 This is a conclusion that I would reach on my consideration of the written submissions of the parties. Necessarily, I did not have the advantage of more than a few minutes of oral argument addressed to the point, and then limited to the argument for the Commissioner. One day the issue may return. In constitutional discourse, few rulings can be said to be forever final. But the prospects for a reversal of *Worthing* appear bleak.

<u>The giving of preference is contrary to s 99</u>

189 *The s 99 point*: Although, as I will indicate[232], I am in agreement with much of the joint reasons upon the other issues presented by the stated case, I have formed a firm view that the Mirror Taxes Act impermissibly gives

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229 *Worthing* (1970) 123 CLR 89 at 131. See also at 103 per Barwick CJ.

230 eg *Commonwealth Places (Administration of Laws) Act* 1970 (Vic).

231 *Worthing* (1970) 123 CLR 89 at 131 per Windeyer J. See also at 103 per Barwick CJ, 120 per Menzies J, 140-141 per Walsh J.

232 See below these reasons at [239].

preference to one State over another State, contrary to s 99 of the Constitution. This conclusion requires an affirmative answer to question 2(d). That answer would invalidate the Mirror Taxes Act. Upon that footing, it becomes strictly unnecessary to answer the other questions, including one (concerning the first limb of s 55 of the Constitution) which is also contestable. It is convenient, therefore, to go directly to the s 99 point.

190 *The requirements of s 99*: Section 99 appears in Ch IV of the Constitution. It states:

> "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

191 Permanent complains that the Mirror Taxes Act purported to apply *as a federal law* the taxing laws of each State in or in relation to Commonwealth places in such State, acquired for the public purposes of the Commonwealth. It was not contested that rates of taxation in the States and, indeed, the types of taxes that are levied by them, differ greatly from State to State.

192 Permanent therefore argued that by a federal law, namely the Mirror Taxes Act, the Commonwealth was disbursing from the one federal Consolidated Revenue Fund different sums in accordance with that Act which necessarily involved giving "preference" to the State receiving a larger sum out of that Fund over another State receiving a smaller sum from the same federal source. This, Permanent said, was forbidden by s 99. In my view, Permanent is correct in this submission.

193 *The extent of the preference*: To make good its contention that the payment out of the federal Consolidated Revenue Fund to each State in respect of stamp duty payable on an instrument would result under the Mirror Taxes Act in the payment of significantly different sums, Permanent produced a Table. This sets out the varying payments to the different States of the Commonwealth, having regard to the provisions of the State legislation concerned thereby incorporated into federal law as its *discrimen*[233].

194 Simplifying the Table somewhat, so as to reduce it to its bare necessities sufficient to establish Permanent's argument based on s 99, the following emerges as the duty to be collected in the several States of the Commonwealth,

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233 Permanent denied that the Take-Out Amount under the Development Agreement in question was consideration in the nature of a premium. However, for the purposes of the Table and to elaborate its present argument, it assumed against itself that it was.

by State officials on behalf of the Commonwealth, paid into the federal Consolidated Revenue Fund and then paid out to the States concerned. The Table assumes in each State an instrument dated 1 July 1998, similar to the Development Agreement brought to duty in this case, but on the further hypothesis that it existed in respect of a Commonwealth place in the other States of Australia:

TABLE

State Act adopted by Mirror Taxes Act	Estimated duty to be paid to each State	Percentage of Victorian total
Stamps Act 1958 (Vic)	$762,583.20	100.00%
Duties Act 1997 (NSW)	$254,265.20	33.34%
Stamp Act 1894 (Q)	$2,102,790.20	275.75%
Stamp Duties Act 1923 (SA)	$2,447,872.00	321.00%
Stamp Act 1921 (WA)	$2,699,320.20	353.97%
Stamp Duties Act 1931 (Tas)	$2,179,342.00	285.78%

195 From the figures and estimates in the Table, it is clear that the sum payable from the federal Consolidated Revenue Fund to "the State concerned"[234], namely Victoria, in respect of the same instrument and transaction liable to duty at the same time is substantially more (by $508,318) than the State of New South Wales would receive from the federal Consolidated Revenue Fund in respect of an identical transaction.

196 It is true that the amount payable to Victoria would, in its turn, be less than the amount payable to the States of Queensland, South Australia, Western Australia and Tasmania in respect of an identical transaction and instrument at the same time. However, in terms of s 99 of the Constitution, it is sufficient that the party complaining of non-compliance should be able to show "preference to one State … over another State". Permanent submitted that this was manifest in the payment under the Mirror Taxes Act to the State of Victoria of a sum less than would be paid in otherwise identical circumstances to the States of Queensland, South Australia, Western Australia and Tasmania.

197 In any case, Permanent submitted, correctly in my view, that the validity of the Mirror Taxes Act had to be considered by reference to the entire scheme. By virtue of the facts demonstrated in the Table, it argued that the impugned federal law expressly provided for differential federal payments as between the several States of the Commonwealth. Although elsewhere in Ch IV of the Constitution provision is envisaged for differential "financial assistance" to

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234 Mirror Taxes Act, s 23(3).

particular States "on such terms and conditions as the Parliament thinks fit"[235], no such entitlement exists in the particular nominated case of "any law or regulation of trade, commerce, *or revenue*"[236]. On the contrary, in such a case (of which this was one) Permanent argued that differentiation amounting to "preference to one State … over another" was strictly forbidden. The Mirror Taxes Act offended that prohibition.

198 *The applicability of s 99 to s 52(i)*: It is not as if the drafters, and those advising the Commonwealth in the preparation of the Mirror Taxes Act, were unaware of (or overlooked) the "preference" problem presented by s 99. As I have shown, careful attention was paid to the strict requirements of s 81, also appearing in Ch IV, providing for "revenues" of the Commonwealth to be received into the one Consolidated Revenue Fund and to be appropriated therefrom. The requirements of s 81 were duly complied with. So why did the drafters not conform with the requirements of s 99 of the Constitution, on the face of its language equally stringent?

199 The answer to this question is found not in some artificially narrow construction by those advising the Commonwealth of the scope and operation of s 99 (or of the word "preference" appearing there). The advice was that s 99 of the Constitution had no application *at all* to a law made pursuant to s 52(i), as the Mirror Taxes Act purported to be. The theory of this advice was that the Bill that became the Mirror Taxes Act concerned a subject upon which the Federal Parliament had "exclusive power" of legislation. It was therefore for that Parliament, in effect, to do as it pleased without having to comply with a provision such as s 99.

200 One can see the glimmer of a textual foundation for this proposition, rooted in the word "exclusive" and in the notion that, in such matters of "exclusive" federal concern, the Parliament was unconstrained by the vexing limitation imposed to protect the several States in respect of disbursements from the federal Consolidated Revenue Fund. Such a view might be reinforced by comforting notions that, after all, the federal law in question was doing no more than giving back to the States what would have been their revenue, but for the troublesome interposition of s 52(i) and the decision of this Court in *Allders*[237].

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235 Constitution, s 96.

236 Constitution, s 99 (emphasis added).

237 (1996) 186 CLR 630. In *Allders* at 633, the Solicitor-General for the Commonwealth sought to uphold the interest of the taxpayer, Allders. At 635 he opposed reopening *Worthing*. So it cannot be suggested that *Allders* came as an unwelcome surprise to the Commonwealth.

201 Seeking to justify the apparent departure from the constitutional requirement of equal disbursement of revenue amongst the several States out of the one Consolidated Revenue Fund pursuant to federal law, the explanatory memorandum circulated with the Bill that became the Mirror Taxes Act was quite clear[238]:

> "The limitation on the Commonwealth's taxing power, precluding its use so as to discriminate between States or parts of States, does not apply to the Bill. The Government is also advised that the constitutional limitations on laws imposing taxation, requiring laws imposing taxation to deal with no other matter, and requiring such laws to deal with one subject of taxation only (Constitution, section 55), do not apply to the Bill. As these principles do not usually restrict State drafting of State taxing laws, the task of adopting relevant State drafting by reference could have been made more difficult if those principles applied.
>
> Differences between the taxing laws of different States could have been argued to produce discrimination between States or parts of States; the legislation could have been split between an appropriation Bill and an assessment Bill, requiring selective reference to different parts of State drafting for the two purposes; and the question could have arisen whether mirror taxation is one, or more than one, subject of taxation. *Because of the powers under which the Bill is proposed*, each of these difficulties is believed to be irrelevant." (emphasis added)

202 The Commissioner and interveners (including the Commonwealth) urged acceptance of this reasoning. However, it is flawed. It must be rejected. It is inconsistent with the plain words of the Constitution, with that document's structure and purposes and with the Commonwealth's practice in other respects.

203 As to the words, s 52 (like s 51) opens with the qualifying phrase "subject to this Constitution". It may be that the structure of the Constitution would have imported such a limitation in any case. A national constitution expressed in relatively brief language must be read as a whole. The several parts must be integrated with each other so far as the context allows. However, in the case of s 52 the qualifying phrase is expressly stated. There is no reason, either in the language or context of s 99, if it otherwise applies, to exclude it from controlling laws made under s 52. On the contrary, so far as s 52 supports a law of "revenue" (the subject matter of s 99) in respect of a Commonwealth place, the

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238 Australia, House of Representatives, Commonwealth Places (Mirror Tax) Bill 1998 (Cth), Explanatory Memorandum at 7-8 [1.15]-[1.16].

limitation imposed by s 99 applies, in terms, to a law made pursuant to that section.

204 *The purpose and history of s 99*: The purpose and history of s 99 reinforce this conclusion. It is a provision in a crucial part of the Constitution that was the subject of fierce negotiation before federation. One of the impediments to federation, that almost prevented its achievement in 1901, was the fear of preferential disbursement of federal revenue to some of the new States, in ways that would be unfair to others. This was, for example, a reason why, in Tasmania, Andrew Inglis Clark, a "primary architect of our Constitution"[239], withheld his support from the final document[240].

205 At the time of federation, the concern of the founders related to the supposed efficiency of a colonial regime committed to policies of free trade as against protectionism. There was equal concern that smaller, less populous States would be a burden on the larger ones[241]. The proposed federal compact nearly came unstuck several times because Mr George Reid, and those of like persuasion, "compared New South Wales to a teetotaller proposing to keep house with five drunkards"[242]. There would have been no federation, certainly none in 1901, without the acceptance of the provisions in Ch IV of the Constitution, notably s 99.

206 Sir Robert Garran explained[243]:

> "The greatest trouble of all was over federal and State finance. The States were giving up all their customs and excise revenue. The federal tariff was an unknown quantity, but whatever it might be the Commonwealth would at the outset have far too much revenue, and the States far too little; some of it must be returned to the States. But how much should the Commonwealth raise? How much should it be obliged to return? And on what basis of apportionment? Here were questions that not only vitally affected the budget of each State, but raised the stormy question of free trade versus protection. All sorts of hard and fast

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239 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 172 per Deane J.

240 Neasey and Neasey, *Andrew Inglis Clark*, (2001) at 208-209.

241 Garran, *Prosper the Commonwealth*, (1958) at 45-49, 87-88, 99-100.

242 Garran, *Prosper the Commonwealth*, (1958) at 99. See also *Australian Dictionary of Biography*, (1988), vol 11 at 351.

243 Garran, *Prosper the Commonwealth*, (1958) at 118-119.

> formulas were tried and found wanting, owing to the impossibility of forecasting the future. With many misgivings formulas were agreed on for the first ten years; after that, the only possible way was to 'trust the Federal Parliament'."

The trust, however, was controlled by one strict rule against giving "preference" to States or parts of States in the federal disbursement of its revenue.

207 Unlike some provisions in Ch IV, s 99 was neither temporary in its operation, nor limited to endure for a specified interval[244]. Nor was it allowed to fall into desuetude[245]. It was not amended by referendum, as s 105 was to be, so as to remove an application limited by reference to time[246]. It was a permanent, important, governing principle of the Australian federal arrangement. One of the primary objects for the creation of this Court was to uphold that compact. It must be upheld by reference to the text of the Constitution. Where the constitutional charter is clear and applicable, as it is here, it cannot be overridden by intergovernmental agreements and interdependent federal and State legislation[247].

208 I therefore agree with this much of the conclusion expressed in the joint reasons[248]. Laws made under s 52 of the Constitution are subject to the requirements of s 99. I also agree with the joint reasons that the Mirror Taxes Act is a law or regulation of "revenue" within s 99 of the Constitution. As such, it attracts the prohibition on "preference" by any law of revenue "to one State … over another State"[249].

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244 As in the Constitution, ss 87 ("ten years after the establishment of the Commonwealth"), 88 ("within two years after the establishment"), 93 ("[d]uring the first five years after the imposition of uniform duties of customs"), 94 ("[a]fter five years from the imposition of uniform duties of customs") and 96 ("[d]uring a period of ten years").

245 As in the Constitution, s 101 (Inter-State Commission).

246 Constitution, s 105, deleting the words "as existing at the establishment of the Commonwealth". See *Constitution Alteration (State Debts)* 1909 (Cth).

247 See *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 140-144 [202]-[216]; 202 ALR 233 at 282-286.

248 Joint reasons at [83]-[84].

249 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 153-154, quoted in the joint reasons at [82].

209 It follows that the premise upon which the Commonwealth considered that it could ignore s 99 is knocked away. This is a serious result because it seems clear from the quoted passage in the explanatory memorandum that, but for that premise, the federal officers, rightly, perceived great difficulties in the structure and expression of the Mirror Taxes Act. As I shall indicate, those difficulties are real. In the event, they prove fatal.

210 Apart from anything else, it might have been expected that the error of advice would have been avoided because of the great care, taken elsewhere in the Mirror Taxes Act[250], to conform to the other applicable provision in Ch IV, namely s 81. If a law made under s 52(i) of the Constitution was subject to that provision (as the Commonwealth accepted, provided by its law and conformed to in practice) it is puzzling to imagine how it could have been thought that s 99 would not equally apply. Presumably, it was considered that the rule about the Consolidated Revenue Fund was somehow more fundamental than the rule against giving preference to particular States in laws of revenue. However that might be, mistake there was. It led the drafters of the Mirror Taxes Act into constitutionally forbidden territory.

211 *The impermissible "preference"*: I now reach the point where I depart from the joint reasons[251]. It may be accepted that the "preference" to one State over another State, appearing in terms of a prohibition in s 99, means more than simply different outcomes in the application of the federal revenue law as between different States[252]. To take the most obvious example, a law of revenue providing for the payment to one State of a sum calculated by reference to the population of that State, the aggregate or per capita incomes of the taxpayers in that State or some like *discrimen*, would not, as such, offend s 99. That is not the kind of "preference" to which that section is addressed. What is forbidden is "preference" that involves the differential application of the federal law in question in a way that affects the disbursement amongst the States by reference to their character as States (or any part thereof). Differentiation may exist. But if it is created by a federal revenue law, it cannot give "preference". The hallmark of federal laws, so far as they are classified (as here) as laws of "revenue", is that they must be even-handed as between the several States.

212 In ascertaining the meaning of "preference", as in all matters of constitutional interpretation, the duty of this Court is to have regard to the

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250 s 23(1).

251 See joint reasons at [85]-[86].

252 *Elliott v The Commonwealth* (1936) 54 CLR 657 at 682-683.

substance of the impugned law and not, as such, its *form*[253]. The concern of the Court, in giving effect to one of the comparatively few express prohibitions in the Constitution, must necessarily be to address and uphold its object. It is not, as such, to evaluate the policy that lay behind the impugned law or the drafting in which that policy is expressed.

213 It does not matter that the intentions of the drafters of the Mirror Taxes Act were pure; that the objects in sight were laudable; that the social justifications for particular State preference were overwhelming; or that the State policy concerns were compelling. All of these are issues that might possibly be capable of resolution by the kind of differentiated financial assistance provided for in s 96 of the Constitution. However, if amounting to "preference", they cannot be allowed in a "revenue" law (of which this is one) conforming to s 99.

214 Care must be taken against slipping out of the constitutional language appearing in s 99. It makes no explicit reference to "discrimination" or "discriminate". These words appear elsewhere in the constitutional text[254]. However, whilst one can accept that the kind of "preference" which is forbidden carries a pejorative or discriminatory flavour, the eyes should remain fixed on the words of s 99. Those words address attention to a prohibition of a federal law, relevantly, in the giving of "preference to one State … over another State", and doing so "by any law … of … revenue".

215 The word "preference" is defined in the *Macquarie Dictionary*[255] as "prior favour or choice", "a practical advantage given to one over others", a "prior right or claim". *The New Shorter Oxford English Dictionary*[256] defines "preference" to be "[t]he action or an act of preferring or being preferred; … prior choice". In the context of economics, it defines the word as the "favouring of, or an advantage given to, one … over others in business relations; ... the favouring of a country by admitting its products free or at a lower import duty than those of other countries". So the focus of attention is upon affording differential favours or advantages, the existence of a particular favour or advantage being judged in a practical way.

216 The history that lay behind the Mirror Taxes Act may be understood, as may the object of replenishing an unexpected and sudden shortfall in State

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253 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; *Ha* (1997) 189 CLR 465 at 498. See also *Re Wakim* (1999) 198 CLR 511 at 572 [103].

254 Constitution, ss 51(ii), 117.

255 3rd ed (1997) at 1686.

256 (1993), vol 2 at 2330-2331.

revenues consequent upon *Allders*. Cooperation between the elements of the Commonwealth (federal, State and Territory) is a basic postulate of the Australian Constitution[257]. Such cooperation is to be upheld, so far as the constitutional text permits. However, in this case, we face not an *implied* constitutional prohibition (as has caused difficulties enough in the past[258]). Section 99 is an *express* injunction, deliberately adopted as part of the federal bargain upon the basis of which the Commonwealth was established. If the prohibition is enlivened, arguments of convenience melt away. The prohibition must simply be obeyed. This Court must say so. If anything, it is made even more clear in this case because there is a reflection of a somewhat similar prohibition on discrimination in taxation laws in s 51(ii) of the Constitution[259].

217 *Explanations of the "preference"*: In *Cameron v Deputy Federal Commissioner of Taxation*[260], Starke J, referring both to ss 99 and 51(ii), said[261]:

> "A law with respect to taxation applicable to all States and parts of States alike does not infringe the Constitution merely because it operates unequally in the different States – not from anything done by the law-making authority, but on account of the inequality of conditions obtaining in the respective States. On the contrary, a law with respect to taxation which takes as its line of demarcation the boundaries of States or parts of States necessarily discriminates between them, and gives a preference to one State or part thereof over another State or part thereof".

218 In the same case, Isaacs J explained the form of "discrimination" that was forbidden by s 51(ii) in terms that are equally applicable to the kind of "preference" that is forbidden under s 99 of the Constitution[262]:

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257 *Re Wakim* (1999) 198 CLR 511 at 602-603 [193]-[195].

258 eg *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 (implied rule of law); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (implied separation of the judicial power); *Re Wakim* (1999) 198 CLR 511 (implied prohibition of State conferral of judicial power on federal courts).

259 Constitution, s 51(ii): "taxation; but so as not to discriminate between States or parts of States".

260 (1923) 32 CLR 68 at 79.

261 *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360 at 367 and *R v Barger* (1908) 6 CLR 41 were referred to.

262 *Cameron* (1923) 32 CLR 68 at 76-77.

> "Stock in Queensland and stock in New South Wales are, by reason solely of their State situation, 'treated differently,' by the mere fact that different standards are applied to them respectively. It does not matter whether those legal standards are arbitrary or measured, whether dictated by a desire to benefit or to injure, the simple fact is they are 'different,' and those different legal standards being applied simply because the subject of taxation finds itself in one State or the other there arises the discrimination by law between States which is forbidden by the Constitution."

219 Also in *Cameron*, Knox CJ said[263]:

> "It is manifest that the fair average value, as found by the table, of stock in different States varies according to the State in which such stock are found; and that this is the only *discrimen* pointed out in the table. … [W]hen the localities selected to furnish the *discrimen* are States or parts of States the discrimination is expressly forbidden".

220 In the same decision, Higgins J explained[264]:

> "Two pastoralists may in fact make £1,000 net profit – one in New South Wales, the other in Queensland; and yet under these Rules they may be treated as making unequal profit, and be liable to pay unequal income tax. The only reason for this result is that one is in Queensland, the other in New South Wales."

221 The criteria explained in *Cameron* have been accepted in later cases[265]. There have been relatively few such cases. Doubtless, this is because, until now, few attempts have been made to enact *federal* revenue laws containing a provision that selects the place of disbursement of the federal revenue by reference to the tax being higher in one State and lower elsewhere by reference to the same event or happening occurring in the other State. In the past the prohibition in s 99 has been obeyed. On this occasion it has not.

222 By the Mirror Taxes Act, the State revenue authorities have, pursuant to federal law, been authorised to collect, effectively on behalf of the Commonwealth, and to pay into the one federal Consolidated Revenue Fund, taxes levied in significantly different amounts in relevantly identical

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263 (1923) 32 CLR 68 at 71-72.

264 (1923) 32 CLR 68 at 78.

265 eg *Conroy v Carter* (1968) 118 CLR 90 at 99-100 per Taylor J (Kitto and Windeyer JJ concurring).

circumstances, the sum raised and disbursed to the States by the Commonwealth taking as "its line of demarcation the boundaries of States"[266]. In my view, this would be a forbidden discrimination in taxation within s 51(ii). But more to the present point, in the matter of the federal disbursement pursuant to a revenue law such as the Mirror Taxes Act, it is the giving of forbidden "preference" to one State over another State *by such federal law*. This is not a mere matter of form. It is the whole substance and purpose and effect of the federal law in question. In its disbursements, it prefers one State over another State[267]. It cloaks the federal Act with State-referred differentiation.

223 State law can, as State legislators please, differentiate within a State's own borders and concerns in the revenue the State collects from State taxpayers. State law may do so in matters of stamp duty, so that instruments brought to tax have significantly different consequences as between the several States of the Commonwealth. In doing this, there is no offence to the Constitution. But when, as here, the federal legislative power is engaged, the prohibition in s 99 of the Constitution must be obeyed. The Mirror Taxes Act conflicts with s 99. On its face, it offends the Constitution.

224 *Past authority does not save the law*: The citation of *Elliott v The Commonwealth*[268] in the joint reasons does not save the impugned federal law from invalidity under s 99 of the Constitution. As the constitutional text, the history that preceded it and the cases that have applied it[269] show, the imposition of differentiated federal revenue collection and disbursement as between the several States was, and is, a very sensitive federal issue. It is not enough to say that State taxes are different *inter se* and, therefore, that "discrimination" in the operation of the federal law does not "give preference" as forbidden by the Constitution. The critical words are "shall not ... give preference". It is the latter phrase that must be addressed, not, as such, the concept of "discrimination" which imports different notions[270].

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266 *Cameron* (1923) 32 CLR 68 at 79.

267 cf *Barger* (1908) 6 CLR 41 at 79-80, 105-108, 130-132; *Cameron* (1923) 32 CLR 68 at 79-80; *James v The Commonwealth* (1928) 41 CLR 442 at 457, 460-462, 464-465; *Crowe v The Commonwealth* (1935) 54 CLR 69 at 83, 86, 92, 96-97; *Elliott* (1936) 54 CLR 657 at 668-669, 678, 680, 682-683, 686-693; *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 265-266.

268 (1936) 54 CLR 657. See joint reasons at [87]-[88].

269 See reasons of McHugh J at [125]-[158] and especially *Clyne* (1958) 100 CLR 246 at 265-266, 268, 272.

270 *Elliott* (1936) 54 CLR 657 at 683 per Dixon J (diss). See reasons of McHugh J at [156]-[157].

225 The impugned law does "give preference" when looked at from the perspective of the several States of the Commonwealth, viewed from the standpoint for which the prohibition on giving such preference in revenue laws was provided in s 99. It is certainly so from the perspective of the Australian taxpayers in the several States. It is so directly by reference to their locality in different States. It is so under federal not State law. Obviously, on the face of the federal law, and in its operation by reference to State geography, the payment from the federal Consolidated Revenue Fund "gives preference" to one State over another. The character of the federal law for these constitutional purposes is therefore fixed by the consequences of that federal law as a revenue measure, necessarily burdening and advantaging differentially those subject to it. The constitutional character is not determined by other provisions of other laws of the States.

226 The rule in s 99 of the Constitution is one fundamental to the requirements of the federal compact. It is addressed to federal lawmaking as such. It is a guarantee not only to the States as political entities but to the people of Australia (the "electors") living in the different States. The provision should not be eroded by this Court, which is duty bound to uphold that compact. Least of all should this be done by reference to judicial *dicta* concerning other provisions of the Constitution securing other and different purposes.

Justification of helping States to overcome inconvenience

227 *Inadmissible justifications*: Bereft of the postulated excuse for the impermissible "preference" on the face of the federal law, the Commissioner (and the Commonwealth) argued that there was no "preference" because, viewed as a matter of equalising the position of taxpayers in Commonwealth places with equivalent taxpayers elsewhere within the boundaries of the State concerned, the kind of differentiation forbidden by s 99, by reference to the State *discrimen*, was not engaged. This argument convinces a majority of this Court[271]. It does not convince me.

228 The impugned law (the Mirror Taxes Act) is a statute made by the Federal Parliament. It is not, as such, a series of State laws although supplementary laws of the States were enacted to facilitate the impugned scheme. Alone, such State laws would have been incompetent to intrude into the regulation of events or things in or of Commonwealth places. There, the Federal Parliament enjoyed "exclusive" legislative power. Still less could the State laws have disbursed federal revenue from the one Consolidated Revenue Fund in respect of such places. Thus, it is necessary, in judging the federal law against the standard of

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271 Joint reasons at [91]-[95].

s 99 of the Constitution, to look to the effect of what *it* does and the criterion that *it* selects for its operation.

229 When this is done, the federal law, in substance and effect, provides for differentiated payment as between the States. It does not address internal State adjustments within the boundaries of the States concerned – as such not a matter of federal legislative power. The Mirror Taxes Act provides for national disbursements to all of the States. It does so by giving federal preferences "to one State ... over another State". Under the scheme of the Constitution a payment would necessarily have to come in the form of an appropriation for the purposes of the Commonwealth from the "one Consolidated Revenue Fund" provided by s 81 of the Constitution. This, indeed, is what the Mirror Taxes Act purports to do[272]. It then provides for the payment to each State of the sums provided. What is important is not, as such, the source and purpose of the payment, for the moneys received by the Commonwealth undoubtedly passed into the Consolidated Revenue Fund. It is in the appropriations from that federal Fund that the prohibition on "preference to one State … over another State" is enlivened. Matters antecedent, excuses and supposed justifications cannot circumvent or avoid the constitutional prohibition on "preference". The Constitution looks to the effect and substance of what the federal law actually does as such a law. And it must be remembered that the source of the legislative power to make the federal law is the *exclusive* power of the Federal Parliament over legislation with respect to Commonwealth places.

230 The appeal to the supposed justification of equalising the burden on taxpayers in different States by reference to "the corresponding State taxing law"[273] *within those States*, so that taxpayers will be "as nearly as possible [subject to the same burden] as [they] would be under the corresponding State taxing law alone if the Commonwealth places in the State were not Commonwealth places"[274], cannot circumvent the prohibition stated in s 99 on preferences in *federal* revenue laws. So far as the exclusive federal power to make laws with respect to Commonwealth places is concerned, its exercise must conform to the federal constitutional standard. It is not enough that it conforms to the varying standards of the States. The federal standard, for well established reasons, forbids preferences. Those reasons gave rise to s 99 of the Constitution. The Mirror Taxes Act on its face enacts differential preferences as between the States, in the benefits of federal taxation revenue received from the one federal Consolidated Revenue Fund. Such differentiation is forbidden by the

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272 Mirror Taxes Act, s 23(4).

273 Mirror Taxes Act, s 8(4)(b)(ii). See joint reasons at [92].

274 Mirror Taxes Act, s 8(4)(b).

Constitution. No amount of explanation or *intra*-State justification can sustain the offending provisions.

231 The Commonwealth is a national polity. It is obliged to conform to national standards stated in the Constitution. None of those standards was more important at federation, and few have proved so beneficial since, than the creation by the Constitution of a continental common market and national economy. Within that market and economy, the Commonwealth is obliged, in all of its revenue laws, to avoid giving preferences as between the States. The Mirror Taxes Act only failed to comply with this requirement because it was wrongly assumed that it was exempt from the requirements of s 99. The belated, previously unconsidered, justification now advanced should be rejected.

232 *Overcoming inconvenience*: The supposed inconvenience of this conclusion is greatly exaggerated[275]. There were several courses that the Federal Parliament could have adopted, conformably with s 99 of the Constitution, if it wished to offset the fall in State revenues consequential upon the *Allders* decision without enacting *inter*-State preferences. It could, for example, have struck a common federal impost upon instruments made in or in relation to Commonwealth places and provided for reimbursement from the fund thereby collected to the States without giving "preference" by reference to the boundaries (or parts) of the States concerned.

233 Alternatively, it could have devised a scheme to give financial assistance to a State "on such terms and conditions as the Parliament thinks fit" pursuant to s 96 of the Constitution. Doubtless, there were other ways in which the perceived *Allders* problem could have been solved, if that were the intergovernmental wish. What could not be done was to enact a federal law, such as the Mirror Taxes Act, disbursing federal revenue from the one federal Consolidated Revenue Fund to different States according to a formula giving preference as between them in terms of a criterion expressed by reference to the boundaries of the State concerned.

234 *Conclusion: approach is unconstitutional*: This Court should not struggle to "correct" the outcome in *Allders*. A price of the Federal Parliament's exclusive legislative power to make laws with respect to Commonwealth places is that, in such places, State laws, including State revenue laws, are inoperative by their own force. The attempt effectively to revive them with all their many differences, through a vehicle of federal law, unsurprisingly runs into constitutional difficulties. By its nature, federal legislation normally has a national and not a local operation. If it is taxation legislation, it must refrain from giving preference between States and parts of States. And so far as the

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275 See *Worthing* (1970) 123 CLR 89 at 131-132 per Windeyer J.

federal law is one of revenue, the imposition of preference to one State over another is expressly and emphatically prohibited.

235 A court such as this must not only give meaning to the constitutional text having regard to its language and history. It must view each decision as a precedent upon which others may build in the future[276]. Any wavering over preferential payments of federal revenue by reference to the criterion of State identification offends text and history. More importantly, it offends a pivotal control on the disbursement of federal revenue enshrined in the Constitution as an express prohibition.

236 *Result: a breach of s 99*: The consequence is that the Mirror Taxes Act is invalid on the ground that it is contrary to s 99 of the Constitution. An attempt is made in s 4 of the Mirror Taxes Act to breathe life and "effect" into the Act by particular reference to nominated sections of the Constitution. Necessarily, no such provision can stand against an express constitutional prohibition such as appears in s 99. No statutory attempt is made to do so.

237 The foregoing reasoning requires that question 2(d) in the stated case be answered "Yes". In the result, Permanent succeeds in its challenge to the purported imposition upon it, under the Mirror Taxes Act, of the duty which the Commissioner seeks to recover. The Act cannot be read down nor can the impost otherwise be held constitutionally valid.

Residual questions are unnecessary to answer

238 It follows that it is unnecessary to answer any of the other questions in question 2. To do so at any length, in the face of the invalidation of the Mirror Taxes Act, would be to pursue issues that, for me, are theoretical.

239 Whilst I incline to agree with the opinions expressed in the joint reasons rejecting Permanent's submissions that the Mirror Taxes Act imposes taxation dealing with more than one subject of taxation[277]; impermissibly delegates the legislative power of the Commonwealth[278]; offends s 51(ii) (which on the face of things is not engaged, the Act being made under s 52(i)[279]) and is "otherwise"

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276 See *Silbert v Director of Public Prosecutions (WA)* (2004) 78 ALJR 464 at 467-468 [20]-[21]; 205 ALR 43 at 48.

277 Joint reasons at [38]-[54].

278 Joint reasons at [75]-[78], applying *Gould* (1998) 193 CLR 346 at 485-487 [284]-[287].

279 Joint reasons at [79]-[80], applying *Allders* (1996) 186 CLR 630 at 662, 678-680.

invalid[280], I have much more hesitation about the correctness of their Honours' conclusion concerning the application of the first limb of s 55 of the Constitution[281]. Certainly, I agree that the issues raised under s 55 are justiciable[282].

240 Ordinary prudence dictates that, where constitutional invalidity is established on one ground (as in my view it is), the proliferation of unnecessary *dicta* about other grounds of invalidation should be avoided. I will obey that injunction.

Orders

241 For the foregoing reasons, I agree in the answers to questions and in the orders proposed by McHugh J[283].

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280 Joint reasons at [97].

281 Joint reasons at [55]-[74].

282 Joint reasons at [44]-[50]. I also agree with what their Honours write about *Buchanan v The Commonwealth* (1913) 16 CLR 315. See joint reasons at [31]-[36].

283 Reasons of McHugh J at [160]-[163].