Does non-recognition of out-of-State roadworthy certificates breach the freedom of inter-State trade and full faith and credit provisions of the Constitution?

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One of the burdens of federalism derives from the fact that several Australian jurisdictions refuse to accept, in satisfaction of their statutory requirements that vehicle owners obtain a roadworthy certificate in respect of a vehicle they wish to register, roadworthy certificates issued by other jurisdictions. The author argues that this imposes a discriminatory burden of a protectionist kind on purchasers of vehicles and is therefore a breach of s 92 of the Constitution. The author also proposes a new interpretation of the full faith and credit requirement contained in s 118 of the Constitution which would govern cases where one jurisdiction issues a certification as to status relating to a person or thing as a result of the application of a common standard which has been adopted by different jurisdictions. The author argues that under such an interpretation, non-recognition of a roadworthy certificate which was issued by another jurisdiction in accordance with the *Australian Design Rules*, issued by the Commonwealth under the *Motor v Vehicle Standards Act 1989*, which all jurisdictions have adopted, should be found to be a breach of s 118. A finding that non-recognition is unconstitutional under either or both of s 92 and s 118 would relieve vehicle owners who already have a certificate issued in one jurisdiction of the burden of having a vehicle re-tested when they seek to register it in another.

I Introduction

Among the impediments that Australian federalism places in the way of both personal and business affairs is the regime governing registration of motor vehicles purchased in one State or Territory and brought into another, in particular the fact that some jurisdictions require that a person who imports a vehicle from another jurisdiction must obtain a certificate of roadworthiness, even if a certificate of roadworthiness has been issued in the jurisdiction of origin. This article argues that non-recognition by jurisdictions of roadworthy certificates issued by other jurisdictions breaches both s 92 and 118 of the Constitution. Although from an overall perspective the issue may seem trifling, from the perspective of the individual the imposition of a requirement to obtain a roadworthy certificate in respect of a vehicle which already has one is irrational, inconvenient and financially burdensome.

Part 2 of the article outlines the law governing roadworthy certificates in the various States and Territories and identifies those jurisdictions which impose a requirement on people registering a vehicle to have a roadworthy certificate but which do not recognise roadworthy certificates issued by other jurisdictions. Part 3 discusses s 92 of the Constitution, and argues that the roadworthy regime in those jurisdictions breaches s 92 in that it impedes inter-State trade and commerce. Part 4 discusses the requirement that each State must afford full faith and credit to the law of other States under s 118 of the Constitution, and argues that failure to recognise roadworthy certificates from other jurisdictions may be a breach of s 118 of the Constitution. The article concludes in Part 5 with a suggested new approach to the interpretation of s 118.

II Motor vehicle roadworthy legislation

The statutory regime governing motor vehicle registration in Australia differs between jurisdictions. Apart from South Australia and the Northern Territory, each State and Territory

imposes a requirement that, in prescribed circumstances, a person applying to register a vehicle in their name must provide the registration authorities with a certificate of inspection, commonly referred to as a roadworthy certificate. The situation on which the requirement most commonly arises is where one person has purchased a vehicle from someone-else and as the new owner seeks to transfer registration into their name.

There are however differences between jurisdictions: In New South Wales, the ACT, Queensland and Victoria, the obligation to provide a certificate arises whenever a person seeks to transfer registration,[1] whereas in Western Australia and Tasmania the obligation applies only to a person who is seeking to register in one of those States a vehicle registered in another State or Territory.[2]

In those jurisdictions where an obligation to obtain a roadworthy certificate applies, the person applying to register a vehicle must have the vehicle tested for a prescribed fee. Any defects noted during the inspection must be remedied and the vehicle must then be re-tested. Once the vehicle has passed the test and a certificate of roadworthiness has been issued, the vehicle owner has a defined period within which to register the vehicle. Only people authorised by the relevant jurisdiction may test vehicles and issue roadworthy certificates,[3] which means that in those jurisdictions where the obligation to obtain a certificate applies, certificates from other jurisdictions are not recognised. This is despite the fact that each jurisdiction tests vehicles in accordance with the same set of national standards – the *Australian Design Rules* – which were issued by the Commonwealth under s 7 of the *Motor v Vehicle Standards Act 1989* in order to ensure uniformity in roadworthy requirements, and which all States and Territories have adopted.[4]

The obligation to obtain a roadworthy certificate rests upon the person seeking to transfer the vehicle into their name – in other words, on the buyer in cases where registration is to be transferred as a consequence of a purchase of a vehicle from someone-else.[5] However, as a matter of practice, and in order to make the vehicle more attractive to buyers, many sellers offer vehicles on the basis that they either have obtained, or will obtain, a roadworthy certificate. Of course, where the seller has already obtained the certificate, that will be factored into the price. The effect of this in cases where a vehicle is purchased in one jurisdiction by a

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[1] See ss 26(1)(a), 29(c), 78(1)(f), and 146 *Road Transport (Vehicle Registration) Regulation 2000* (ACT); ss 6(1)(a), 9(1)(d) and 85 *Road Transport (Vehicle Registration) Regulation 2017* (NSW); ss 13(1)(g) and 48(2)(e) *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010* (Qld) as read with ss 19 and 19AA *Transport Operations (Road Use Management—Vehicle Standards and Safety) Regulation* 2010 (Qld).

[2] See s 19 *Road Traffic (Vehicles) Act 2012* (WA), s 24 of the *Road Traffic (Vehicles) Regulations 2014* (WA) and s 3 Road Traffic (Vehicles) Inspection Order *Western Australia Government Gazette* 21 June 2019 (No 86) 2155. The same applies in Tasmania, see ss 52(1) and 54(3) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas).

[3] See s 119 *Road Transport (Vehicle Registration) Regulation 2000* (ACT); s 68 *Road Transport (Vehicle Registration) Regulation 2017* (NSW); s 23 of the *Transport Operations (Road Use Management—Accreditation and Other Provisions) Regulation 2015* (Qld); s 18 *Road Traffic (Vehicles) Regulations 2014* (WA); 52(3)(a) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas).

[4] See s 103 and Schedule 1 *Road Transport (Vehicle Registration) Regulation 2000* (ACT); s 59 and Schedule 2 *Road Transport (Vehicle Registration) Regulation 2017* (NSW); Schedule 1 *Transport Operations (Road Use Management—Vehicle Standards and Safety) Regulation* 2010 (Qld); s 17 and Part 10 *Road Traffic (Vehicles) Regulations 2014* (WA) and the *Vehicle and Traffic (Vehicle Standards) Regulations 2014* (Tas).

[5] In Queensland, s 23 of the *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010* (Qld) prohibits sellers from offering vehicles for sale unless they have obtained a safety certificate.

buyer in another is that the purchaser will obtain no benefit for that part of the price, because they will have to have the vehicle re-tested when they apply to register it in their own jurisdiction.

III Freedom of inter-State trade under 92 of the Constitution

The clause in s 92 of the Constitution relevant to this article states:

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

Section 92 presented interpretative challenges for a number of decades. The original approach adopted by the High Court was the so-called 'laissez-faire' approach, under which s 92 was interpreted as conferring an unrestricted right to engage in inter-State trade and commerce. However, this was inconsistent with s 51(i) of the Constitution, which confers power on the federal Parliament to regulate inter-State trade and commerce. The result was that despite the appearance of the word 'absolutely' in s 92, the High Court changed its interpretation, and in *Cole v Whitfield*[6] adopted what is known as the 'free trade' approach, under which s 92 is interpreted as prohibiting measures which discriminate against inter-State trade and commerce – in other words, subject inter-State trade and commerce to a burden as compared with intra-State trade and commerce. Under this approach, the test for whether legislation breaches s 92 is whether it imposes 'a discriminatory burden of a protectionist kind' that is, whether it protects intra-State trade and commerce from competition from outside the State. In determining whether a provision is protectionist the courts adopt a test based on the practical effect of the provision, which means that a provision will be found to discriminate against inter-State trade if it does so either on its face or if its practical effect is to treat inter-State trade differently from intra-State trade.

The court in *Cole v Whitfield* did however acknowledge that not every measure that has a protectionist effect will be invalid: A protectionist law will survive constitutional scrutiny if it has a non-protectionist purpose and if the protectionist effect which it incidentally causes is not disproportionate to that non-protectionist purpose.

The proportionality test was expanded upon in *Castlemaine Tooheys Ltd v South Australia*,[7] where the High Court held that a measure that is protectionist in its effect will be valid if it has a legitimate non-protectionist objective (that is, if it serves some legitimate public purpose), if it is either necessary or appropriate and adapted to the achievement of that objective, if its protectionist effect is only incidental to the achievement of the objective and if there is proportionality between the objective and its protectionist effect.

A flaw in *Castlemaine Tooheys* – from the perspective of giving force to the freedom contained in s 92 – was that that test it contained did not require that, in order to survive proportionality review, a law which had a protectionist effect should go no further than was necessary to achieve the non-protectionist objective. In other words, so long as the law was 'appropriate and adapted' to the objective it would not breach s 92, even if there were measures which could have achieved the objective but with less invasion of the right contained in s 92. However this changed with the court's decision in *Betfair Pty Ltd v Western Australia*,[8] in which a majority of the court[9] held that a restriction on inter-state trade would be disproportionate where it failed a test of necessity – that is, where it went further than was necessary to achieve a legitimate objective.

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[6] (1988) 165 CLR 360.
[7] (1990) 169 CLR 436.
[8] (2008) 234 CLR 418.
[9] Ibid 477, 479 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

What is the result if one enquires whether the requirement to obtain a roadworthy certificate for a vehicle even where that vehicle already has such a certificate from another jurisdiction breaches s 92?

The first question which must be addressed is whether the requirement has a discriminatory effect of a protectionist kind, either on the face of it or in its practical effect. In answering this question, a distinction must be drawn between Western Australia and Tasmania on the one hand and New South Wales, the ACT, Queensland and Victoria the other. Since the statutory regimes in Western Australia and Tasmania impose the requirement to obtain a roadworthy certificate only on those seeking to register a vehicle obtained from out of State, they are obviously discriminatory on their face, in that the obligation attaches to vehicles obtained from out of State but not on those obtained within the State. The motor vehicle market in Australia, particularly that involving used vehicles, operates nationwide. Major advertising sites, such as *Carsales*[10] and *Drive*,[11] provide an opportunity for buyers and sellers from different jurisdictions to enter into transactions for the purchase of vehicles. Many used car dealers provide inter-State transport of vehicles as part of their service. Transactions across jurisdictional boundaries are therefore not uncommon. Against this background, it is clear that the law in Western Australia and Tasmania is protectionist, in that by burdening purchasers of vehicles from outside the State with an obligation that does not attach to those who purchase a vehicle from within the State, the law creates a disincentive to purchase a vehicle from out of State. This in turn has the economic effect of protecting vendors of vehicles inside the State from competition from out of State vendors, thereby breaching s 92.

In New South Wales, the ACT, Queensland and Victoria, the requirement to obtain a roadworthy certificate applies to all people wanting to register a vehicle, irrespective of where it was obtained. Since the requirement does not single out vehicles purchased within a jurisdiction from one purchased outside the jurisdiction, it is not discriminatory on its face. However a different conclusion is reached when one considers the practical effect of the requirement imposed by these four jurisdictions: As stated in Part II, some sellers advertise vehicles inclusive of roadworthy. In some cases the seller will have already paid the necessary fees for a roadworthy certificate and will price the vehicle accordingly – in other words, at a higher price than it would command without a roadworthy certificate. Although a buyer from within the jurisdiction will benefit from the fact that the certificate will be provided with the vehicle, the same is not true in the case of people in these four jurisdictions who purchase a vehicle from another jurisdiction, because they will still have to obtain a roadworthy certificate when they apply to register the vehicle in their own jurisdiction. In paying that part of the price that was factored in by the seller to recover the cost of obtaining a roadworthy certificate, the buyer from the other jurisdiction will be paying for something that is of no use to them. This acts as a disincentive on buyers from one jurisdiction to purchase vehicles in another, which in turn protects purchasers within a jurisdiction from competition from those outside it, which is what s 92, as interpreted in *Cole v Whitfield*[12] and subsequent cases, prohibits.

But what of cases where a seller advertises a vehicle as being sold with a roadworthy certificate, but on the basis that he or she will obtain the certificate after the contract of sale is entered into? In that circumstance, a seller who finds a buyer from out of State to whom the roadworthy certificate is of no use might agree to sell the vehicle for a lower price. Would that remove the disincentive from the out of State buyer and thus put them on equal terms from within the State? Although on the face of it one might think that to be the case, I would argue that it is not necessarily so. Part of the attraction of purchasing a vehicle that will come with a roadworthy certificate is that it relieves the seller both of the risk of the expense that might

[10] www.carsales.com.au
[11] www.drive.com.au
[12] (1988) 165 CLR 360.

possibly need to be incurred to bring the vehicle to roadworthy standard, and also of the inconvenience of having to take the vehicle to be tested and / or repaired. Although these considerations will have been factored into the price of the vehicle by the seller who is offering the vehicle with roadworthy, neither party to the transaction actually *knows* whether repairs will be required and, if so, how much they will cost. However, the buyer is in a more advantageous position in that circumstance, because that unknown risk is born by the seller, who may find that he or she has to spend more than initially estimated on repairs. Therefore, I would argue that even if a seller sells a vehicle without a roadworthy certificate to an out of State buyer and discounts the price accordingly, the out of State buyer is still disadvantaged in comparison to buyers within the State because they now bear the risk and uncertainty of the repairs which they may face when they register the vehicle in their State. Thus even where a vehicle is sold at a discounted price, I would argue that out of State buyers will still be less likely to buy the vehicle than they would if it came with a valid roadworthy certificate, and that this shields buyers within the State from competition from out of State buyers, which gives rise to the protectionist effect that s 92 prohibits.

The conclusion therefore is that the statutory regimes in Western Australia and Tasmania discriminate against inter-State trade on their face, the regimes in New South Wales, the ACT, Queensland and Victoria discriminate because of their effect, and that the regimes in all six jurisdictions are protectionist.

The next question to consider is whether, the refusal of these six jurisdictions to recognise roadworthy certificates issued by other jurisdictions can be justified by some non-protectionist objective. It might be argued in defence of these jurisdictions that each is entitled, in pursuit of the obviously non-protectionist objective of road safety, to assure itself that vehicles brought within its borders are safe, and that therefore they are entitled to confirm that fact through their own inspection. The problem with that argument is that, as noted in Part II, every jurisdiction in Australia has adopted the same set of common design and safety standards for vehicles. This means that the result of a test should be the same irrespective of which jurisdiction it was inspected in. It follows then that a roadworthy certificate issued in one jurisdiction must satisfy the legitimate road-safety concerns of every other, and that therefore the non-recognition of such certificates cannot be justified under the test for breaches of s 92 contained in *Cole v Whitfield*. One can therefore conclude that each of these six jurisdictions is in breach of s 92 by requiring that inspections be done only by people it has authorised to conduct inspections, while not recognising inspections done and certificates issued in other jurisdictions.

IV Full faith and credit under s 118 of the Constitution

A *The origins of s 118*

Section 118 of the Constitution provides:

> Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

The section first appeared in the draft constitution presented at the Sydney Convention of 1891, and was modelled on Article IV Section 1 of the United States Constitution, which reads:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

References to s 118 at the Convention debates are sparse. The clause was agreed to at the Sydney Convention of 1891 without debate.[13] At the Adelaide Convention of 1897, Henry Dobson posed the question as to whether an order of probate, or a declaration of mental incapacity issued in one State would be effective over assets situated in another. In response Edmund Barton said that the effect of the draft s 118 would be to require the courts of one State to take judicial notice of a judgment issued by the courts of another, but that the judgment would not be able to be executed unless application was made to the court of the first State.[14] However this left unclear what the answer was to the questions posed – that is, whether the courts of the receiving State would be *obliged* to give effect to the judgment. There was no debate on the clause at the Sydney Convention of 1897 or at the Melbourne Convention of 1898.

Quick and Garran discussed s 118 in their *Commentaries on the Constitution of the Commonwealth of Australia*,[15] published the same year the Constitution came into force. Emphasising that the purpose of s 118 was to give effect to comity - that is, respect by one jurisdiction for the laws of another – and referring to case law that had arisen under the analogous provision in the United States Constitution, they stated s 118 required that the validity of the laws, public Acts and records, and judicial proceedings of each State be accepted by every other, but did not venture an opinion as to whether this required that States give effect to decisions of each other's courts.[16]

Greater elucidation was provided by Inglis Clark in his *Studies in Australian Constitutional Law* where, referring to the status of an alien in one State who had been naturalised in another, he stated that[17]

> But it is difficult to see in what manner full faith and credit can be given in one State to the naturalisation of an alien which has taken place as a public act, and which has been publicly recorded, in another State, other than by according to the person who has undergone the process of naturalisation in the other State, the same status as a subject of the Crown which he occupies in the other State. Under s 118 the legal status acquired by a person under the laws of any State in regard to the questions of marriage, divorce, and legitimacy will be accorded to him in every other State of the Commonwealth, notwithstanding the fact that the laws of the State under which he acquired the status have not any ex-territorial force or validity; and there does not appear to be any valid reason why the application of the section should be limited to an exterritorial recognition of the definite legal consequences of transactions and proceedings authorised by some particular laws of the States, and be restrained in regard to transactions and proceedings authorised by other laws of the States, so long as questions of public morality or public safety do not arise and afford a valid ground for making a distinction.

This statement supports the view that that the effect of s 118 is not merely evidentiary. The section does more than simply provide that a law Act, public record or judicial proceedings of one jurisdiction must be accepted as extant by the courts of another jurisdiction. Rather it requires each jurisdiction to give effect to the laws, Acts, public records and judicial proceedings of others. In what circumstances, and subject to what limitations case law states that that obligation applies is considered later in this Part.

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[13] *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 883 (Samuel Griffiths).
[14] *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1004-6 (Henry Dobson and Edmund Barton).
[15] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney, 1976).
[16] Ibid 962.
[17] Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F. Maxwell, 1901) 98.

B *Legislation enacted in support of s 118*

Before examining how s 118 has been interpreted, it is necessary to consider the effect of legislation that has been enacted under s 51(xxv) of the Constitution, which gives the Commonwealth Parliament the power to make laws with respect to

> the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.

This power was used to enact s 185 of the *Evidence Act 1995* (Cth), which provides

> All public acts, records and judicial proceedings of a State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory.

Section 185 differs from both s 118 and s 51(xxv) in that it omits any reference to 'laws' and also refers to public 'acts' (lower case) rather than public 'Acts'. This was also true of the predecessor to s 185, which was s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth). Section 3 of that Act did however refer to State Acts (upper case), and required courts to take judicial notice of them.

Are the differences between s 185 of the *Evidence Act 1995* (Cth), and s 118 of the Constitution significant? Although this question has not been decided with respect to s 185, the High Court considered the issue with reference to s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth). Since the relevant wording of s 185 and s 18 are the same, cases on s 18 can be used as authority for the meaning of s 185.[18] In *Breavington v Godleman*,[19] a majority of the court held that the term 'public acts' in s 18 referred to executive proclamations and orders and to delegated legislation, but did not include Acts of State parliaments.[20] Does that mean that full faith and credit does not extend to Acts?

There are a number of arguments that can be raised against that proposition. The first is that, although in *Breavington v Godleman,* Mason CJ[21] and Wilson and Gaudron JJ,[22] said that s 118 did not contain a command, and that therefore full faith and credit was required only in relation to things mentioned in s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth), the better view is that adopted by Brennan J, to the effect that s 118 does in itself impose an obligation to give full faith and credit to State Acts as a component of State 'laws.'[23] Under that approach, s 118 is regarded as self-executing – in other words, as imposing a mandate which does not need to be brought into effect by Parliament. Although the power conferred by s 51(xxv) *allows* Parliament to enact legislation relating to recognition, it cannot be said that s 118 remained mute in the absence of such legislation, any more than it could be argued that s 49 of the Constitution was ineffective in stating that parliamentary privilege as it operated in the United Kingdom would apply, simply because the section also conferred on Parliament the power to legislate with regard to privileges. Therefore, irrespective of the scope of s 185 of the *Evidence Act 1995* (Cth), the scope of s 118 remains unconfined, and would extend to State Acts.

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[18] See *Rahim v Crawther* (1996) 17 WAR 559, 583 where Malcolm CJ held that s 185 had the same effect as s 18 and *Re DEF and the Protected Estates Act 1983* [2005] NSWSC 534, [41] where Campbell J held that s 185 differed from s 18 'in matters of expression but not in substance.'
[19] (1988) 169 CLR 41.
[20] Ibid 79 (Mason CJ), 94-5 (Wilson and Gaudron JJ), 148 (Dawson J)
[21] Ibid 79.
[22] Ibid 96.
[23] Ibid 115.

The second argument, which follows from the first, is that if s 118 is self-executing and does not rely on s 185 of the *Evidence Act 1995* (Cth) for its application, full faith and credit must be extended to State Acts by virtue of the fact that s 118 refers to State 'Acts' (upper case). This provides an alternative basis for giving of full faith and credit to State Acts, separate from their being a component of State laws.

The third argument is that the discrepancy between s 118 of the Constitution and s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth) (and thus its successor, s 185 of the *Evidence Act 1995* (Cth)) was apparent rather than real. This is evident from the judgment of Dawson J in *Breavington v Godleman*,[24] who stated that whereas s 118 conferred full faith and credit on State Acts (obviously on the basis that s 118 was self-executing), the omission of the Territories from s 118 (because there were no Territories when the Constitution was drafted) did not mean that full faith and credit did not apply to their statutes once Territories were created, as their legislation was enacted under the authority of s 122 of the Constitution which, being part of the law of the Commonwealth, was effective throughout the country. Section 18 did however serve the purpose of providing for full faith and credit for the public acts, records and judicial proceedings of the Territories. This meant, said Dawson J, that s 18 had 'little or no discernible effect' with respect to the States (because full faith and credit was already conferred on their law by s 118 of the Constitution), other than to provide for a method for the authentication of public acts, records and judicial proceedings.

The fourth and final argument is that in so far as Covering Clause 5 of the Constitution states that the Constitution 'shall be binding on the courts, judges and people of every State and of every part of the Commonwealth,' the obligation to comply with s 118 is imposed by implication, and is not dependant upon the enactment of legislation under s 51(xxv).

In light of the above is that it can be said that s 118 does not rely on s 185 of the *Evidence Act 1995* (Cth) for its effectiveness and that it casts an obligation on each jurisdiction to give full faith and credit to the laws (which includes Acts) of the States and Territories, as well as the public acts and records, and judicial proceedings of the States. The effect of s 185 is to extend that obligation to the public acts and records, and judicial proceedings of the Territories and to make provision for the manner of authentication of the public acts, records and judicial proceedings of the States and Territories in accordance with its provisions. Proof of primary and secondary legislation is not required – s 143 of the Act states that proof is not required of the provisions contained in, or the coming into force of, Acts or Ordinances of the States and Territories or of delegated legislation, proclamations or legislative instruments issued under them.

C *Interpretation of s 118*

1 *Interpretation by the High Court*

Interpretation of s 118 is made difficult by the fact that the section has rarely been the subject of litigation. The High Court has given substantive interpretation to s 118 in only a handful of cases, most of which involved conflict of laws, that is, concerned with the question of which jurisdiction's law applies where a contract entered into in one State[25] or a tort committed in

[24] Ibid 148-9.
[25] *Merwin Pastoral Co. Pty Ltd v. Moolpa Pastoral Co. Pty Ltd* (1933) 48 CLR 565.

one State[26] is sued on in another. Such academic comment as there is also focuses on such intra-jurisdictional conflict of law issues.[27]

There have been two cases in which the court has considered whether s 118 requires that a judgment issued by the courts of a jurisdiction,[28] or legislation enacted by a jurisdiction,[29] should be given effect in another. This section of the article examines the general principles established by the High Court in conflict of laws cases and then discusses those two cases.

(a) General principles from conflict of law cases

An important issue considered by the High Court is whether s 118 is merely evidentiary in its effect, requiring only that the courts in one State recognise as a fact the existence of the laws, public records and judicial proceedings of other States, or whether it goes further and mandates the *application* of those laws *et cetera*? An affirmative answer to that question was provided by Deane J *Breavington v Godleman*,[30] where he said that

> To give full faith and credit to something does not, as a matter of ordinary language, mean merely to acknowledge the fact that it exists. Thus, to give full faith and credit to a person's word does not mean merely to accept the fact that the person says something. It means to accept and act upon the content of what he says. To give full faith and credit to a judgment means, as a matter of ordinary language, not only to recognize its existence but, while it stands, to accept and abide by its contents. ... Likewise the directive of s. 118 to give full faith and credit "throughout the Commonwealth" to the laws and Acts of a State whose laws and territorial legislative powers are continued under the Constitution does not, as a matter of ordinary language, mean merely to accept that such laws or Acts exist or have been made. It decrees that those laws must be accepted *throughout the Commonwealth* as the national law applicable to regulate, and define the consequences or attributes of, conduct, property or status within that particular part of the national territory. [Emphasis in the original].

Similarly, Wilson and Gaudron JJ, speaking in relation to s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth) held that

> Section 18, then as now, travelled beyond the merely evidentiary, but confined its substantive effect to "public acts records and judicial proceedings, if proved or authenticated as required by this Act."

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[26] *Anderson v. Eric Anderson Radio & T.V. Pty.Ltd.*(1965) 114 CLR 20, *Breavington v Godleman* (1988) 169 CLR 41, *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, *Stevens v Head* (1993) 176 CLR 433, *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 and *Sweedman v Transport Accident Commission* (2006) 224 ALR 625; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

[27] See Zelman Cowen, 'Full Faith and Credit the Australian Experience' (1951-54) 6 *Res Judicatae* 27, Edward Sykes, 'Full Faith and Credit – Further Reflections' (1951-54) 6 *Res Judicatae* 353, B. O'Brien, 'The Role of Full Faith and Credit in Federal Jurisdiction' (1976) 7 *Federal Law Review* 169, Peter Nygh, 'Full Faith and Credit: A Constitutional Rule for Conflict Resolution' (1991) 13 *Sydney Law Review* 415, Brian Opeskin, 'Constitutional Dimensions of Choice of Law in Australia' (1992) 3 *Public Law* Review 152, Greg Taylor, 'The Effect of the Constitution on the Common Law as Revealed by *John Pfeiffer v Rogerson*'(2002) 30 *Federal Law Review* 69; Alex Amankwah, 'Judicial Legislation: A New Phase?' (2000) 7 *James Cook University Law Review* 254 and Jeremy Kirk, 'Conflicts and Choice of Law within the Australian Constitutional Context' (2003) 31 *Federal Law Review* 247.

[28] *Posner v Collector for Interstate Destitute Persons (Victoria)* (1946) 74 CLR 461.

[29] *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338.

[30] *Breavington v Godleman* (1988) 169 CLR 41, 129-30. See also Deane J's analysis up to page 134.

The High Court has also addressed the question of whether the obligation of one jurisdiction to apply the law of another is subject to qualification. In *Merwin Pastoral Co. Pty Ltd v Moolpa Pastoral Co. Pty Ltd*,[31] three justices of the High Court,[32] referring to the situation where choice of law rules indicated that the courts of one State should apply the law of another, said that s 118 precluded the courts of a State from declining to apply the law of that other State on public policy considerations.[33] In *Breavington v Godleman*,[34] Wilson and Gaudron JJ,[35] while noting that the statements in *Merwin Pastoral* were strictly *obiter*, approved of that view, as did Mason CJ,[36] Deane J[37] and Dawson J.[38] Brennan J's approach was less clear, in that although he cited *Merwin Pastoral* with approval, he nevertheless held that s 118 did not compel a State to give a remedy in circumstances where one would not be available under, or might be contrary to, its own law.[39] It may however be that Brennan J was applying the common law double actionability doctrine, which applied at the time that *Breavington* was decided (subsequently removed from the law in *John Pfeiffer Pty Ltd v Rogerson*[40]) which was to the effect that, in conflict of law cases involving torts, a court was obliged to apply the *lex loci delicti* only if the alleged conduct would have been actionable both under the law of the forum and under the law of the jurisdiction where the tort was alleged to have occurred.

That six members of the court in *Breavington* had approved of the dictum in *Merwin Pastoral* was subsequently noted without disagreement by five of the justices in *John Pfeiffer Pty Ltd v Rogerson*,[41] however they did not consider the *Pfeiffer* case one in which the parameters of s 118 should be decided.[42] Kirby J expressed a more qualified view, only going so far as to opine that, in certain circumstances, s 118 would prevent courts in one jurisdiction from disregarding the law of another on grounds of public policy.[43] He too held that the case before the courts was not one requiring a definitive statement on s 118.[44] Only Callinan J held that s 118 should not be interpreted as requiring one State to apply a law of another State that was 'alien to the policies' of the first State.[45]

(b) The effect in one jurisdiction of the judgments and legislation of another

Conflict of law cases involve courts determining whether they should apply the *lex fori* or the law of another jurisdiction in circumstances where litigation has arisen out of events occurring in that other jurisdiction. The subject of this article is different – namely whether jurisdiction A should recognise the exercise of a power under a statute enacted by jurisdiction B in the absence of any dispute having arisen in jurisdiction B. Thus, unlike cases involving a conflict of laws, which requires a court to choose one or other set of laws as governing a set of facts, in the situation posited in this article there is no question of the law of one jurisdiction trumping the law of another – what is being discussed is whether a requirement imposed by a statute

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[31] (1933) 48 CLR 565.
[32] Ibid 577 (Rich and Dixon JJ) and 587-8 (Evatt J).
[33] See the discussion of this case in Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (Lexis-Nexis, 4th ed, 2019) 300-02.
[34] (1988) 169 CLR 41. *Merwin Pastoral* was also approved of in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 533 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 557 (Kirby J).
[35] Ibid 97 (Wilson and Gaudron JJ).
[36] Ibid 81.
[37] Ibid 136-7.
[38] Ibid 150.
[39] Ibid 116-7.
[40] (2000) 203 CLR 503.
[41] Ibid.
[42] Ibid [65].
[43] Ibid [143].
[44] Ibid [143].
[45] Ibid [202-3].

enacted by jurisdiction A should be regarded as being fulfilled *either* by complying with that statute *or* by complying with a similar statute enacted by jurisdiction B. The High Court has considered the applicability of the law of one jurisdiction in another in two cases:

In *Posner v Collector for Inter-State Destitute Persons (Vic)*,[46] the High Court held that s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth) required that a court in Victoria give effect to a maintenance order issued by a court in Western Australia, notwithstanding that the defendant had not been served with notice of the proceedings that led to the order being issued. The High Court held that full faith and credit required that the Victorian court accept the order at face value and could not go behind it to inquire into its validity.

So far as the effectiveness of statutes is concerned, in *Permanent Trustee Co (Canberra) Ltd v Finlayson*,[47] the High Court held that the executor of a deceased estate which had assets both in New South Wales and the ACT was not bound to satisfy a claim for stamp duty made by New South Wales under the *Stamp Duties Act 1920-1959* (NSW) in relation to the assets situated in the ACT, despite the fact that s 102(1)(a) of that Act subjected all property of a deceased who was domiciled in New South Wales (as this deceased was) to duty, irrespective of where the property was located. The court held that the effect of this was only to allow the New South Wales Commissioner of Stamp Duties to lodge a claim against an executor in New South Wales in respect of property wherever located. The court held that s 102(1)(a) was not intended to be of extra-territorial effect and that s 118 of the Constitution did not give it such an effect.

The High Court thus appears to have drawn a distinction between s 118 as it applies to judgments and to statutes: whereas judgments from one jurisdiction will be given effect in another, statutes will not. However, as will be discussed in Part C, I would argue that the decision in *Permanent Trustee Co (Canberra) Ltd v Finlayson* does not shut the door on the possibility that a record – specifically a roadworthy certificate – issued under the statute law of one jurisdiction should be accepted as effective in another.

2 *Interpretation by State courts*

State courts have differentiated between the effectiveness of judgments as compared to statutes in the same way as has the High Court, although there is one instance in which a court in one State refused to give effect to an order issued by a court in another.

In *Harris v Harris*,[48] the Supreme Court of Victoria held that s 18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth) required it to recognised a divorce order granted by a court in New South Wales, even though it was argued that the New South Wales court had not had jurisdiction when it heard the case. The Victorian court took the New South Wales order at face value and refused to look behind it. *In the Estate of Searle, Deceased*,[49] the Supreme Court of South Australia held that an adoption order issued by a court in New South Wales was effective in so far as it affected the succession rights of a person in South Australia. Similarly, in *Re DEF and the Protected Estates Act 1983*,[50] the Supreme Court of New South Wales held that an order relating to the assets of a disabled person by the Supreme Court of Queensland was effective in determining what steps the Protective Commissioner of New South Wales should take in relation to the person's assets. In *G v G*[51] the Supreme Court of New South Wales held that an interim custody order issued by the Supreme Court of

[46] (1946) 74 CLR 461.
[47] (1968) 122 CLR 338.
[48] [1947] VLR 44.
[49] [1963] SASR 303.
[50] [2005] NSWSC 534; (2005) 192 FLR 92.
[51] (1986) 64 ALR 273.

Queensland would be effective in New South Wales by virtue of s 118. In *Bond Brewing Holdings Ltd v Crawford*[52] the Supreme Court of Western Australia refused an application to restrain receivers appointed by the Supreme Court of Victoria over assets of a company in Western Australia, stating that s 118 required that effect be given to the order of the Victorian court. In *Rowe v Silverstein*[53] the Supreme Court of Victoria refused an application to lift an injunction issued by the New South Wales Supreme Court prohibiting the distribution of moneys paid under a mortgage over property in Victoria.

By contrast, in *Re Estate of Tamburin,*[54] the Supreme Court of South Australia refused to recognise a grant of administration issued by the Supreme Court of Victoria over the estate of the deceased, who was domiciled in Victoria but who owned property in South Australia. The court held that the Victorian court had jurisdiction to grant an order of administration only over property in Victoria, and that s 118 did not give such an order effect over property in South Australia. This decision appears to be inconsistent with all the others by State courts in relation to judgments given by the courts of other States, and in particular with *Bond Brewing Holdings Ltd v Crawford,*[55] (discussed above) the effect of which was to uphold an order by the courts of one State affecting assets in another.

So far as statute law is concerned, in *Rothwells Ltd (in liq) v Connell*[56] the Queensland Court of Appeal held in that it was not required to enforce a Western Australian revenue law, McPherson J stating that Western Australia had not intended its legislation to have extra-territorial effect[57] and that s 118 does not compel one State to substitute the statute law of another for its own.[58]

3 *The judgment / statute distinction*

Is the distinction between enforcing a judgment and giving effect to a statute as clear as these cases make it appear? For example, what is the difference between an order issued by a court in accordance with a statute allowing a spouse to claim maintenance, which the High Court enforced in another jurisdiction in *Posner v Collector for Inter-State Destitute Persons (Vic)*,[59] and a statute allowing a State government office-holder to claim stamp duty, which the High Court refused to enforce in another jurisdiction in *Permanent Trustee Co (Canberra) Ltd v Finlayson*?[60] In cases where a court in one jurisdiction recognised the effectiveness of a court order for another, the court orders which were enforced were the product of the application of statutes operative in the jurisdictions in which the courts issuing the orders sat, and so when they were given effect by the other jurisdiction, that other jurisdiction was, albeit indirectly, giving effect to the statute law of the first jurisdiction. Why should the law adopt a different approach to an enforcement of rights in jurisdiction A through the medium of an order of a court in jurisdiction B, but not allow the direct enforcement in jurisdiction A of rights conferred by a statute enacted by jurisdiction B?

One answer as to why the courts draw this distinction could be that, as was held in *Permanent Trustee Co (Canberra) Ltd v Finlayson*,[61] and *Rothwells Ltd (in liq) v Connell*[62] that to give effect in one jurisdiction to a statute of another would be to give that statute extra-territorial

[52] (1989) 1 WAR 517.
[53] (1996) 1 VR 509.
[54] (2014) 119 SASR 143.
[55] (1989) 1 WAR 517.
[56] (1993) 119 ALR 538.
[57] Ibid 547-8.
[58] Ibid 548-9.
[59] (1946) 74 CLR 461.
[60] (1968) 122 CLR 338.
[61] Ibid.
[62] (1993) 119 ALR 538.

effect, and that either the enacting jurisdiction had not intended the statute to have extra-territorial effect and / or that s 118 did not have the effect of conferring such an effect. But that argument is not convincing – it still does not explain why a statute of one jurisdiction can be given *de facto* extra-territorial effect in another simply because it arrives clothed in the form of a court order. The overlap and difficulty in distinguishing between the enforcement of court orders and the enforcement of statutes is in fact well illustrated by one of the cases cited earlier: In *Re Estate of Tamburin*[63] the South Australian Supreme Court held that an administration order – that is an order by a court – was ineffective because its effect was territorially circumscribed, language which is very similar to that which was used in the cases where courts refused to give effect to statutes outside the jurisdiction which had enacted them.

I would therefore argue that the judgment / statute distinction should not be the basis upon which s 118 is interpreted, and that in certain narrowly-defined circumstances explained in Part C, a statute enacted by one jurisdiction should be treated as effective in others.

C *Full faith and credit and roadworthy certificates*

In light of the above, how should s 118 be interpreted in so far as it relates to the question of whether a jurisdiction should be required to recognise, for the purposes of its own statutory requirements, a licence, authorisation or certificate – specifically a roadworthy certificate - issued by another? If s 118 was interpreted as requiring that a roadworthy be accepted as effective irrespective of which jurisdiction had issued it, it would mean that a legislative provision in a jurisdiction which limited the validity of roadworthy certificates only to those obtained from a tester within that jurisdiction would be unconstitutional.

As a preliminary point it should be noted that such an interpretation of the effect of s 118 would not give rise to a clash between the statute law of different jurisdictions: What is being suggested is that a requirement imposed by a statute enacted by jurisdiction A should be regarded as being fulfilled either by complying with that statute or by complying with a similar statute enacted by jurisdiction B.

Next, it must be accepted that a roadworthy certificate (authenticated in accordance with s 185 of the *Evidence Act 1985* (Cth)) falls within the meaning of the word 'records' contained in s 118. Case law in Australia has focussed on whether s 118 compels giving effect to judgments or statutes of other States, and there is no precedent specifically relating to records. Similar lack of attention to records was noted by Redpath in her discussion of the doctrine as it applies under Article IV Section 1 of the United States Constitution, upon which s 118 was modelled.[64] However there is no doubt that a roadworthy certificate would be covered by s 118 in that such a certificate constitutes a record under s 118 – a record evidencing the fact that a vehicle is roadworthy. Why then should s 118 not be interpreted as requiring States to recognise, in satisfaction of their own requirements that a vehicle be shown to be roadworthy, evidence of that fact contained in a record issued by another State?

In answering that question, assistance can, paradoxically, be obtained by considering arguments that have been raised in the United States *against* the proposition that full faith and credit requires the courts of one State to recognise processes that have occurred under the authority of the statutes of another State. These were put most forcefully by Whitten,[65] who

[63] (2004) 119 SASR 143

[64] Elizabeth Redpath, 'Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records' (2013) 62 *Emory Law Journal* 639, 665-9. For useful summaries of the interpretation of the doctrine in the United States see Ralph Whitten, 'Full Faith and Credit for Dummies' (2005) 38 *Creighton Law Review* 465 and Joseph Fraioli, 'Having Faith in Full Faith and Credit: *Finstuen*, *Adar*, and the Quest for Interstate Same-Sex Parental Recognition' (2012) 98 *Iowa Law Review* 365.

[65] Whitten, Ibid, 477.

suggested that in that circumstance, a State that did not allow its citizens openly to carry firearms would be obliged to allow citizens from another State which licensed its citizens to carry firearms to do so in the State they were visiting, and would similarly oblige a State where the minimum age for a driver's licence was 16 to allow a ten year-old driver licensed in another State to drive a vehicle on the roads. The usefulness of these arguments lies in the fact that they confuse *activity* with *status*.

A licence to engage in an *activity* is causally connected to a particular area. For example, where a fishing licence was issued by the authorities in jurisdiction A, full faith and credit would not entitle a licence-holder to fish in the waters of jurisdiction B, because the authorisation it confers relates *only to the waters of jurisdiction A*, and full faith and credit would not have the effect of making its effect to a wholly different circumstance such as fishing within the waters of jurisdiction B. The legislation that determines whether jurisdiction A will grant a fishing licence will have been enacted in light of the environmental conditions that exist in the jurisdiction – in other words, will be determined by criteria that are tailored to give rise to an outcome (to either grant or not grant the licence) affected *by the circumstances in that jurisdiction*. The same applies to other types of licences – such as driver's and forearms licences - which authorise an activity within a jurisdiction and which will also be affected by factors peculiar to the circumstances of that jurisdiction, such as the nature of its roads and what training is required before driving a motor vehicle (in the case of drivers' licences) or the level of crime and what requirements are set before a person may own a gun (in the case of firearms licences).

By contrast, recognition of a marriage or an adoption effected in another jurisdiction relates to a *status* that people carry with them rather an activity that is engaged in in a particular area. A certificate of marriage or adoption is thus qualitatively different from a driver's or firearms licence because there is nothing about the status of spouse or adoptive parent that is dependant on where that status is enjoyed. The same, I would argue is true of roadworthy certificates. The decision whether to issue a roadworthy certificate is not affected by conditions in the jurisdiction issuing it – whether a vehicle is roadworthy depends solely upon an evaluation of the condition of the vehicle, and which jurisdiction the vehicle is located in has no effect on that. The certificate thus relates to the *status* of the vehicle, not where it is used, and therefore should be accorded the same effect as would be a marriage or adoption certificate issued by another jurisdiction.

This, I would argue, provides a basis for distinguishing the High Court decision in *Permanent Trustee Co (Canberra) Ltd v Finlayson,*[66] and the decisions of State courts in *Rothwells Ltd (in liq) v Connell*[67] and *Re Estate of Tamburin*,[68] in which courts held that s 118 did not require one jurisdiction to give effect to the law of another. None of these cases involved status, rather they involved activities, such as the collection of stamp duty or the administration of an estate. By contrast, the argument presented here is that in the specific category of cases where the law of one jurisdiction has conferred a status which attaches to a person, - or a vehicle – s 118 should be interpreted (subject to a requirement discussed below) as mandating other jurisdictions to give effect to that status. In all other circumstances, s 118 would be interpreted as before – the different interpretation would apply only in status cases.

Interpreting s 118 in this way is not contingent upon a finding that a jurisdiction which has issued a roadworthy certificate must have intended the statute under which the certificate was issued to have extra-territorial effect. In the cases discussed in the previous paragraph the courts refused to give effect in one jurisdiction to a statute of another in part on the grounds that to do so would be to give the statute extra-territorial effect, and that either the enacting

[66] (1968) 122 CLR 338.
[67] (1993) 119 ALR 538.
[68] (2004) 119 SASR 143

jurisdiction had not intended the legislation to have extra-territorial effect and / or that s 118 did not have the effect of conferring such an effect. However, I would argue that the common-law presumption against extra-territoriality[69] does not constitute an impediment to the interpretation of s 118 in the way argued for in this article. Here again the status / activity distinction is relevant: Where a person has a status – for example marriage or adoption – conferred on them by virtue of a statute of a jurisdiction, it is clear that the conferral of the status must be interpreted as being of extraterritorial effect, both because status is something that people carry with them and because of the common-law exception to the presumption against extra-territoriality which applies in cases where to give effect to the presumption would undermine the purpose of the legislation.[70] The same applies in the case of roadworthy certificates which, as argued above, constitute evidence of a status which the vehicle carries with it. A vehicle does not suddenly lose the status of being roadworthy – that is, become unroadworthy - when it is taken from one jurisdiction to another.

A counter-argument to this new interpretation of s 118 is that it could have the effect of undermining the sovereignty of States within the federal system because it would mean that each jurisdiction would have to treat as effective all certifications issued by every other jurisdiction, and that that might have a deleterious effect if, to take a hypothetical example, a certificate of professional competence issued by jurisdiction A could be obtained after less rigorous training than was required by jurisdiction B.

Earlier in this Part, I mentioned that the new interpretation of s 118 that I am proposing should be subject to a qualification. That qualification is founded upon a distinction that needs to be drawn between those certifications which are based on a common standard, and those which are not. An important feature of the roadworthy regime is, as was noted in Part 2,[71] that all Australian jurisdictions apply the same set of standards when testing vehicles. This means that, in contrast to the example in the previous paragraph of professional licences issued under criteria that differ as between jurisdictions, the result of a roadworthy test can be presumed to be the same irrespective of the jurisdiction in which it was conducted, which means that any roadworthy certificate, irrespective of where it is issued, is evidence of compliance with the same standard.

Could the interpretation of s 118 accommodate a distinction which would require the recognition of certificates evidencing compliance with a common standard, while permitting a jurisdiction to refuse to recognise a certificate of compliance with a standard different to that which that jurisdiction applies? I would argue that the answer to that lies in the creation of an exception to the rule in *Merwin Pastoral Co. Pty Ltd v Moolpa Pastoral Co. Pty Ltd*[72] in which it was held that there was no public policy exception which would justify a jurisdiction declining to apply the law of another. Although that case involved conflict of laws rather than the situation where jurisdiction A is called upon to acknowledge as satisfying an obligation arising under its own law a process that has taken place in jurisdiction B, an adapted version of the rule it contains could be used in the different circumstance being addressed in this article. The *Merwin Pastoral* rule was approved of by six members of the court in *Breavington v Godleman*,[73] and was also subsequently noted without disagreement by five of the justices in *John Pfeiffer Pty Ltd v Rogerson*.[74] However, in the latter case Kirby J adopted a more qualified approach, stating that 'in some circumstances', s 118 would prevent courts in one jurisdiction from disregarding the law of another on grounds of public policy,[75] which implies that in other circumstances, the law of another jurisdiction could be disregarded.

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[69] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309.
[70] *Kumagai Gumi Co Ltd v FCT* (1999) 90 FCR 274.
[71] See above n 4 and accompanying text.
[72] (1933) 48 CLR 565.
[73] (1988) 169 CLR 41.
[74] (2000) 203 CLR 503.
[75] Ibid [143].

Callinan J went further, holding that s 118 should not be interpreted as requiring one jurisdiction to apply a law of another jurisdiction that was 'alien to the policies' of the first jurisdiction.[76] I would argue that the rule in *Merwin Pastoral* should be confined to conflict of laws cases, and that in cases of the type being considered here, where one jurisdiction is being asked to accept as satisfaction of its own statutes a certificate pertaining to staus issued by another jurisdiction, the first jurisdiction should be able to decline, on public policy grounds, to give effect to the statute law of the other.

To summarise, the new interpretation of s 118 proposed is as follows: In circumstances where a public record evinces the conferral of status on a person or thing by a jurisdiction, s 118 requires that any other jurisdiction must give effect to that record as if it was a record of that jurisdiction, subject to a public policy exception which allows that jurisdiction to refuse to give effect to the record if the standard used by the jurisdiction that issued the record to determine whether to confer the status differs from the standard applicable in the other jurisdiction.

An application of s 118 to the specific case of roadworthy certificates in accordance with the approach outlined above would proceed as follows: A roadworthy certificate is a public record issued by a jurisdiction and, as such, must *prima facie* be accorded recognition by other jurisdictions as fulfilling the requirement that, in order to be registered, a certificate must have been issued in relation to that vehicle. A (new) exception to the rule in *Merwin Pastoral* would permit a jurisdiction to refuse to recognise the public records of another on public policy grounds. However, that exception would not apply in the case of roadworthy certificates, because such certificates are issued after the application of a test which is uniform across Australia, and so there is no public policy ground upon which recognition could be denied. The conclusion would be that legislation of a jurisdiction which accepted as valid only those roadworthy certificates issued by its own authorised testers would be unconstitutional under s 118. A jurisdiction could make its roadworthy testing regime compliant with s 118 by providing that a certificate issued by any Australian jurisdiction after a vehicle had passed a test conducted under the uniform national standards would be valid for purposes of registration.

V Conclusion

Debates on federalism are usually conducted on a high level of abstraction.[77] Issues such as the question of whether roadworthy certificates should be recognised are more instructive because they bring home the inconveniences that federalism causes to people in their everyday lives. In this article I have sought to demonstrate that there are two grounds upon which the exclusionary roadworthy certification regime adopted by Australian jurisdictions breach the Constitution:

The application by jurisdictions of a requirement that vehicles brought in from outside the jurisdiction must satisfy a roadworthy test before being registered while the owners of vehicles within the jurisdiction are not burdened in that manner undoubtedly constitutes a breach of s 92 in that it amounts to discrimination against inter-State trade which has a protectionist effect.

The second ground upon which the current regime could be found to be unconstitutional is more speculative, but I have sought to demonstrate that there is an argument for interpreting s 118 in such a manner as to require each jurisdiction to accept as satisfaction of its own statutory requirements a certification provided *either* under its own legislation *or* under the legislation of another jurisdiction – provided always that there were no public policy grounds

[76] Ibid [202-3].
[77] See for example the author's critique of federalism in Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia* (Springer, 2020) 159-80.

which would justify it not accepting the certification from the other jurisdiction, which there would not be where certifications were issued under a set of common standards, as is indeed the case in the specific instance of roadworthy certificates.

This would hardly sound the death-knell of State sovereignty, and in the case of roadworthy certificates, would relieve people who already have a certificate issued in one jurisdiction of the burden, which is both onerous and otiose, of having the vehicle re-tested when they seek to register it in another.

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