CASE NOTES

WORTHING v. ROWELL AND MUSTON PTY LTD AND OTHERS[1]

THE QUEEN v. PHILLIPS[2]

ATTORNEY-GENERAL (N.S.W.) v. STOCKS AND HOLDINGS (CONSTRUCTORS) PTY LTD[3]

Constitutional law—Places acquired by Commonwealth for public purposes—Exclusive legislative power of Commonwealth.

The three cases here noted concern the interpretation of section 52(1) of the Constitution, which reads:

> 52. 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—
>
> (1.) The seat of government to the Commonwealth, and all places acquired by the Commonwealth for public purposes: . . .

Although the second limb of this section had not come squarely before the High Court in seventy years of federation, its meaning had been considered by the New South Wales Supreme Court in *R. v. Bamford*,[4] by the New South Wales District Court in *Kingsford Smith Air Services Ltd v. Garrisson*[5] and briefly in *obiter dicta* by Isaacs and Higgins JJ. in *Commonwealth v. New South Wales*,[6] and by Taylor and Kitto JJ. in *Spratt v. Hermes*.[7]

The views expressed in these cases are far from uniform in their interpretations of the power and the scope of the power conferred on the Commonwealth Parliament by the second limb of section 52(1). Professor Zelman Cowen suggested[8] that there were five possible solutions:

(i) Upon acquisition pursuant to section 51(31) or section 85 of the Constitution land is to be regarded as having been excised from a State

[1] (1970) 44 A.L.J.R. 230. High Court of Australia; Barwick C.J., McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ.

[2] (1970) 44 A.L.J.R. 497. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ.

[3] (1970) 45 A.L.J.R. 9. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer and Walsh JJ.

[4] (1901) 1 S.R. (N.S.W.) 337. The question that arose was whether a N.S.W. court had jurisdiction to hear a charge of larceny, brought under s. 69 of the Postal Act of N.S.W. The theft occurred at the Armidale Post Office after the post office's premises had been acquired by the Commonwealth through the operation of s. 69 and s. 85 of the Constitution. The question was whether N.S.W. criminal law continued to operate with respect to the Post Office in view of the grant of exclusive legislative power to the Commonwealth by s. 52(1).

[5] (1938) 55 W.N. (N.S.W.) 122. Here the jurisdiction of the District Court to hear a claim for negligence was questioned by the defendant because the allegedly negligent act occurred on the Kingsford Smith Aerodrome, a place acquired by the Commonwealth under the Lands Acquisition Act 1906-1934; the Commonwealth's legislative power being derived from s. 51(31). Consequently the effect on the Court's jurisdiction of exclusive legislative power being conferred on the Commonwealth by s. 52(1) had to be decided. In substance it was the same question which faced the High Court in *The Queen v. Phillips* (1970) 44 A.L.J.R. 497.

[6] (1923) 33 C.L.R. 1 *per* Isaacs J. 46, Higgins J. 59-60.

[7] (1965) 114 C.L.R. 226 *per* Taylor J. 263, Kitto J. 257, 258.

[8] Cowen, 'Alsatias for Jack Sheppards?: The Law in Federal Enclaves in Australia' *Sir John Latham and Other Papers* (1965) 171, 188-91.

so as to form Commonwealth territory. This interpretation is based on the dissent of Stephen J. in *R. v. Bamford*[9] and in the view of the writer of this note seems to be supported by the obscure *obiter dictum* of Isaacs J. in *Commonwealth v. New South Wales*,[10] that '[t]he grant of exclusive power [made by section 52(1)] carries an inevitable inference with it. It shows that the proprietorship and the sovereignty were intended to go together in this respect'.[11]

(ii) Section 52(1) gives the Commonwealth a broad source of power to legislate with respect to acquired lands. Although the land is not excised from the State, the only State laws which can operate in places acquired lawfully by the Commonwealth are those colonial laws continued in force by section 108 of the Constitution. This was the majority view in *R. v. Bamford*.[12]

(iii) Section 52(1) only authorizes legislation with respect to places as places; no general legislative power is given to the Commonwealth. This view was expressed by Quick[13] and Wynes.[14]

(iv) 'Places' referred to in section 52(1) are territories in a political sense. The power of the Commonwealth to acquire land, as opposed to places, is conferred by sections 51(31) and 85, and the power to legislate with respect to them is given by section 51 and not by section 52(1). Higgins J. put forward this interpretation in *Commonwealth v. New South Wales*.[15]

(v) Although section 52(1) confers general power on the Commonwealth to legislate with respect to places acquired for public purposes, this does not necessarily exclude the general operation of State laws. State laws infringe the exclusive Commonwealth power only if they are laws with respect to places acquired by the Commonwealth, and they cannot be characterized as such if they are of general application throughout the State. Only if they are directed specifically to Commonwealth places do they intrude into the area of Commonwealth legislative power. This view was suggested by Professor Cowen.[16]

Professor Cowen believed that the appropriate choice lay between his own view and that of the majority in *R. v. Bamford* and that as

> *R. v. Bamford* stands as an almost isolated landmark in this area of the law, it should not be held to foreclose a different and more convenient solution . . . by the High Court. . . .[17]

Despite the disadvantages, it was the *Bamford* interpretation that the High Court adopted in *Worthing's* case.[18] Worthing fell and injured himself while working on a building project at the Richmond Air Force Base in New

[9] (1901) 1 S.R. (N.S.W.) 337.
[10] (1923) 33 C.L.R. 1.
[11] *Ibid.* 46.
[12] (1901) 1 S.R. (N.S.W.) 337 *per* Owen and Simpson JJ.
[13] Quick, *Legislative Powers of the Commonwealth and the States of Australia* (1919) 621-2.
[14] Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd ed. 1962) 159. In the fourth edition, 1970, this view has been reduced to a footnote, p. 116 n. 36, where the author cites as further support the *dicta* of Taylor J. in *Spratt* v. *Hermes* (1965) 114 C.L.R. 226, 263.
[15] (1923) 33 C.L.R. 1, 60.
[16] Cowen, *op. cit.* 189-91.
[17] *Ibid.* 191.
[18] (1970) 44 A.L.J.R. 230.

South Wales. He sued his employers, Roche Bros (the second named defendant), for breach of a statutory duty which was allegedly imposed on them by regulations made in May 1950, under the Scaffolding and Lifts Act 1912 (N.S.W.). The question before the High Court was whether that defendant was bound by the regulations. The defendant argued that the base was a place acquired by the Commonwealth for public purposes, that the State regulations were laws with respect to that place and consequently were an intrusion into the exclusive field of legislative power given by section 52(1) to the Commonwealth Parliament. The High Court, by a majority of four to three,[19] held that the State law, even though it was of general application throughout the State, was a law with respect to the base, and so was a law outside the scope of State legislative power. The regulations did not therefore bind Roche Bros.

In *The Queen v. Phillips*[20] the accused was charged with a criminal offence under section 184 of the Criminal Code 1913 (W.A.). The crime was alleged to have been committed within the boundaries of Pearce Air Force Base near Perth. Again the High Court held by a majority of four to three[21] that the State law had no application to Commonwealth places, and consequently that Phillips could not be charged under the Criminal Code. The essential difference between the two cases is that the former decided that section 52(1) excludes power in the State to make certain laws after the acquisition of the place by the Commonwealth, while the latter decided that similar laws were excluded from the date of acquisition, even though they had been validly made before the acquisition and had been in force up to the date of acquisition.[22]

Which State laws come within the scope of *Worthing* and *Phillips*? Although little was said in *Worthing* about colonial laws which have been repealed since federation and which are laws with respect to Commonwealth places, it was accepted[23] that the decision in *R. v. Bamford*[24] was correct. There it was held that section 108[25] of the Constitution had not continued the operation in the State of the colonial law in force at the time New South Wales became a State of the Commonwealth. In *Phillips* section 184 of the Criminal Code 1913 (W.A.) was substantially the same as a colonial law repealed in 1902. It was felt that this repeal 'had terminated any relevant operation of section 108',[26] and it may be supposed that had the colonial law been re-enacted in 1902 without any changes whatsoever, section 108 would not have operated to save it. It would have ceased to be a colonial law

[19] Barwick C.J., Menzies, Windeyer and Walsh JJ., with McTiernan, Kitto and Owen JJ. dissenting.

[20] (1970) 44 A.L.J.R. 497.

[21] Barwick C.J., McTiernan, Menzies and Owen JJ., with Windeyer, Walsh and Gibbs JJ. dissenting. Owen and McTiernan JJ. accepted *Worthing* as binding and relied on it in reaching their decisions. Windeyer and Walsh JJ. accepted *Worthing* as binding in relation to State laws made after the Commonwealth had acquired the land but not in relation to State laws made before the acquisition.

[22] The Court in *Worthing* specifically excluded from its decision the question of the effect of State laws made prior to acquisition; *Worthing* (1970) 44 A.L.J.R. 230 *per* Barwick C.J. 232.

[23] *E.g.* (1970) 44 A.L.J.R. 230 *per* Wideyer J. 246.

[24] (1901) 1 S.R. (N.S.W.) 337.

[25] '108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; . . .'

[26] (1970) 44 A.L.J.R. 497 *per* Barwick C.J. 498. Accord McTiernan J. 501 See also Menzies J. 501, Windeyer J. 505 and Owen J. 506.

on its repeal and would have become a State law on its re-enactment by the State Parliament.

The argument[27] that State laws are not 'with respect to' Commonwealth places if they are of general application throughout the State was firmly rejected. The Chief Justice said:

> I am unable to conclude that the only laws which were intended to be placed beyond the power of a State by the exclusive nature of the legislative power given by s. 52 were laws passed by the State operating only or specifically in . . . a place acquired by the Commonwealth for public purposes.[28]

For a State law to be invalid because it encroaches into the area of exclusive legislative power given by section 52(1) to the Commonwealth Parliament, it must be one that can be characterized as a law 'with respect to' a place that has been acquired by the Commonwealth for public purposes. It was held by the majority in *Worthing* that the safety regulations were laws with respect to the Richmond Air Force Base. Windeyer J. felt that a law with respect to the conduct of persons within a place, or transactions there, could be a law with respect to that place,[29] and Barwick C.J. held a similar view.[30] Menzies J. was content to state 'that a law for the government of a place is a law with respect to the place even if it be a law for the government of other places as well'.[31] The dissenting view of Kitto[32] and Owen[33] JJ., that section 52(1) intends the Commonwealth Parliament to have exclusive power to make laws on the subject matter of a place 'as a place' was rejected by Barwick C.J.[34] and by Walsh J.[35] By discerning a direct and close connexion between the building work and the place, Walsh J. was able to conclude that the regulations were laws with respect to the place.[36]

In *Phillips* there was greater uniformity in the opinions of the Court. Barwick C.J., with McTiernan and Owen JJ. (who had both dissented in *Worthing*), and Menzies J. accepted that case as conclusive on the question of whether the section of the Criminal Code, under which the accused was charged, was a law with respect to the Commonwealth place. It was held[37] that the State law was one regulating the conduct of persons in the place, and so was a law with respect to the place. As in *Worthing*,[38] Walsh J. declined to decide the full scope of the power conferred by section 52(1), but not

[27] This was Cowen's own solution, see *supra* n. 16.

[28] *Worthing* (1970) 44 A.L.J.R. 230 *per* Barwick C.J. 235. See also Menzies J. 242, Windeyer J. 247 and Walsh J. 251; *Phillips* (1970) 44 A.L.J.R. 497 *per* Gibbs J. 511.

[29] (1970) 44 A.L.J.R. 230, 247.

[30] *Ibid.* 235 'a law regulating conduct in a place is . . . a law with respect to that place within the meaning of s. 52 of the Constitution'.

[31] *Ibid.* 242.

[32] *Ibid.* 239. His Honour adopts a passage of Taylor J. in *Spratt v. Hermes* (1965) 114 C.L.R. 226, 263.

[33] His honour refers to a passage of Kitto J. in *Spratt v. Hermes* (1965) 114 C.L.R. 226, 258, (1970) 44 A.L.J.R. 230, 248.

[34] *Ibid.* 235.

[35] *Ibid.* 249.

[36] *Ibid.* 250. McTiernan J. characterized the regulations as being laws with respect to the regulation of safety on building sites and impliedly rejected any close connexion with acquired places: *ibid.* 237.

[37] (1970) 44 A.L.J.R. 497 *per* Barwick C.J. 498, McTiernan J. 500-1, Menzies J. 501-2, and Owen J. 507.

[38] (1970) 44 A.L.J.R. 230, 250.

before suggesting that the Western Australian law was not necessarily a law with respect to the Pearce Base.[39]

Of greater interest is the judgment of Gibbs J. His Honour felt bound by *Worthing* to say that section 184 of the Criminal Code could have been enacted validly by the Commonwealth because it had conferred on it, by section 52 of the Constitution, a general power to legislate with respect to places acquired by the Commonwealth. In other words, section 184 was a law with respect to Pearce Air Force Base.[40] As Gibbs J. dissented on the major issue of the case, the question of whether the District Court had jurisdiction to try the accused had to be considered by His Honour. Now the court's purported jurisdiction stemmed from the District Court of Western Australia Act 1969 (W.A.), an Act passed after the acquisition of the land at Pearce by the Commonwealth. Clearly *Worthing* would have required the question to be answered in the negative if the Act was a law with respect to the Pearce Base, for the Act had been passed after the acquisition. Gibbs J.[41] held that as the statute set up a court and invested it with State jurisdiction it was not one which dealt with a matter within the power given to the Commonwealth Parliament by section 52(1). The State Parliament could therefore pass the Act and so the District Court had jurisdiction to hear the case. However, at the time of the enactment of the statute there was no power remaining in the State to legislate with respect to conduct at the Pearce Base because of the prior Commonwealth acquisition. It is submitted that a State cannot legislate with respect to a court's jurisdiction on matters that are no longer within its legislative powers, as such a law would be one with respect to those matters.

The meaning of a 'place' acquired by the Commonwealth for public purposes was left open in *Worthing* and *Phillips*. It was generally conceded that a R.A.A.F. Base was a place within the meaning of section 52(1).[42] Barwick C.J. was prepared to define a place as 'an area of the earth's surface, of its subjacent soil or of its superincumbent air to the possession of which a right may by law be had or obtained'.[43] Windeyer J. felt that a place is a fixed locality and that a car or boat could not be a place. His Honour would not finally decide whether a place must be part of the earth's surface but indicated that while a stratum title would pass to the Commonwealth an upper storey of a building as a place, a leasehold interest or a temporary licence to occupy would not amount to acquisition in the relevant sense.[44] Walsh J.[45] expressly declined to decide the extent of the meaning of the term 'place', and while McTiernan and Kitto JJ.[46] were prepared to hold land to be a place they did not decide whether the term 'place' encompassed other objects as well as land.

In a similar fashion it was accepted without question that an acquisition of land for defence facilities was for 'public purposes'. Rather intriguingly

[39] (1970) 44 A.L.J.R. 497, 507-8. Walsh J. relied on the dissenting judgments in *Worthing*. As McTiernan and Kitto JJ. rejected in *Phillips* the views they had expressed in *Worthing* it is suggested that Walsh J.'s doubts will not be taken up in the future.

[40] *Ibid.* 511.

[41] *Ibid.* 513. Walsh J. adopted the reasons of Gibbs J. on this point, *ibid.* 510.

[42] *Worthing* (1970) 44 A.L.J.R. 230 *per* Barwick C.J. 233, McTiernan J. 237, Walsh J. 249; *Phillips* (1970) 44 A.L.J.R. 497 *per* Barwick C.J. 497.

[43] *Worthing* (1970) 44 A.L.J.R. 230, 233.

[44] *Ibid.* 244.

[45] *Ibid.* 249.

[46] *Ibid.* 237, 238.

Windeyer J. suggested that 'there may be places which are validly acquired by the Commonwealth for some public purpose not obviously embraced by any specific head of legislative power or the incidental power'.[47] His Honour gave no examples and did not elaborate.

More settled was the question of whether a place continued to be part of the territory of a State after acquisition or whether it became part of Commonwealth territory.[48] Although the question was not directly before the Court,[49] it was stated that acquired places remained part of State territory.[50]

The provision of the United States Constitution comparable to section 52(1), Article I, section 8, clause 17,[51] and cases concerning it, were considered by members of the Court.[52] These American authorities were rejected[53] as support for the argument that upon acquisition Commonwealth places cease to be part of the State because of a fundamental difference between the Australian and United States Constitutions. The latter embodied a compact between independent sovereign States which were able, as sovereign States, to cede their land to the Union. Indeed, for the Union to acquire State territory cession was required, and this accounts for the wording of clause 17. The Constitution of the Commonwealth on the other hand was an Act of the Imperial Parliament. The Commonwealth's ability to acquire land is grounded on the supremacy of the Imperial Parliament and not the notion of cession by sovereign States. The United States Supreme Court decisions referred to the High Court were thus not relevant.

To some extent this 'territory' issue was a red herring. *Worthing* and *Phillips* concerned who had power to legislate with respect to places acquired by the Commonwealth and the extent of the legislative power. In *Worthing*, once a State law made after the Commonwealth acquisition had been characterized as a law with respect to the place, it was inevitably held by the majority that the State law was an invasion of the exclusive legislative power conferred by section 52(1) on the Commonwealth and was of no effect.

The problem faced by the Court in *Phillips* was different. There it had to be decided whether a State law, which was generally considered to be one with respect to the conduct of persons at Pearce and so one with respect to the base, violated the exclusive legislative power of the Commonwealth. The doubt arose because the State law had been enacted before the acquisition by the Commonwealth. It was not disputed that the Commonwealth had power to legislate in terms of section 184 of the Criminal Code 1913 (W.A.); what was in question was the effect of the acquisition. Did the fact of acquisition render inoperative all State laws with respect to that place or did the acquisition merely give the Commonwealth Parliament exclusive

[47] *Ibid* 245-6.
[48] This is the first rationalization offered by Cowen, *op. cit.* 188.
[49] See Barwick C.J. in *Worthing* (1970) 44 A.L.J.R. 230, 232.
[50] *Ibid. per* Barwick C.J. 233, McTiernan J. 237, Windeyer J. 244, Walsh J. 251; *Phillips* (1970) 44 A.L.J.R. 497 *per* Barwick C.J. 498, 499, Gibbs J. 511-2.
[51] This clause empowers Congress: '[t]o exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines . . .'.
[52] *Worthing* (1970) 44 A.L.J.R. 230 *per* Barwick C.J. 233-4, Kitto J. 238, Menzies J. 241-2, Windeyer J. 244-5; *Phillips* (1970) 44 A.L.J.R. 497 *per* Barwick C.J. 499, Gibbs J. 511-2.
[53] *Supra* n. 52.

legislative power which would only render inoperative existing State laws when exercised? The view of the majority was succinctly put by Barwick C.J.:

> what becomes fully effective upon the acquisition, and as from its date, is not merely a power thereafter to pass laws with respect to the place acquired; what is attracted . . . as from that date is the exclusive legislative authority for all laws to operate in that place. At that moment, by virtue of the exclusiveness of the power given to the Commonwealth, the States . . . lose all legislative power, not merely the power to make a new law but the legislative power which could support the continued operation of an existing law in the place acquired.[54]

And further:

> no statutory provisions operating to regulate or control the conduct of persons in that place can have validity unless they emanate directly or indirectly from the [Commonwealth] Parliament, the possessor of the relevant exclusive legislative power.[55]

The dissenting judgments of Walsh and Gibbs JJ.[56] stressed that there is a distinction between provisions relating to powers and provisions relating to the operation of laws. Section 52(1) was, in Their Honours' view, only related to the legislative power of the Commonwealth. As it did not concern the operation and effect of laws made by the States before acquisition of the place by the Commonwealth it did not render these State laws inoperative in relation to places acquired by the Commonwealth. Hence section 184 of the Criminal Code continued in force in relation to acts committed within Pearce Air Force Base.

The significance of section 108 was considered in relation to this problem. On the one hand it was argued that

> its provisions do indicate clearly that, without it, colonial laws upon a matter within Commonwealth exclusive legislative power would not have continued in force in the territory of a colony once it became a State. In other words, it shows that it requires express constitutional authority to maintain, as the laws of a State, laws in force at the time when the power to make such laws becomes exclusive to the Commonwealth Parliament.[57]

As there was no such express constitutional authority in section 52(1) it was argued that the State law in question, section 184, lapsed when the Commonwealth acquired Pearce.

This contention was rejected by the dissenting judges. Windeyer J. felt it to be an excessively literal interpretation of the constitution;[58] Gibbs J. felt that section 108 had been inserted out of excessive caution and did not disclose any intention that State laws made after federation should be abrogated if they related to matters as to which the Commonwealth's power had become exclusive;[59] and Walsh J. agreed[60] with Gibbs J.

The third case dealing with places acquired by the Commonwealth for public purposes is *Stocks and Holdings*.[61] In 1951 a Planning Scheme

[54] (1970) 44 A.L.J.R. 497, 499.
[55] *Ibid.* 500.
[56] *Ibid. per* Walsh J. 508, Gibbs J. 511.
[57] *Ibid. per* Menzies J. 502. See also Owen J. 507, Barwick C.J. and McTiernan J. did not investigate the argument in detail.
[58] *Ibid.* 506.
[59] *Ibid.* 513.
[60] *Ibid.* 508.
[61] *Attorney-General for the State of New South Wales, etc. v. Stocks and Holdings (Constructors) Pty Limited* (1970) 45 A.L.J.R. 9.

Ordinance had been enacted in New South Wales which on its face purported to apply to the Randwick Rifle Range. It was held by the High Court that as the range was a place within the meaning of section 52(1) of the Constitution the Ordinance, if it was to be construed as being with respect to the land, did not have any effect and did not bind the Commonwealth as owner of the land.[62] Part of the range was sold in 1965 by the Commonwealth to the local council which later sold it to the defendant. The High Court was asked to decide whether, upon the transfer by the Commonwealth to the council, the Ordinance bound the council as owner. The argument that the Commonwealth's exclusive legislative power with respect to a place acquired for public purposes remained with the Commonwealth after it had disposed of the place, was rejected.[63] After transfer, the Commonwealth Parliament ceased to have any legislative power with respect to the ex-Commonwealth place.

Menzies J. was alone prepared to accept that the State could enact a valid law specifying places acquired by the Commonwealth, but having no operation with respect to such places until they ceased to be the property of the Commonwealth.[64] His Honour so interpreted the Ordinance. Such a view was rejected by other members of the Court because a State law of that nature would be one with respect to the place and would not be less of an infringement of Commonwealth exclusive legislative power because it operated only upon the abandonment of the place by the Commonwealth.[65] The consequence of the view of the majority was that if the construction of the Ordinance by Menzies J. was correct it was invalid. The Court was, however, prepared to avoid such a conclusion by not so interpreting the Ordinance. It was thus held, by four to one, that the Ordinance did not bind the Council as owner upon the transfer from the Commonwealth.[66]

Commonwealth and State[67] governments reacted to the decision in *Worthing* by procuring the enactment of statutes designed to counter the effects of this decision. The Commonwealth Places (Application of Laws) Act 1970 (Cth) came into force on 11 November 1970, and the relevant Victorian provision, the Commonwealth Places (Administration of Laws) Act 1970, on 1 February 1971.

[62] *Ibid. per* Barwick C.J. 10, McTiernan J. 11, Windeyer J. 15-6, Walsh J. 18. Menzies J. felt unable to read down the State legislation on the basis that State Parliament is presumed to have intended to legislate within its legislative powers, *ibid.* 13.

[63] *Ibid. per* Menzies J. 14, McTiernan J. 11, Windeyer J. 16.

[64] *Ibid.* 14.

[65] *Ibid. per* Barwick C.J. 10, Windeyer J. 16, Walsh J. 18. The Chief Justice adopted the reasoning of Walsh J. Note that Walsh J. later indicated that there may be some State laws, enacted while a place acquired by the Commonwealth is still owned by the Commonwealth, which are capable of having a valid operation with respect to that place after it ceases to belong to the Commonwealth. His Honour confined his earlier opinions to the State law in question. *Ibid.* 19.

[66] The final question considered by the High Court was whether a gazetted Interim Development Order was effective in binding the council and subsequent owners. This question was decided by interpreting the Local Government Act 1919 (N.S.W.), ss 342L and 342Y. The views of the Court are not here relevant.

[67] The writer is indebted to Mr M. Sexton for pointing out the existence of the State legislation and the unique provision of the Victorian Act which keeps the Act in force only until 31 December 1971. Other State Acts are: N.S.W., Act No. 80 of 1970; Western Australia, Act No. 88 of 1970; Queensland, Act No. 45 of 1970; South Australia, Act No. 64 of 1970. It seems Tasmania has not enacted complementary legislation, see Lane, 'The Law in Commonwealth Places—A Sequel' (1971) 45 *Australian Law Journal* 138, 144-5 n. 34.

The federal Act defines a 'Commonwealth place' in section 3 as

> a place . . . with respect to which the Parliament, by virtue of section 52 of the Constitution, has . . . exclusive power to make laws for the peace, order and good government of the Commonwealth.

It will be remembered that the High Court did not decide the full meaning of 'place' as used in section 52(1). This question has been neatly avoided by the Act; if a place is a 'Commonwealth place' it is governed by State law because of the operation of the Act; if it is not a 'Commonwealth place' within the meaning of the Act then it must be a State place where State law has always run.

The core of the Act is contained in section 4 which, both prospectively and retrospectively, applies to Commonwealth places State laws in force at any time that the place is a Commonwealth place. By section 7(i) State courts are invested with federal jurisdiction in all matters arising under the provisions of the Act.

The Victorian Act broadly follows the structure of the federal statute.[68]

In *Worthing,* those Judges who raised the possibility of Commonwealth assimilative legislation, such as the Commonwealth Places (Application of Laws) Act 1970, had no doubts that the Commonwealth Parliament was competent to pass such legislation under the power given by section 52(1).[69] It seems that the ability of the Commonwealth to legislate in this way was one factor which motivated the majority when it held the New South Wales regulations did not apply to Commonwealth places, thus revealing a void in Commonwealth legislation.

As has already been mentioned,[70] some members of the Court in *Stocks and Holdings* felt that a State law which purported to operate with respect to a place (held by the Commonwealth at the time of legislation) after the Commonwealth had disposed of the place, was itself a law with respect to that place at the time of its enactment. Such a law would be outside the legislative power of State Parliament because the grant of power to the Commonwealth contained in section 52(1) is exclusive. On this argument are not the Commonwealth Places (Administration of Laws) Act 1970 and other similar State statutes laws with respect to Commonwealth places?

It is of some relevance that when the Victorian Act was passed *Stocks and Holdings* had not been decided though it had been argued before the High Court. Section 15, which keeps the Victorian Act in force only until 31 December 1971 may have been formulated in the light of submissions made in that case on the expectation that they might be adopted by the Court. However, this is mere speculation.

[68] The purpose of the State legislation is discussed by Lane, *op. cit.* 144, where that writer argues that the Commonwealth cannot impose duties on State authorities or carry out State laws which, by virtue of the Commonwealth Act, apply as Commonwealth laws to places within the States acquired by the Commonwealth. The States' Administration of Laws Acts impose the duty of enforcing laws in Commonwealth places on State officials. Be that as it may, the possible invalidity of the State legislation (see *infra*) and the limited duration of the Victorian Act, make discussion of the need for complementary legislation unnecessary in this note.

[69] (1970) 44 A.L.J.R. 230 *per* Barwick C.J. 235, 236, Menzies J. 243, Windeyer J. 247.

[70] *Supra* n. 65.

In any case whether or not the State Acts are valid exercises of State legislative powers is of little practical importance so long as the Commonwealth Act remains in force.[71] It is submitted that all gaps in Commonwealth legislation revealed by the High Court have been remedied by statute and unless the Commonwealth Act can be challenged these gaps will be forever closed.

F. C. O'BRIEN

MOUNT ISA MINES LIMITED v. PUSEY[1]

Negligence—Nervous shock—Liability for damage—Foreseeability

The High Court had no difficulty in unanimously rubber-stamping the decision of the Queensland Supreme Court. The judgments, however, demonstrate the unsatisfactory nature of the law of negligence.

Two electricians employed by the appellant company negligently used a multimeter and were as a result horribly burned by an intense electric arc. The respondent, also employed by the company, was on the floor below as an assistant charge engineer. On hearing the noise on the floor above, he hastened there and assisted to an ambulance one of the electricians whom he found naked and 'just burnt up'. The man died nine days later. The respondent continued work without any apparent ill-effects for about four weeks, when he developed symptoms of mental disturbance diagnosed by psychiatrists as a type of schizophrenia. He was awarded ten thousand dollars damages for personal injuries caused by the appellant's negligence. This decision was affirmed on appeal by the Full Court of the Supreme Court of Queensland.[2] The High Court of Australia likewise affirmed the decision unanimously.

The appellant company claimed on appeal that it owed no duty of care since neither the precise kind of injury the respondent suffered nor, indeed, any psychological disturbance was reasonably foreseeable. Furthermore, it was submitted that the respondent's mental illness was not 'caused' by the appellant's negligence, but was essentially due to the respondent's abnormally sensitive nature.

Various judges described the respondent's precise illness in such circumstances as 'rare', 'rare and exceptional', and an experienced psychiatrist was quoted as saying that he had had only one case like it in eighteen years' practice. Despite a small rearguard action by the Chief Justice, who described the actual nervous shock suffered as 'rare but not unexpected', and therefore, presumably, foreseeable (but by a psychiatrist rather than the reasonable employer), the majority opinion of the High Court was clearly that the precise kind of nervous injury suffered was not foreseeable.

However, all five judges held that some class of psychosomatic, nervous shock was foreseeable, and that the respondent's illness belonged to that class. They then applied the well-established rule that there is liability if the precise form of injury falls into a class of injury that was foreseeable.[3]

[71] Professor Lane would argue otherwise, *op. cit.* 144; see *supra* n. 68.

[1] (1971) 45 A.L.J.R. 88. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer and Walsh JJ.

[2] [1970] Qd R. 1.

[3] *Chapman v. Hearse* (1961) 106 C.L.R. 112, 115. *Overseas Tankship (U.K.) Ltd v. Miller Steamship Co. Pty Ltd* [1967] 1 A.C. 617, 636 (*Wagon Mound (No. 2)*).