SECTION 51 (XXXVIII) OF THE CONSTITUTION

By
KEVEN BOOKER*

This article examines the interpretation of section 51 (xxxviii) of the Commonwealth Constitution. After considering the characterization problems presented by the section and the effect of constitutional limits, the author suggests the categories of laws that could be passed pursuant to the section. Mr Booker then argues that the first statute purported to be based on the section, the Coastal Waters (State Powers) Act 1980 (Cth), is not a valid exercise of the power but, nevertheless, the Act is valid under the external affairs power, section 51 (xxix).

I. INTRODUCTION

In *New South Wales* v. *Commonwealth (Seas and Submerged Lands Act* case) the High Court decided that State boundaries end at the low water mark.[1] This meant States lacked general legislative power over the first three nautical miles of coastal waters.[2] The Coastal Waters (State Powers) Act 1980 (Cth)[3] is a Commonwealth statute which confers power on State Parliaments to legislate for the first three nautical miles of offshore waters and beyond this region for some purposes.[4] The statute was passed in response to request and consent legislation enacted by each State Parliament.[5] The Act purports to rely on section 51 (xxxviii) of the Constitution which provides that:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to...(xxxviii). The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

There is no case law on section 51 (xxxviii) and the Coastal Waters (State Powers) Act 1980 (Cth) is the first Commonwealth statute to be based on it. Constitutional commentators largely ignored section 51 (xxxviii) after Quick and Garran concluded that it was difficult to see what power it conferred.[6] Interest in the placitum revived with the suggestion that it was a source of power to abolish appeals to the Privy Council[7] and recently it has been looked to as a general source of power to enable the Commonwealth to authorize the States to enact laws repugnant to Imperial legislation.[8]

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*LL.B (Hons) (W.A.); Lecturer in Law, the University of New South Wales. The author wishes to thank Professor Garth Nettheim and Mr George Winterton for their comments on an earlier draft of this article.

This article examines the meaning of section 51 (xxxviii). It is submitted that the placitum conferred extra power on the Commonwealth Parliament at federation and that its potential as a head of power increased as a result of the adoption of the Statute of Westminster 1931 (Imp.).[9] However, it is argued that the Coastal Waters (State Powers) Act 1980 (Cth) cannot be characterized as a section 51 (xxxviii) law, although it is a valid law with respect to external affairs.

As with all section 51 heads of legislative power there are two distinct problems in deciding whether a law is a valid section 51 (xxxviii) law. First, you must ascertain whether the law can be characterized as coming within the words of the placitum. Secondly, because section 51 is expressed to be subject to the Constitution, it is necessary to establish that a law which fits the required description does not breach other constitutional limits.

II. THE PROBLEM OF CHARACTERIZATION

The reference in section 51 (xxxviii) to the Federal Council of Australasia is puzzling. As the Federal Council of Australasia Act 1885 (Imp.) was repealed by covering clause 7 of the Commonwealth Constitution, the Council did not exist and therefore did not have any legislative powers at the establishment of the Constitution.[10] If the words are interpreted to mean the powers which the Council could exercise just prior to the Constitution coming into effect, the words are redundant as those powers were given to the Commonwealth Parliament in other section 51 placita[11] and those powers could have been exercised by the United Kingdom Parliament. Although the words referring to the Federal Council may assist in ascertaining the intention or purpose behind the inclusion of placitum (xxxviii) in the Constitution, those words may be ignored when delineating the powers with respect to which the Commonwealth may legislate.

Sections 51 (xxxvi), (xxxvii) and (xxxix) refer to "matters". If section 51 (xxxviii) provided that the Commonwealth could pass laws with respect to "matters" on which only the United Kingdom Parliament could pass laws, it would mean the Commonwealth could enact laws creating rights and imposing duties with respect to those matters. But the placitum provides that the Commonwealth law must be a law with respect to the exercise of power, as distinct from a Commonwealth statute which itself is *in* exercise of the power.[12] Because a threshold condition for the placitum coming into operation is a lack of power existing in any body or person other than the United Kingdom Parliament, the Commonwealth law must be one which can control not only the exercise of legislative power but also grant the power or authorize its exercise (unless it is a law controlling the exercise of power by the Parliament of the United Kingdom). A law authorizing another legislative body to exercise power is clearly a law with respect to the exercise of power. The words do not indicate to whom this authority may be given. At the very least the Commonwealth Parliament must be able to authorize the State Parliaments to pass laws in exercise of the relevant legislative power: the State Parliaments are the bodies who must request or concur in the use of section 51 (xxxviii); the Constitution divides legislative power between the Commonwealth and State Parliaments; and

one of the threshold conditions for the use of section 51 (xxxviii) is a lack of State legislative power.

An authorization statute can be regarded as a Commonwealth law in exercise of a relevant power of the United Kingdom Parliament by classifying the United Kingdom power as the power to extend the legislative power of a colonial legislature. Apart from this way of describing an authorization statute, it is not clear whether Commonwealth laws in exercise of United Kingdom powers fit the description required by the placitum. If the Commonwealth Parliament can authorize itself, then construing the words as being limited to laws conferring and controlling the exercise of legislative power would merely require an enabling statute before the Commonwealth could pass laws in exercise of the power. It is submitted that the broad interpretation which has been given to the words "with respect to" in the opening passage of section 51[13] allows placitum (xxxviii) to be read as giving general power to the Commonwealth to pass its own laws in exercise of powers which could be exercised by the United Kingdom Parliament at federation, as well as power to enact laws authorizing the exercise of legislative power. The words of the placitum will bear this construction and as the other thirty-eight placita in section 51 empower the Commonwealth Parliament to enact laws in exercise of powers over subject matter, people or for specified purposes, the statutory context supports this additional interpretation. Further, if section 51 (xxxviii) is read as meaning that the Commonwealth laws are confined to laws empowering or controlling other legislative bodies, the mechanism seems clumsy. It would have been simpler to put a provision in the Constitution authorizing State Parliaments to exercise the relevant legislative power, provided the Commonwealth concurred.

For the remainder of this analysis it will be assumed that both Commonwealth laws in direct exercise of powers which only the United Kingdom Parliament possessed on 1 January 1901, and laws authorizing the exercise of those powers by other legislative bodies fit the words of the placitum. Although an authorization law can be regarded as a special case of a law in exercise of a United Kingdom power, for analytical purposes the distinction between these two types of Commonwealth statutes will be maintained for the remainder of the article.

Describing the content of the placitum in terms of power that only the United Kingdom Parliament possessed makes section 51 (xxxviii) sound like a paradox. It should be noted that valid section 51 (xxxviii) laws are not themselves laws which only the United Kingdom Parliament could enact, although the legislative effect may be identical to an Imperial law and *apart from section 51 (xxxviii) itself*, the power could have been exercised only by the United Kingdom Parliament at the establishment of the Constitution.

The word "Commonwealth" is used in two main senses in the Constitution. It may mean the body politic defined in covering clause 6 or it may be a reference to the central organs of government.[14] Both usages occur in section 51.[15] Obviously, "Commonwealth" in placitum (xxxviii) is not a reference to the federal legislative, judicial or executive institutions. Even reading the word as meaning the body politic leaves room for more than one interpretation of "exercise within the Commonwealth...of any power." Four interpretations have been put forward by commentators:

(a) the words have the same meaning as "legislative powers with respect to the affairs of the territory of the Commonwealth, or any part of it" and thereby impose a limit on the subject *matter* of the United Kingdom powers conferred;
(b) the words impose a limit on the *identity* of the institution exercising power;
(c) the words impose a *territorial* limit on the *location* of the body exercising power;
(d) the words impose a *territorial* limit on the *operation of laws* passed in exercise of a relevant United Kingdom power.

Interpretation (a) depends on the intention behind a drafting change made to the first version of what eventually became section 51 (xxxviii).[16] The relevant paragraph in the 1891 draft Bill provided that the Commonwealth Parliament could legislate with respect to:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States concerned, and any *Legislative powers with respect to the affairs of the territory of the Commonwealth, or any part of it,* which can at the date of the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.[17]

The emphasized words were later omitted and the single word "power" was substituted.[18] The words were considered to be surplusage because all Commonwealth laws had to be for the peace, order and good government of the Commonwealth.[19] The words were not regarded as repeating what was already stated elsewhere in the paragraph. Hence, interpretation (a) must be rejected.

Interpretation (b) was suggested by Professor Zines.[20] The argument is that the words "within the Commonwealth" require the body exercising power to be either the Commonwealth Parliament or a State legislature because these bodies are the legislative institutions of the body politic. To the contrary, it can be argued that where it was thought necessary to refer to institutions in the placitum this was done expressly. It is highly unlikely that some danger of authorizing a foreign legislative body was apprehended. Further, the authorization of a foreign parliament is probably unconstitutional for another reason.[21]

This leaves interpretations (c) and (d) suggesting *territorial* limits. When the word "Commonwealth" is used to refer to the body politic it sometimes carries with it the connotation of the physical limits of the political units which comprise the body politic. A variety of phrases are used in the Constitution to grant or limit power by reference to events inside or outside a geographical area called the Commonwealth.[22] The phrase "within the Commonwealth" in section 101 and in the marginal note to section 92, and the phrase "within any part of the Commonwealth" in section 126 clearly mean inside the territorial limits of the Commonwealth. To interpret "within the Commonwealth" in section 51 (xxxviii) in the geographical sense is a natural reading and it is an interpretation which is consistent with usage elsewhere in the Constitution.

If the limit imposed is territorial, interpretation (c) suggests that the placitum requires that the body exercising legislative power, whatever its identity, be located within the Commonwealth when it so exercises power.[23] This is a trivial interpretation.[24] Considering that the Commonwealth Parliament and the Parliaments of the States (the bodies likely to be exercising the power and, probably, the only

bodies which could exercise the power) operate within the Commonwealth, there would be no point in inserting such a requirement.[25]

The second territorial interpretation is to read "exercise within the Commonwealth" as restricting the realm of operation of the law. The purpose of section 51 (xxxviii) was to add to the list of legislative powers the power to make laws on subject matter otherwise outside the legislative powers of the Commonwealth (and also beyond State legislative competence) by reference to powers only the United Kingdom Parliament could exercise on 1 January 1901. The Imperial Parliament exercised power over matters in many parts of the world. In the context of a section listing legislative powers for a colonial legislature, some words were needed to indicate that the powers of the Imperial Parliament were picked up only insofar as was necessary to fill a possible gap in legislative power within the federation and to ensure that the placitum was not construed as an exception to the rule that colonial legislatures lacked general legislative power over extra-territorial events. If the placitum simply read "the exercise of any United Kingdom power" it would have granted power which was not needed and which the Imperial authorities would probably have been unwilling to hand over.

It is submitted that "exercise within the Commonwealth" confines the operation of any Commonwealth statute in exercise of a relevant power, or of any State law passed pursuant to a Commonwealth authorization statute, within the geographical limits of the Commonwealth. To put this in another way, the placitum will not support any extra-territorial laws. If, as submitted above, the purpose behind the inclusion of the words "within the Commonwealth" was expressly to discount the interpretation of section 51 (xxxviii) as a grant of general power to legislate extra-territorially, the result has been to impose a more stringent limit than the constitutional limit on extra-territorial legislative competence. This is because a colonial legislature can pass laws operating outside the boundaries of the colony if there is a sufficient nexus to things within the colony.[26] This result would not have been apparent when the Constitution was drafted because the nexus doctrine dates from *Croft* v. *Dunphy*.[27] When the Constitution was drafted, confining the operation of laws to the Commonwealth would have been considered equivalent to providing that the United Kingdom powers to legislate outside colonial boundaries were not included.

Textual considerations support interpretation (d). Placitum (xxxviii) seems to contemplate that at least one State will be directly concerned, otherwise there could not be a request or concurrence. An obvious way in which a State is directly concerned is with the operation of the law in the State. Further, section 101 uses the words "within the Commonwealth" in the context of a grant of power in relation to the operation of laws.

As the boundaries of the States end at the low water mark, the above analysis means that section 51 (xxxviii) cannot support laws operating offshore. The line where the external affairs power is called into play to support laws on things outside Australia is also the line for deciding whether a law has an extra-territorial operation. If interpretation (d) is correct, placitum (xxxviii) can only be used to enact laws governing the offshore region if "Commonwealth" in the placitum extends beyond the boundaries of the federated States. The word is sometimes

construed to mean the States and the Commonwealth territories including external territories,[28] but in no case has "Commonwealth" been construed to mean all areas subject to Commonwealth sovereignty. Even if the offshore zone were an external territory or were converted into an external territory,[29] the author's view is that it is outside the Commonwealth for section 51 (xxxviii) purposes. All commentators who have construed the placitum as meaning that the operation of law is confined to a geographical area have assumed that this was the area bounded by the States.[30] Considering the ambit of Commonwealth legislative power as being subject to all the prohibitions it was subject to at the establishment of the Constitution, the geographical areas in which a gap in State and Commonwealth legislative power would occur, and in which section 51 (xxxviii) could be used, would all lie within the States. If the Commonwealth could not enact a law operating in a non-State area subject to Commonwealth sovereignty because the Constitution prohibited the law, section 51 (xxxviii) would have been subject to the prohibition.[31] This result suggests that "Commonwealth" means federated States in this context.

If the Commonwealth statute by its terms operates within a State, or authorizes or controls the enactment of laws which will operate in a State, then that State would be "directly concerned" for the purpose of the placitum. Beyond that obvious interpretation it is difficult to construe "directly concerned" in the abstract. Likewise, it is hard to say precisely what "at the request or with the concurrence of the Parliaments" means, though undoubtedly State legislation[32] requesting the enactment of a Commonwealth statute in a particular form is sufficient, if not necessary.[33]

Assuming a Commonwealth law meets the criteria discussed so far, it is necessary to decide whether it is with respect to a legislative power which only the United Kingdom Parliament could have exercised at federation. As the Parliament of the United Kingdom could in theory have exercised any legislative power and as no body other than the State and Commonwealth Parliaments (and their delegates) had legislative power over Australia, this is equivalent to asking what powers neither the Commonwealth nor the State legislatures could exercise. A law repealing the Constitution or prohibiting all interstate trade is one which only the United Kingdom Parliament could have passed in 1900. These laws can be characterized as coming within section 51 (xxxviii), but the laws would not be valid Commonwealth laws because they would be prohibited by section 128[34] and section 92 of the Constitution respectively. The class of laws which can be characterized as being within section 51 (xxxviii) is large, but the class of valid laws which can be enacted in reliance on the placitum is small. This is a consequence of the constitutional limits to which section 51 (xxxviii) is subject.

III. THE EFFECT OF CONSTITUTIONAL LIMITS ON SECTION 51 (XXXVIII)

Section 51 placita are subject to: express prohibitions in other sections of the Constitution; limits implied from the nature of the Constitution; and limits imposed by the wording of some section 51 placita.[35] Prior to the Statute of Westminster Adoption Act 1942 (Cth) the Commonwealth Parliament was a colonial legislature

subject to two additional limits: extra-territorial legislative incompetence; and repugnancy.

The rule that a colonial legislature did not have general power to enact extra-territorial laws was not contained in any Imperial statute, but grants of legislative power to colonial legislatures were construed as being limited to making laws only for the colony.[36] This rule was applied to Commonwealth statutes.[37] For Commonwealth law this limit was expressly removed by section 3 of the Statute of Westminster 1931 (Imp.). Extra-territorial legislative incompetence did not mean colonial legislation could not have any operation outside the boundaries of the colony. It meant the colony only had plenary legislative power within its boundaries. A colonial law could validly apply extra-territorially if there was a sufficient nexus between the extra-territorial event being regulated and the peace, order and good government of the colony.[38]

The repugnancy limitation arose from section 2 of the Colonial Laws Validity Act 1865 (Imp.). While this limitation applied, the Commonwealth Parliament could not enact laws repugnant to any provision in an Imperial statute applying in Australia by paramount force.[39] Since the words of section 51 (xxxviii) refer to powers which only the United Kingdom Parliament could exercise at the establishment of the Constitution, it has been argued that the placitum was a *pro tanto* repeal of section 2 of the Colonial Laws Validity Act 1865 (Imp.).[40] This interpretation would have some force if, prior to the Statute of Westminster, the Commonwealth Parliament otherwise lacked power to enact any valid laws based on section 51 (xxxviii).[41] The doctrine that a section of the Constitution may reveal an intention to repeal an earlier Imperial statute[42] has never been applied to override section 2 of the Colonial Laws Validity Act 1865 (Imp.). If a *pro tanto* repeal of that section was intended, a very awkward form of wording was chosen. It seems unlikely that it was intended to give placitum (xxxviii) this dramatic effect.

The repugnancy limit was removed in relation to the Commonwealth Parliament by the Statute of Westminster 1931 (Imp.) section 2, but State Parliaments remain subject to it. State Parliaments also lack general power to legislate extra-territorially and are subject to express and implied prohibitions imposed by the Commonwealth Constitution.

It is submitted that the effect of the constitutional limits to which Commonwealth legislative power was subject prior to the Statute of Westminster was to prevent the Commonwealth Parliament from using section 51 (xxxviii) to authorize other bodies to enact laws.[43] The Commonwealth Parliament could not authorize a State Parliament to breach any express or implied limit which the Commonwealth Constitution imposes on State legislative power. Similarly, to authorize a State Parliament to enact laws repugnant to Imperial statutes would itself have been repugnant to particular Imperial statutes or to section 2 of the Colonial Laws Validity Act 1865 (Imp.). On the view taken above as to the meaning of "within the Commonwealth", a Commonwealth statute which authorized a State Parliament to enact laws having an extra-territorial operation would be eliminated at the characterization stage. Even if that view is not correct, such a law would have been repugnant to the various Imperial statutes which granted legislative power to the States subject to the extra-territorial incompetence rule. That is, the position would

be the same as if those statutes expressly prohibited general State legislation from having an operation beyond State boundaries.

It may be that section 51 (xxxviii) is to be read, as a matter of characterization, as meaning that the powers can be exercised only by either the Commonwealth or State Parliaments, but it does not say this expressly. Even if it is not implicit in the wording of the placitum it is surely implicit in the federal structure that only the State and Commonwealth Parliaments will possess general legislative powers (apart, of course, from the Imperial Parliament.)[44] This is not to be confused with delegation of legislative power to a subordinate body. If the Commonwealth Parliament can enact laws in exercise of the United Kingdom powers, then it can delegate this law making function in the same way that it can delegate under other placita. Again, if the Commonwealth Parliament authorizes a State Parliament to exercise legislative powers, when the State Parliament enacts statutes in pursuance of this authorization it can delegate, for example, a regulation making power. However, in neither case is there an analogy with the authorization of some new Assembly or some foreign Assembly to act as if it had a status equivalent to the Commonwealth Parliament or a State Parliament. Of course, one foreign Parliament, the United Kingdom Parliament, possessed power to legislate for Australia. It is submitted that a basic constitutional limitation prevents section 51 (xxxviii) from being used to control the exercise of power by the Westminster Parliament. Considering that the United Kingdom Parliament cannot bind itself,[45] the Commonwealth Constitution, which is section 9 of an Imperial statute, cannot be interpreted as giving the Commonwealth legislature power to fetter the power of the United Kingdom Parliament.[46]

If, prior to the Statute of Westminster 1931 (Imp.), section 51 (xxxviii) could not support valid laws authorizing or controlling the exercise of powers which only the United Kingdom Parliament could exercise at the establishment of the Constitution, could the Commonwealth Parliament enact valid laws in exercise of such powers? Assume the Commonwealth and the States lacked legislative power and wished to use section 51 (xxxviii) to enable the Commonwealth Parliament to enact a law creating rights and imposing duties with respect to some subject matter. It is submitted that there are two kinds of laws which are not cut down by express or implied constitutional prohibitions or by the repugnancy of extra-territorial limits. It is only where lack of Commonwealth legislative power arises solely from the lack of a head of power that a valid section 51 (xxxviii) law is possible.

The first kind of law is a Commonwealth statute giving State laws an operation outside the State but within Australia. A Victorian law purporting to operate in New South Wales has an extra-territorial operation just as much as it would have if it was operating out to sea off the coast of Victoria. The Commonwealth Parliament could not give its statutes an extra-territorial operation prior to the Statute of Westminster, but extra-territorial for the Commonwealth Parliament means beyond Australia. Something can be extra-territorial for a State yet still be within Australia. It is submitted that the Commonwealth Parliament could use section 51 (xxxviii) to enact a statute giving, for example, Victorian law an operation in New South Wales. A law which gave all Victorian legislation on firebrigades an extra-territorial operation in New South Wales would be a law which does not come within any other

Commonwealth head of power, it would be beyond Victorian legislative power, it would not contravene any express or implied prohibition in the Commonwealth Constitution, it would not be repugnant to any Imperial legislation and, as federal law, it would not have an extra-territorial operation. The law would operate within the Commonwealth, hence, assuming the request/concurrence requirement is also met, it would be a valid section 51 (xxxviii) statute. That is, although the Commonwealth Parliament could not, at that time, have used placitum (xxxviii) to authorize the Victorian Parliament to enact Victorian laws having an operation in New South Wales, it could have extended the operation of Victorian laws into New South Wales.

The second possibility arises from a notional extra-territorial limit on State legislative power. For some purposes it is necessary to think of the Commonwealth as a notional territory subject to federal law, and with the State Parliaments lacking power with respect to that territory in the same way that, for example, Victoria lacks legislative power to deal with matters which touch and concern only New South Wales.[47] The Victorian Parliament does not have power to enact a law designating a statutory firefighting corporation as being part of the Crown in right of New South Wales. Likewise, it could not make the corporation part of the Crown in right of the Commonwealth and nor could any other State Parliament. Yet, the Commonwealth Parliament could not enact a law setting up a firebrigade corporation operating within a State because it lacks a relevant head of power. It may be able to do this in a limited way under some heads of power,[48] but it has no general power over fire-fighting brigades. The respective reasons for the lack of Commonwealth legislative power and State legislative power in this example are quite different, but the combined effect is to create a situation in which section 51 (xxxviii) could be used. Although the same result might be achieved by other means, for example, reference of power over firebrigades or, perhaps, State legislation authorizing the Crown in right of the Commonwealth to register a firebrigade unit under State law, that is not to the point. In conclusion, in this second example, at the establishment of the Constitution the Parliament of the United Kingdom could have enacted a law which created a Commonwealth firebrigade corporation and made that corporation part of the Crown in right of the Commonwealth. The State Parliaments could not validly enact such a statute and the Commonwealth lacked a head of legislative power. It follows that, if, as assumed here, section 51 (xxxviii) permits the Commonwealth Parliament to enact laws in exercise of the relevant United Kingdom powers, a State could request or concur in, the passage of such a Commonwealth statute. This analysis applies in any situation where the Commonwealth Parliament lacks a head of power and a State Parliament cannot legislate because the subject matter does not touch and concern the State but only the Commonwealth considered as a national territory.

IV. CHANGING THE CONSTITUTIONAL LIMITS: THE EFFECT OF THE STATUTE OF WESTMINSTER 1931 (IMP.)

The Statute of Westminster 1931 (Imp.) did not diminish Commonwealth legislative power and the two kinds of statutes which could have been enacted,

pursuant to section 51 (xxxviii), prior to the Statute of Westminster 1931 (Imp.) remain within that power.

The Statute of Westminster 1931 (Imp.) did not change the words of section 51 (xxxviii) and their connotation was frozen at 1 January 1901. The effect of the statute was to increase the potential number of laws that could be passed pursuant to section 51 (xxxviii) by freeing the Commonwealth Parliament from the repugnancy limit imposed by section 2 of the Colonial Laws Validity Act 1865 (Imp.). With respect, the assertion by Professors Lumb and Ryan that an application of the maxim *contemporanea expositio* prevents the Statute of Westminster from having this effect,[49] is incorrect. The lifting of the repugnancy limit has the same significance for all placita. The process of characterization is controlled by the maxim *contemporanea expositio* but this does not change the effect of removing a constitutional limit which lies outside section 51. For example, if section 92 was deleted from the Constitution the size of the potential class of laws that could be enacted pursuant to section 51(i) would increase without any alteration in the connotation of the words "Trade and commerce...among the States" in section 51(i).

An example of a section 51 (xxxviii) law which would now be valid is a Commonwealth statute which authorizes a State Parliament to enact laws repugnant to Imperial statutes applying in the State by paramount force.[50] The Commonwealth authorization statute cannot be challenged for repugnancy and State laws passed under the Commonwealth authority would be valid despite the fact that section 2 of the Colonial Laws Validity Act 1865 (Imp.) still applies to the State Parliaments. That is, the Commonwealth law is not only immune from challenge on the basis of repugnancy but is also the dominant law.[51] Section 106 of the Commonwealth Constitution is not an obstacle.[52] Although both section 51 and section 106 are expressed to be subject to the Constitution, the heresy that sections 106 and 107 require a reading down of federal legislative power was scotched in the *Engineers* case.[53] The repugnancy prohibition would cease to apply to the State to the extent of the inconsistency with the Commonwealth statute. Three State Parliaments have passed legislation requesting Commonwealth legislation to this effect.[54] Each State Act requires a Commonwealth statute which declares that no law made by the Parliament of the relevant State shall be void or inoperative on the ground that it is repugnant to the provisions of any existing or future Act of the Parliament of the United Kingdom. The only exceptions would be the Commonwealth of Australia Constitution Act 1901 (Imp.), the Statute of Westminster 1931 (Imp.) and section 5 of the Colonial Laws Validity Act 1865 (Imp.). It would be convenient for State Parliaments to possess this power. At present the repugnancy rule means State Parliaments lack control over their own statute books and this incapacity is exacerbated by the fact that it is not always clear whether an Imperial statute is in force by way of reception or by way of paramount force.[55]

Hence, section 51 (xxxviii) could be used to abolish remaining links with the Privy Council other than appeals on *inter se* matters where the High Court grants a certificate under section 74 of the Commonwealth Constitution.[56] The problem of the restriction imposed by the words "within the Commonwealth" (given that the Judicial Committee of the Privy Council is administered in London)[57] can be solved

by framing a law which operates on events in Australia. The law could prohibit any form of legal process being undertaken in Australia to engage in the process of appealing to the Privy Council. Alternatively, the law could prohibit the enforcement of Privy Council decisions in Australia.[58] The "abolition" law could be a Commonwealth law or a State law passed under a Commonwealth authorization statute. It has been suggested that the requirement that all States "directly concerned" request or concur may prevent the use of section 51 (xxxviii) to abolish Privy Council appeals unless all six States agree.[59] This argument depends upon a very broad interpretation of "directly concerned". Reading those words as meaning all States are directly concerned when they share a legal problem seems unwarranted on the wording of the placitum and produces the highly inconvenient result of preventing the use of section 51 (xxxviii) where the States share a legal problem but do not agree on its solution. It would be anomolous for Privy Council appeals to be abolished in some States and not in others but no insuperable legal difficulties would arise.[60] We already have a two tier system as federal matters cannot go on appeal.

The Statute of Westminster 1931 (Imp.) also freed the Commonwealth Parliament from the extra-territoriality limit. Because section 51 (xxxviii) laws must be with respect to the exercise of power "within the Commonwealth", on the view taken in this article of the meaning of those words,[61] removal of the extra-territoriality limit did not change the potential class of laws valid under section 51 (xxxviii).[62]

The general theory of the effect of possible changes in the Constitution on the scope of placitum (xxxviii) is straightforward. The imposition of new prohibitions may cut down the possible number of statutes valid under section 51 (xxxviii). If a prohibition on Commonwealth legislative power is removed and the Commonwealth Parliament already possesses a head of legislative power over the subject matter, section 51 (xxxviii) is not needed to enable the Commonwealth to legislate. If there is no head of power the size of the class of potential section 51 (xxxviii) laws increases, as illustrated above in the discussion on the effect of the removal of the repugnancy limit. If the Commonwealth gains a new head of legislative power or if a prohibition on State legislative power is lifted theoretically the position is unaltered, although it is unlikely that section 51 (xxxviii) would be used.

V. CHANGING THE STATUTE LAW: EFFECT OF THE REPEAL OF THE STATE REQUEST LEGISLATION

If a State Parliament passed a law requesting the use of section 51 (xxxviii) it could obviously repeal the request legislation prior to the Commonwealth Parliament enacting legislation acceding to the request. The State Parliament continues to possess the power to repeal its law after the Commonwealth statute (whether it is an authorization statute or a statute in exercise of power) has come into force. Section 51 (xxxviii) is an exclusive legislative power but the State repeal law does not encroach upon the Commonwealth domain. The State repeal law is a law on the subject of the State request or concurrence while the subject matter of the Commonwealth's exclusive power is the exercise of powers which only the Parliament of the United Kingdom could exercise at the establishment of the Constitution. The State law is not on the subject matter of the Commonwealth's

exclusive legislative power and there is nothing else in the Commonwealth Constitution to prevent the State Parliament from repealing its law. An analogous problem with regard to section 51 (xxxvii) has been the subject of considerable analysis.[63] It is submitted that the better view is that a State law referring power to the Commonwealth may be repealed at any time (subject to any manner and form limitation in the State Act), but even if the opposing view is correct, it does not dictate any analogous conclusion for section 51 (xxxviii).

Although a State Parliament can repeal its request legislation after the Commonwealth has passed a law acceding to the request, the repeal has no effect on the validity of the Commonwealth statute. The State request legislation is not the basis of Commonwealth legislative power, it is merely a condition precedent to the use of this head of section 51, and if the State request law is in force when the Commonwealth legislates the condition precedent is satisfied. The situation is analogous to that which arises under other sections requiring State consent such as sections 51 (xxxiii) and (xxxiv), 111, 123. By way of contrast the State reference statute under section 51 (xxxvii) defines the nature of the Commonwealth power and if it can be repealed while the Commonwealth law based on it is still in force, the repeal would prevent the Commonwealth law having any further force.[64]

VI. CHANGING THE STATUTE LAW: CAN THE COMMONWEALTH PARLIAMENT REPEAL ITS SECTION 51 (XXXVIII) LAW?

The problem is whether the Commonwealth Parliament can repeal its section 51 (xxxviii) law without the request or concurrence of the State Parliaments which originally requested its enactment.[65] If the statute which is characterizable as being within placitum (xxxviii) can also be a valid law under some other head of power, that other head of power can be the source of power to repeal. This possibility can arise because the Commonwealth Parliament can pass laws now which it did not have the power to pass at the establishment of the Constitution. For example, if the Coastal Waters (State Powers) Act 1980 (Cth) is a valid law with respect to external affairs,[66] then a Commonwealth statute repealing that Act can also be regarded as a valid section 51 (xxix) law. This is true even if section 51 (xxxviii) is an alternative source of validity for the Coastal Waters (State Powers) Act 1980 (Cth) as there is nothing in the wording of placitum (xxxviii) to indicate that it is to operate as a limit on the scope of other heads of power in section 51.

If section 51 (xxxviii) is the only source of power to enact the relevant legislation the repeal problem is more difficult. Because section 51 (xxxviii) is the source of power to enact the law, it does not follow that a Commonwealth statute which repeals the law can only be valid if it comes within section 51 (xxxviii). It is possible for a head of power to support a repeal law even though it could not have supported the original enactment. For example, the incidental power can be used to pass a law to remove a statute from the statute books where that statute has been declared void for lack of legislative power — the declaration does not remove the statute from the statute books. Again, the concept of legislative power may carry with it the inherent power to repeal any statute passed in reliance on it. If this is true of Commonwealth legislative power, the Commonwealth would possess legislative power to repeal any

of its statutes unless the Constitution expressly forbids such repeal or expressly imposes a manner and form limitation on repeal.[67] Even if there is no such inherent repeal power for all placita it is arguable that it is to be implied in the case of section 51 (xxxviii) laws as that placitum is defined in terms of powers exercisable by the Parliament of the United Kingdom and that Parliament possesses the power to repeal any of its own statutes. The possession of a repeal power is necessary to enable the Commonwealth Parliament to stand in the shoes of the United Kingdom legislature.

The better view is that after the Commonwealth legislature passes a section 51 (xxxviii) law pursuant to a State request, or with State concurrence, then either the incidental power allows the Commonwealth to repeal its law or the repeal power is implicit in the grant of legislative power. If there is no other source of power to enact the law and if there is no incidental or implied repeal power, the Commonwealth statute could not be repealed unless the State request/concurrence mechanism of section 51 (xxxviii) was invoked. To rely on section 51 (xxxviii) as the source of power to repeal requires construing the Commonwealth law repealing the original Commonwealth Act as a law with respect to the exercise of power which only the United Kingdom Parliament could exercise, even though the Act being repealed is not a law which only the United Kingdom legislature could enact.

If the State request/concurrence mechanism of section 51 (xxxviii) can be used to support a Commonwealth repeal law, the original State request or concurrence may suffice. The State request legislation could, it is submitted, be in sufficiently general terms to enable the Commonwealth to enact and repeal laws on some subject matter. But this argument is not open where, as with the recent offshore settlement, the States request a Commonwealth law in a particular form. If the Commonwealth law required the request or concurrence of all the States because all the States were directly concerned, and if the request/concurrence mechanism has to be invoked anew to authorize a repeal of the Commonwealth statute, it seems that the request or concurrence of all the States would be necessary. In that situation it may be difficult for the Commonwealth Parliament to repeal its own law. Where more than one State has requested legislation but where the Commonwealth legislature could have acted on the request of one State to deal with the relevant problem of that State, a single Commonwealth Act which accedes to the multiple request would, presumably, be read as having a severable operation.

VII. THE VALIDITY OF THE COASTAL WATERS (STATE POWERS) ACT 1980 (CTH)

(i) As a section 51 (xxxviii) law

The Act purports to be based on section 51 (xxxviii). Its preamble declares:

> Whereas, in pursuance of paragraph (xxxviii) of section 51 of the Constitution of the Commonwealth, the Parliaments of all the States have requested the Parliament of the Commonwealth to enact an Act in, or substantially in, the terms of this Act: be it therefore enacted...

The critical section is section 5 which provides that:

The legislative powers exercisable from time to time under the constitution of each State extend to the making of —

(a) all such laws of the State as could be made by virtue of those powers if the coastal waters of the State, as extending from time to time were within the limits of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the coastal waters of the State;

(b) laws of the State having effect in or in relation to waters within the adjacent area in respect of the State but beyond the outer limits of the coastal waters of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the first-mentioned waters, being laws with respect to —

(i) subterranean mining from land within the limits of the State; or

(ii) ports, harbours and other shipping facilities, including installations, and dredging and other works, relating thereto, and other coastal works; and

(c) laws of the State with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the State, being laws applying to or in relation to those fisheries only to the extent to which those fisheries are, under an arrangement to which the Commonwealth and the State are parties, to be managed in accordance with the laws of the State.

Section 3 of the Act defines the "adjacent area in respect of the State" in terms of the boundaries set out in Schedule 2 of the Petroleum (Submerged Lands) Act 1967 (Cth). In the same section "coastal waters of the State" is defined as meaning the territorial sea within the adjacent area in respect of the State together with any other sea within the adjacent area which is on the landward side of the territorial sea. Section 4(1) provides that the limits of the territorial sea shall be the limits set under the Seas and Submerged Lands Act 1973 (Cth) or pursuant to any agreement between Australia and another country. Section 4(2) provides that if the limits of the territorial sea extend beyond three nautical miles, there will be no corresponding extension of the coastal waters of the State. In short, section 5(a) gives the States general legislative power over the first three nautical miles offshore; section 5(b) extends State legislative power over certain subject matters to water in the adjacent area but beyond coastal waters; and section 5(c) allows the States to pass laws with respect to fisheries in Australian waters beyond coastal waters pursuant to Commonwealth-State arrangements.

Because each State Parliament passed a statute requesting a law in the form of the Coastal Waters (State Powers) Act 1980 (Cth) and assuming these States statutes are in force when the Commonwealth Act is proclaimed, the request/concurrence condition precedent of section 51 (xxxviii) of the Constitution is satisfied.

It is submitted that the Act also satisfies the requirement that it it be a law with respect to the exercise of a power which on 1 January 1901, could be exercised only by the Parliament of the United Kingdom. In terms of the earlier analysis,[68] section 5 of the Coastal Waters (State Powers) Act 1980 (Cth) is a law authorizing State Parliaments to exercise legislative power as distinct from a Commonwealth law in exercise of power. The relevant power which the United Kingdom Parliament

possessed at that time and which the State and Commonwealth Parliaments did not possess was the general power to pass laws operating in the offshore region.

In the *Seas and Submerged Lands Act* case[69] the High Court decided that the Constitution froze the boundaries of the States and that those boundaries ended at the low water mark. It follows that the Parliaments of the States lacked general legislative power over each of the three offshore areas mentioned in section 5 of the Coastal Waters (State Powers) Act 1980 (Cth). That case also decided that the Commonwealth possessed general power to legislate for the offshore zone, but the judgments do not make it entirely clear what the powers of the Commonwealth were at the establishment of the Constitution. On one view taken in the *Seas and Submerged Lands Act* case, at least the first three nautical miles were under Commonwealth sovereignty and subject to Commonwealth legislative power at federation.[70] However, the generally accepted view is that the Commonwealth lacked general legislative power in that zone at that time.[71]

The external affairs power, section 51 (xxix), was not regarded as a general grant of power to legislate with extra-territorial effect. In contrast, the wording of section 51(x) necessitated construing that placitum as a grant of power to legislate extra-territorially on the subject of fisheries. "Beyond territorial limits" in that placitum has been interpreted to mean beyond the first three nautical miles.[72] There seems to be no reason why the Commonwealth Parliament could not have used section 51(x) to legislate to make arrangements with the States over the extent to which State law would control fisheries beyond three nautical miles. But it is not clear whether section 5(c) of the Coastal Waters (State Powers) Act 1980 (Cth) would have been within Commonwealth power at the establishment of the Constitution. If section 5(c) was within power at that time and if it is severable, it would be independently valid and the question of characterization as a section 51 (xxxviii) law would only arise for subsections (a) and (b). If it is not severable, then it is true to say that section 5 is a law which the Commonwealth could not have validly enacted on 1 January 1901 because it lacked the power to enact subsections (a) and (b) even if it possessed power to enact subsection (c).

The final characterization hurdle is the requirement that the Act be a law with respect to "the exercise within the Commonwealth of any power...". On the analysis given in this article, the Coastal Waters (State Powers) Act 1980 (Cth) is not a law satisfying the words "within the Commonwealth" because it is a law which authorizes State Parliaments to legislate for coastal waters, other parts of adjacent areas and for fisheries in Australian waters beyond State coastal waters. If the view that the words "within the Commonwealth" require the section 51 (xxxviii) law to be a law with respect to the operation of law within the boundaries of Australia is correct, the Coastal Waters (State Powers) Act is plainly not characterizable as a section 51 (xxxviii) law because it authorizes State Parliaments to pass laws operating offshore. It is a law with respect to the exercise of power beyond the Commonwealth, not "within the Commonwealth".

If the Coastal Waters (State Powers) Act 1980 (Cth) is classed as a law in exercise of the United Kingdom to authorize the State Parliaments to pass laws for the offshore zone, the "within the Commonwealth" requirement is still not met. The Commonwealth legislation is a law which has operative effect outside Australia. It

seems highly artificial to argue that the Commonwealth statute operates only in Australia though the State laws it authorizes operate offshore.[73] The requirement that a section 51 (xxxviii) law be a law with respect to the exercise of power within the Commonwealth is only satisfied in the case of the Coastal Waters (State Powers) Act 1980 (Cth) if the words "within the Commonwealth" do not impose a territorial limit on the operation of the relevant exercise of legislative power. The Coastal Waters (State Powers) Act 1980 (Cth) would be valid under section 51 (xxxviii) if "within the Commonwealth" refers to the location of the legislative body when it exercises the power, or to the identity of the legislative body as being one of the institutions exercising power within the federation.[74]

(ii) *Validity as a section 51 (xxix) law*

If the Coastal Waters (State Powers) Act 1980 (Cth) cannot be characterized as a section 51 (xxxviii) law it does not follow that it lacks a head of power. The fact that it purports to be based on that placitum is not decisive. Parliament may think that a law is based on one head of power when the correct position is that the law is value under some other head. It has already been suggested that section 5(c) of the Act could have been passed under section 51(x) of the Constitution. More importantly, all subsections of section 5 deal with the operation of law beyond the low water mark and therefore in areas external to Australia. In the *Seas and Submerged Lands Act* case three judges held that the Seas and Submerged Lands Act 1973 (Cth) was valid under section 51 (xxix) because it was a law with respect to things beyond Australia.[75] There seems to be no reason to doubt that this straightforward interpretation of the external affairs power will be followed in future cases. The Coastal Waters (State Powers) Act 1980 (Cth) is a law about things beyond Australia as it is a law extending State legislative power to offshore regions.

The Act can also be classified as a law with respect to State legislative power, a subject on which the Commonwealth lacks a head of power, but this classification does not deprive the law of its character as a law with respect to external affairs. Some cases have suggested that there is a characterization limit on the power of the Commonwealth to delegate its legislative power.[76] The argument would be that if the Commonwealth passed a law authorizing a State Parliament to exercise all the powers the Commonwealth can exercise under its external affairs power, this would not be a law on external affairs but an invalid law on the scope of State legislative power. In the language of Murphy J, this is an example of an argument which keeps the pre-*Engineers* ghosts walking.[77] Such a law is surely a law with respect to external affairs and a law with respect to State power. Even if there is a characterization limit on the power of the Commonwealth Parliament to delegate its legislative powers, surely that limit has not been exceeded in the case of the Coastal Waters (State Powers) Act 1980 (Cth). The Commonweath has not authorized the State legislatures to exercise *any* power the Commonwealth itself could exercise with respect to external affairs. Section 5(a) is limited to laws the State could otherwise make under its Constitution, and the subsection is confined to the extension of State legislative power over the first three nautical miles offshore. Subsections (b) and (c) allow the States to pass laws operating beyond three nautical miles but only in relation to limited subject matter and subject matter which is more likely to be of

State than national concern. If the legislation is regarded as a delegation of Commonwealth power under section 51 (xxix), only a small part of that power has been delegated.

If the Coastal Waters (State Powers) Act 1980 (Cth) can be characterized as coming within section 51 (xxix), (xxxviii) or both, the Act will be valid unless it violates some constitutional prohibition. The Act does not alter State boundaries so it does not breach section 123. The Act enlarges State legislative power but the Constitution does not expressly prohibit this. The Constitution contains an express State reference power in section 51 (xxxviii) but this should not be read as implying that the States cannot, in the absence of an express Commonwealth reference power, legislate on subject matters for which they have received the authority of the Commonwealth Parliament. The Constitution lists the legislative powers of the Commonwealth Parliament but it contains no list of State legislative powers and it does not freeze the extent of those legislative powers in the way it freezes the physical limits of the States.

If the offshore zone were a Commonwealth territory or a Commonwealth place it would be subject to exclusive Commonwealth legislative control. The Commonwealth Parliament could legislate to extend the operation of State *law* into the area, as federal law, but it could not extend State legislative *power* to cover the area.[78] The lack of State legislative power over the offshore region is not the result of the Constitution giving the Commonwealth Parliament exclusive legislative power but is due to the continuing colonial status of the State Parliaments. The Constitution does not say expressly that the Commonwealth Parliament cannot lift these colonial restrictions but neither does it expressly provide that the Commonwealth can do this. The question is whether such a lifting falls within at least one of the given heads of power and does not breach any other prohibition.

A possible ground of challenge arises from the words of section 5(a). It defines the legislative powers which the State Parliaments are authorized to exercise in terms of laws which could be made under the constitution of the State if the coastal waters were within the limits of the State. There are laws which a State Parliament can pass but which the Commonwealth cannot enact because of a prohibition in the Commonwealth Constitution. The general laws which a State Parliament will now be able to enact to operate in coastal waters will gain their authority from a Commonwealth statute. The statute is subject to prohibitions like section 116, and accordingly it cannot authorize a State Parliament to pass *any* law which that Parliament could pass if the coastal waters were within the limits of the State. Interpreted literally, section 5(a) is beyond power. The Commonwealth Parliament cannot bypass the prohibitions to which its laws are subject by enacting a law to authorize the States to, *inter alia*, pass laws which deal with the prohibited subject matter. Presumably, section 5(a) can be read down to avoid this problem, especially as section 7(c) expressly provides that nothing in the Act is intended to give any force or effect to a provision of a State law to the extent of any inconsistency with the Constitution of the Commonwealth.

Subject to the foregoing point, it is submitted that the Coastal Waters (State Powers) Act 1980 (Cth) is valid under section 51 (xxix). Alternatively, if the interpretation given in this article to the words "within the Commonwealth" is

incorrect, the Act is valid under both placitum (xxxviii) and placitum (xxix). This raises the question of why the request/concurrence machinery of section 51 (xxxviii) was invoked. If section 51 (xxxviii) were the only head of power on which to base an Act extending State legislative power offshore, and if that meant that the Commonwealth Parliament could not repeal the Act without a request to do so from the Parliaments of the States, the intention may have been to make it difficult to change the arrangements. Aside from the fact that this relies on a doubtful interpretation of section 51 (xxxviii), it simply has no relevance where the legislation is plainly valid under another head of power. The safeguards against change are political not legal. The Coastal Waters (State Powers) Act 1980 (Cth) does not provide the security an alteration of State boundaries would have provided.

VIII. CONCLUSION

As was noted by Isaac Isaacs in the debates at the 1898 Convention, section 51 (xxxviii) was a clumsy piece of drafting.[79] The repugnancy restraint operating on the legislative powers of the Commonwealth prior to the adoption of the Statute of Westminster severely curtailed the placitum's potential though, contrary to the Quick and Garran analysis,[80] some valid laws could have been based on it immediately after federation. Two classes of examples have been given above.

Three States have requested Commonwealth legislation authorizing their respective Parliaments to pass laws repugnant to Imperial statutes. The Commonwealth has possessed the power to use section 51 (xxxviii) to accede to such requests since the adoption of the Statute of Westminster.

It has not been easy to solve constitutional problems relating to the offshore zone using a constitution which was drafted when the problems were not foreseen. The zone is subject to Commonwealth sovereignty, yet it is not part of Australia and it is not an external territory. As a result of the Coastal Waters (State Powers) Act 1980 (Cth) the first three nautical miles of coastal waters will be subject to State legislative control. By force of the Coastal Waters (State Title) Act 1980 (Cth) the States will acquire title to their coastal waters. However, no State boundary has been altered and could not be altered without compliance with section 123. This immediate offshore area is not part of each State. The puzzles posed by section 51 (xxxviii) and the constitutional mysteries of the offshore zone have been brought together in the form of the question of the validity of the Coastal Waters (State Powers) Act 1980 (Cth).

The Act purports to be based on section 51 (xxxviii). After lying dormant for so long, placitum (xxxviii) has been called upon when not needed and asked to do something which it is highly doubtful it can do. The request/concurrence mechanism of section 51 (xxxviii) may be a useful part of the rhetoric of co-operative federalism, but, if the view taken in this article is correct, a law characterizable as being within section 51 (xxxviii) has not resulted. The validity of the Coastal Waters (State Powers) Act 1980 (Cth) rests on section 51 (xxix), the external affairs power. The *Seas and Submerged Lands Act* case created the problem and it provides the answer.

FOOTNOTES

1. (1975) 135 C.L.R. 337 *per* Barwick C.J., McTiernan, Mason, Jacobs and Murphy, J.J., Gibbs and Stephen J.J. dissenting. The majority also decided that the declaration in s.6 Seas and Submerged Lands Act 1973 (Cth) that sovereignty in respect of the territorial sea vested in the Crown in the right of the Commonwealth was valid. See R. D. Lumb, *The Law of the Sea and Australian Off-Shore Areas* (2nd ed., 1978) 69-76; P. Goldsworthy, "Ownership of the Territorial Sea and Continental Shelf of Australia: An Analysis of the Seas and Submerged Lands Act Case (State of New South Wales and Ors v. The Commonwealth of Australia)" (1979) 50 *A.L.J.* 175.
2. It did not mean that State legislatures had no power over the offshore zone. A State Parliament may legislate with extra-territorial effect providing the law it makes has a sufficient connection with the State. State laws applying offshore have been held valid on this basis: *Pearce* v. *Florenca* (1976) 135 C.L.R. 507, 512, 517, 522, 526-527. It may be difficult to determine whether there is a sufficient nexus: *Robinson* v. *West Australian Museum* (1977) 138 C.L.R. 283, 294, 303, 331, 341, 344. See generally R. D. Lumb, note 1 *supra,* 81-83; F. A. Trindade, "The Australian States and the Doctrine of Extra-territorial Legislative Incompetence" (1971) 45 *A.L.J.* 233. State power to legislate where there is a sufficient nexus is preserved by the Seas and Submerged Lands Act 1973 (Cth) s.16(b) and by the Coastal Waters (State Powers) Act 1980 (Cth) s.7(b).
3. To come into force on a date to be proclaimed. The Act was part of a package of legislation passed to give effect to a settlement negotiated between the Commonwealth and the States. For the political background see: Commonwealth Attorney-General, Senator P. Durack, "Offshore constitutional responsibility" (1979) 4 *Commonwealth Record* 834; "Offshore powers of the Commonwealth" (1979) 4 *Commonwealth Record* 963; Note: "Distribution of offshore constitutional responsibilities between the Commonwealth and States" (1979) 53 *A.L.J.* 605; Note: "The Offshore Constitutional Settlement" (1980) 54 *A.L.J.* 517. The principal cognate Commonwealth Statutes are the Coastal Waters (State Title) Act 1980 (Cth), Coastal Waters (Northern Territory Title) Act 1980 (Cth), Coastal Waters (Northern Territory Powers) Act 1980 (Cth), Seas and Submerged Lands Act Amendment Act 1980 (Cth), Petroleum Submerged Lands Act Amendment Act 1980 (Cth), Fisheries Amendment Act 1980 (Cth) and the Navigation Amendment Act 1980 (Cth). For a summary of these legislative provisions see Commonwealth Attorney-General's Department, *Offshore constitutional settlement — A milestone in co-operative federalism* (1980).
4. See the text accompanying notes 68-72 *infra* for details.
5. Constitutional Powers (Coastal Waters) Act 1979 (N.S.W.), Constitutional Powers (Coastal Waters) Act 1979 (S.A.), Constitutional Powers (Coastal Waters) Act 1979 (Tas.), Constitutional Powers (Coastal Waters) Act 1979 (W.A.), Constitutional Powers (Coastal Waters) Act 1980 (Vic.), Constitutional Powers (Coastal Waters) Act 1980 (Qld.).
6. J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 650-651.
7. G. Nettheim, "The Power to Abolish Appeals to the Privy Council from Australian Courts" (1965) 39 *A.L.J.* 39, 44; Commonwealth Attorney-General, R. Ellicott, "Comment on a paper by the Chief Justice" (1977) 2 *Commonwealth Record* 885, 886; J. Crawford, "The New Structure of Australian Courts" (1978) 6 *Adel. L.R.* 201, 224; A. R. Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and "The Law for Australia"* (1978) 113-115.
8. R. Graycar and K. McCulloch, "Gilbertson v. South Australia — The Case for S.51 (XXXVIII) ?" (1977) 6 *Adel. L.R.* 136; C. Saunders, "The Interchange of Powers Proposal" (1978) 52 *A.L.J.* 187, 195; L. Zines, *The High Court and the Constitution* (1981) 245.
9. Statute of Westminster Adoption Act 1942 (Cth) with effect from 3 September 1939.
10. J. Quick and R. R. Garran, note 6 *supra,* 651; L. Zines, note 8 *supra,* 245; Australian Constitutional Convention 1974 Standing Committee B, *Report to Executive Committee* (1974) 11. This point was noted by Isaac Isaacs when the Constitution was being drafted: *Official Record of the Debates of the Australian Federal Convention, Third Session* (1898) i, 225.
11. J. Quick and R. R. Garran, *ibid.*
12. G. Nettheim, note 7 *supra,* 44.
13. See the authorities cited in W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed., 1976) 24-25; Commonwealth Attorney-General's Department, *The Australian Constitutional Annotated* (1980) 46-47.
14. R. D. Lumb, "'The Commonwealth of Australia' — Constitutional Implications" (1979) 10 *F.L. Rev.* 287, 289.
15. *Id.*, 291.
16. G. Nettheim, note 7 *supra,* 46; L. Zines, note 8 *supra,* 249.
17. See *Official Report of the National Australasian Convention Debates* (1891) 953.

18. *Official Record of the Debates of the Australasian Federal Convention, Third Session* (1898) i, 225.
19. *Ibid.* M. Crommelin has argued that the words "within the Commonwealth" are surplusage as they mean "for the Commonwealth" or "on behalf of the Commonwealth": "Offshore Mining and Petroleum: Constitutional Issues", paper delivered at the fifth Annual Conference of the Australian Mining and Petroleum Law Association (1981) 13. This argument ignores the drafting change referred to in the text.
20. L. Zines, note 8 *supra,* 249. *Semble* he adopts this interpretation but *cf.,* 246.
21. See note 45 *infra* and the accompanying text.
22. *E.g.* s.21 ("absent from the Commonwealth"); s.51 (iii), (xxiv) and s.118 ("throughout the Commonwealth"); and s.51 (xx) ("within the limits of the Commonwealth").
23. G. Nettheim, note 7 *supra,* 46; R. D. Lumb, "Section 51, pl. (xxxviii) of the Commonwealth Constitution" (1981) 55 *A.L.J.* 328, 329.
24. L. Zines, note 8 *supra,* 246.
25. R. Graycar and K. McCulloch, note 8 *supra,* 152, n.89.
26. Note 2 *supra* and see the text accompanying notes 36-38 *infra.*
27. [1933] A.C. 156.
28. *Berwick Ltd* v. *Gray* (1976) 133 C.L.R. 603, 608; R. D. Lumb, note 14 *supra,* 297-302; J. Q. Ewens, "Norfolk Island as Part of the Commonwealth" (1980) 54 *A.L.J.* 68.
29. In the *Seas and Submerged Lands Act* case the Commonwealth argued that the offshore area subject to Commonwealth sovereignty was a s.122 territory: (1975) 135 C.L.R. 337, 342. Of the judges constituting the majority, only Jacobs J. dealt with the submission, holding that the area was not a Commonwealth territory: *id.,* 496. This does not mean the Commonwealth could not create a Commonwealth territory in the offshore region.
30 J. Quick and R. R. Garran, note 6 *supra,* 651; W. A. Wynes, note 13 *supra,* 173; R. Graycar and K. McCulloch, note 8 *supra,* 151; R. D. Lumb, note 14 *supra,* 302, n.95; R. D. Lumb and K. W. Ryan, *The Constitution of Australia Annotated* (3rd ed., 1981) para. 407; L. Zines, "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth" in L. Zines (ed.), *Commentaries on the Australian Constitution* (1977) 1, 43.
31. See the text accompanying notes 34-44 *infra.*
32. Parliament usually expresses its will through an Act of Parliament: *R* v. *The Public Vehicles Licensing Appeal Tribunal of the State of Tasmania; Ex parte Australian National Airways Pty Ltd* (1964) 113 C.L.R. 207, 226. W. A. Wynes, note 13 *supra,* 171. Possibly a vote or a formal resolution would be sufficient to satisfy the request/concurrence requirement.
33. A s.51 (xxxviii) reference can be in the form of a statute which refers power to enact a law in a particular form, but this is not necessary: *R* v. *The Public Vehicles Licensing Appeal Tribunal of the State of Tasmania; Ex parte Australian National Airways Pty Ltd id.,* 225.
34. *Contra,* C. Howard, "Constitutional Amendment: Lessons from Past Experience" (1973) 45 *Australian Quarterly* 35, 40-41. With respect, Professor Howard's argument that s.51 (xxxviii) can be used to repeal the Constitution overlooks the significance of the opening words of both s.51 and s.128.
35. *E.g.* s.51 (xxxi).
36. See note 2 *supra.*
37. See *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association (No.3)* (1920) 28 C.L.R. 495; *R* v. *Foster; Ex parte Eastern and Australian Steamship Co. Ltd* (1959) 103 C.L.R. 256.
38. See note 2 *supra.*
39. *China Ocean Shipping Co.* v. *South Australia* (1979) 27 A.L.R. 1, 8, 18, 29-31, 55.
40. R. Graycar and K. McCulloch, note 8 *supra,* 149, 150. That this interpretation was possible was noted by the Law Officers when the Commonwealth of Australia Bill was sent to England: see "Memorandum of the Objections of Her Majesty's Government to Some Provisions of the Draft Commonwealth Bill (March 29, 1900)" in *Commonwealth of Australia Constitution Bill Reprint of the Debates in Parliament, the Official Correspondence With the Australian Delegates, and other papers* (1900) 149, 150; J. Quick and R. R. Garran, note 6 *supra,* 351.
41. See the text accompanying notes 47-48 *infra* for examples of laws the Commonwealth could have passed prior to the adoption of the Statute of Westminster 1931 (Imp.).
42. See L. Zines, note 8 *supra,* 245.
43. A possible exception is a law to authorize a State Parliament to bypass a manner and form limitation in a State statute, provided that the manner and form provision did not depend on s.5 of the Colonial Laws Validity Act 1865 (Imp.).
44. *Cf., In Re Initiative and Referendum Act* [1919] A.C. 935, 945.

45. Except, perhaps, by means of a manner and form provision: see G. Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 *L.Q.R.* 591; *contra,* H. W. R. Wade, "The Basis of Legal Sovereignty" [1955] *Cambridge L. J.* 172.
46. If this is incorrect, prior to the Statute of Westminster 1931 (Imp.), the repugnancy limit would have produced the same result.
47. This is not to be confused with the implied limit on State legislative power upheld in *Commonwealth* v. *Cigamatic* (1962) 108 C.L.R. 372, although the result in that case could have been reached using the doctrine discussed in the text.
48. *E.g.,* under s.51 (vi) and (xxxix).
49. R. D. Lumb and K. W. Ryan, note 30 *supra,* para. 407; R. D. Lumb, note 23 *supra,* 330.
50. L. Zines, note 8 *supra,* 250.
51. See A. Castles, "The Paramount Force of Commonwealth Legislation Since the Statute of Westminster" (1962) 35 *A.L.J.* 402.
52. See L. Zines, note 8 *supra,* 242-244, 250; but see also M. Crommelin, note 19 *supra,* 19-20, 23, submitting that s.106 may prove to be an obstacle.
53. *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
54. Constitutional Powers (New South Wales) Act 1978 (N.S.W.); Constitutional Powers (Tasmania) Act 1979 (Tas.); Constitutional Powers (Request) Act 1980 (Vic.).
55. A recent illustration is the debate over the applicability of s.3 of the Act of Settlement 170 in Australia: see K. Booker and G. Winterton, "The Act of Settlement and the Employment of Aliens" (1981) 12 *F.L. Rev.* (forthcoming).
56. G. Nettheim. note 7 *supra,* 44. This assumes that a State repeal law would be repugnant to Imperial legislation regulating Privy Council appeals. For an argument to the contrary see A. R. Blackshield, note 7 *supra,* 141.
57. See G. Sawyer, "The British Connection" (1973) 47 *A.L.J.* 113, 117.
58. A. R. Blackshield, note 7 *supra,* 145, n.27.
59. R. D. Lumb and K. W. Ryan, note 30 *supra,* para. 408; *contra* G. Nettheim, note 7 *supra.* The equivalent head of power in the 1891 draft Bill required the request/concurrence of "all the States concerned": see text accompanying notes 16-17 *supra.* The later debates do not explain why the word directly was added.
60. But see G. Sawyer, note 57 *supra,* 118.
61. See text accompanying notes 26-31 *supra.*
62. L. Zines, note 30 *supra,* 43. *Cf.,* L. Zines, note 8 *supra,* 249.
63. See R. Anderson, "Reference of Powers by the States to the Commonwealth" (1951) 2 *Univ. W.A. L. Rev.* 1, 7. W. A. Wynes, note 13 *supra,* 171; G. Winterton, "The Appropriation Power of the Commonwealth" (LL.M. Thesis, University of Western Australia, 1968; *Australian Law Theses and Seminar Papers in Microfiche* [1976] fiche 41/1 - 41/8) 410.
64. R. Anderson, note 63 *supra,* 8.
65. See speech by Senator Evans on the Coastal Waters (State Powers) Bill 1980, Sen. Deb. 21 May 1980, Vol. 85, 2608, 2610; M. Crommelin, note 19 *supra,* 22-23.
66. As submitted *infra,* text accompanying notes 75-77.
67. *E.g.* s.123: a Commonwealth statute which extended State boundaries three nautical miles offshore could not be repealed without complying with s.123.
68. See text accompanying notes 12-13 *supra.*
69. (1975) 135 C.L.R. 337.
70. *Id.,* 500-501, 505-506 per *Murphy J.;* see also 373-375 *per* Barwick C.J.
71. For an analysis of the evolution of Commonwealth legislative power with respect to external affairs see L. Zines, note 30 *supra,* 38-43.
72. *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177, 190-191, 202, 209-210; *A. Raptis & Son* v. *South Australia* (1977) 138 C.L.R. 346, 357, 379, 393.
73. R. Graycar and K. McCulloch, note 8 *supra,* 151.
74. See text accompanying notes 20-25 *supra.*
75. (1975) 135 C.L.R. 337, 360 *per* Barwick C.J., 471 *per* Mason J., 497 *per* Jacobs J.
76. See *Victorian Stevedoring and General Contracting Co. Pty Ltd* v. *Dignan* (1931) 46 C.L.R. 73, 101 *per* Dixon J., 119-120 *per* Evatt J.
77. *Attorney-General (W.A.) Ex. rel. Ansett Transport Industries (Operations) Pty Ltd* v. *Australian National Airlines Commission* (1976) 138 C.L.R. 492, 530 referring to *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129; see also G. Winterton, "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?" (1980) 11 *F.L. Rev.* 167, 194, 196.

78. *Cf., Attorney General of Nova Scotia* v. *Attorney-General of Canada* [1951] S.C.R. 31; *Knickerbocker Ice Co.* v. *Stewart* 253 U.S. 149, 164 (1920).
79. *Convention Debates,* note 10 *supra,* 225.
80. J. Quick and R. R. Garran, note 6 *supra,* 651.