

STAMP DUTY

Transactions Connected with Commonwealth Places — The Alders Decision

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STAMP DUTY: AN INFRASTRUCTURE STORY

The Commonwealth owns New South Wales land. It acquired the land for military purposes but has not used it for any purpose for many years.

The Commonwealth gives X a transfer of 10 hectares. X is taken to hold the land for and on behalf of the Commonwealth. X needs funds to build an airport terminal on the land (for the new second airport) and grants a mortgage to Z.

The Commonwealth also gives Y a lease of 5 hectares. Y seeks to build a shop on that land and to raise finance it grants a fixed and floating charge over all of its assets to W who will only lend if its funds are used to build the airport terminal. Y also owns land in Melbourne and London. Y intends to rent out cars to airline passengers under an Avis type operation.

Y and X pay the Commonwealth a sum for the right to use the Holsworthy airport trade mark at their premises.

To raise further capital, X is considering a public float. Y is wondering whether it should restructure its financing and grant the securities to a trustee for the benefit of various lenders to increase its flexibility.

As X is unsure about the commercial viability of its operations, it has insisted upon an option to resell the land in 20 years back to the Commonwealth.

Assume that the local State law requires reports to be made to the local Office of State Revenue by the parties to each of these transactions. That law levies a "stamp duty" on that report by reference to the amounts payable by one party to the other under the transaction. Is the duty constitutionally sound? Does it depend on how the parties' payments to each other are to be calculated?

Refer: *Alders international Pty Limited v Commissioner of State Revenue* 140 ALR 189.
Contrast the majority judgment of the Chief Justice with that of the other four majority judges.

ALLDERS ... ARE COMMONWEALTH PLACES STAMP DUTY HAVENS?

Does the *Allders* decision tell us that Commonwealth places are stamp duty havens?

At first sight it would seem that this is what it says, on the basis that section 52(i) of the Constitution provides the relief. That section states that the Federal Parliament has:

"exclusive power to make laws for the peace order and good government of the Commonwealth with respect to all places acquired by the Commonwealth for public purposes."

The High Court reversed the finding of the Victorian Supreme Court that the Victorian Stamps Act was a valid tax law with respect to instruments. The Victorian court had decided that the Stamps Act was not an unconstitutional law with respect to the Commonwealth place where *Allders* had its duty free shop.

The key difference between the courts (and between the judges of the High Court) is their characterisation of the particular lease duty provisions of the Stamps Act. The Court split three ways:

1. for *Allders*:

- (a) four judges: the stamp duty was not payable because it was a tax on activities occurring at a Commonwealth place.
- (b) the Chief Justice: stamp duty was not payable because it was a burden on the creation of *Allders*' leasehold.

note: these approaches are quite different.

2. against *Allders*:

- two judges: the lease was dutiable because stamp duty is a tax attaching to instruments, not places or activities occurring at a place.

The differing majority views may strike down different stamp duties. On one hand, some stamp duties may be invalid because they attach to an activity occurring at a Commonwealth place (the four judges approach). Others may be invalid because they attach upon the creation of a property interest in that place (the Chief Justice). The *Allders*' lease escaped duty because it satisfied both theories.

The significance of the *Allders* case¹ for State taxes saw New South Wales, South Australia and Western Australia appear at the High Court hearing in support of Victoria. The Commonwealth supported *Allders*.

THE CONSTITUTIONAL AND FEDERAL LAW BACKGROUND

The Federal Constitution provides that:

- 1. only the Commonwealth may make laws with respect to: "all places acquired by the Commonwealth for public purposes".²

¹ *Allders International Pty Limited v Commissioner of State Revenue* 140 ALR 189.

² Section 52(i). Section 107 provided that, on Federation, States lost the powers to make laws which were exclusively vested in the Commonwealth. Section 108 provides for the colonial laws of the

2. both the Commonwealth and the States may make laws with respect to: "taxation", but the Commonwealth "may not discriminate between the States or parts of States".³
3. the Commonwealth may not make any law which prefers a State or part of a State over another State or part of another State.⁴
4. the States may not impose any tax on property belonging to the Commonwealth.⁵
5. State laws inconsistent with a Commonwealth law are invalid to the extent of the inconsistency.⁶

Two constitutional cases also provide important background. Firstly, *Bamford's case*⁷ is generally accepted as the basis for the proposition that places acquired by the Commonwealth remain places inside the relevant State (so that Melbourne airport was not excised from Victoria). Secondly, the High Court's 1970 decision in *Worthing*⁸ had held that a New South Wales law of general application (the Scaffolding and Lifts Act) did not apply to a Commonwealth military base in New South Wales. In response, the Commonwealth enacted the Commonwealth Places (Application of Laws) Act 1970 to fill the gap and apply most State laws to the Commonwealth places in the State, but not "so as to impose any tax".⁹

MELBOURNE AIRPORT

Melbourne airport had been transferred from the Commonwealth to the Federal Airports Corporation by force of the Federal Airports Corporation Act. That legislation also provided that the airport was to be held by the Corporation for the Commonwealth while it remained a Federal Airport. According to the explanatory memorandum, the intention was to make sure that the airport had "the status of a Commonwealth place in terms of section 52(i) of the Constitution".¹⁰

WORTHING'S CASE (1970): RECONSIDER IT?

The High Court is not bound by its own decisions. And it will not always allow a party to contest an earlier decision.¹¹ In *Allders*, the court denied the States' application to re-argue *Worthing*.

The majority of four to three in *Worthing's* case held that State laws of general application (those not targeted to Commonwealth places) do not operate in Commonwealth places to the extent that they purport to regulate activities occurring at those places. The minority held that those general laws continued to apply, even if the Commonwealth's power was "exclusive", so that we did not have "law-free Commonwealth enclaves."

States which fall within the scope of a Federal power and which are in force as at Federation to continue in force until "provision is made in that behalf" by the Government.

³ Section 51(ii).

⁴ Section 99.

⁵ Section 114: See *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 227.

⁶ Section 109.

⁷ (1901)1 SR (NSW) 337.

⁸ *Worthing v Rowell & Muston Pty Limited* (1970) 123 CLR 89.

⁹ Section 4(3).

¹⁰ See *Worthing* at 211.

¹¹ *Evda Nominees Pty Limited v Victoria* (1984) CLR 311.

A QUESTION OF SYMMETRY

Section 52(i) confers an exclusive power on the Commonwealth. The High Court has not yet defined the boundaries of this particular power beyond applying general constitutional principles that it be given a broad construction. Instead, the High Court has decided cases about State laws and the extent to which they invade the Commonwealth's undefined legislative space. The State Law cases are illustrative only of invalid State laws and, by analogy, valid hypothetical Commonwealth laws.

The four majority judges in *Allders* noted that most cases tested the boundaries of State laws, not those of Federal laws and observed that: "Yet the one is the obverse of the other."¹²

Menzies J in *Worthing* said: "to the extent to which [section 52] grants legislative power to the parliament, it denies legislative power to the parliaments of the States. The denial is measured by the grant."¹³

But this apparent symmetry ignores the fact that using a particular principle to decide that a particular State law invades the Commonwealth's domain does not exhaustively define any test or exclude other principles applying in other cases.¹⁴ Conversely it does not imply that there must be principles which, collectively, exclude the operation of all State laws.

This is the key to assessing the impact of *Allders* and the distinction between the judgments. The Chief Justice goes beyond *Worthing*; the four majority judges apply it, Dawson J says that it is the only test.

A quaint distinction between the judgments might also be found in the four majority judges describing, as a "slogan" the principle that stamp duty is a tax on instruments. Toohey J and Dawson J vehemently reject this trivialising and the Chief Justice was able both to respect the principle and to join the majority.¹⁵

WHAT THE FOUR MAJORITY JUDGES SAID

These judges decided that the Commonwealth could do what the Victorian Act had done: "there can be no doubt that federal law could impose a stamp duty on an instrument of lease of land within a place acquired by the Commonwealth for public purposes."¹⁶

But, in these judges' view, this was not enough to invalidate the Victorian Stamps Act in its application to the *Allders* lease. Why? This is unclear. If the Commonwealth could enact the tax and the tax was within the exclusive power of the Commonwealth then it should be outside the States' power. We can conclude that these judges were attracted to but did not apply any symmetrical test: what the Commonwealth can do, the States cannot.

Instead, these judges asked: to what extent did the Victorian Stamps Act invade the Commonwealth's sole legislative authority with respect to Commonwealth places? To answer this question, they proposed two steps; firstly, the State law had to be characterised for constitutional purposes. Next, that character had to be examined to see if it was "with respect to" a Commonwealth place.

¹² At pages 222 and 223.

¹³ At page 141.

¹⁴ Dawson J clearly disagrees with this proposition: *Allders* at page 198.

¹⁵ At pages 222, 207, 201 and 196 respectively.

¹⁶ At page 223.

For these judges, there was a significant difference between the Constitutional Character of the Stamps Act and its Taxing Character. It did not matter whether or not stamp duties was a tax on instruments or on the transactions, property or activities referred to in the dutiable instrument. Instead the constitutional character of the Stamps Act was to be determined by a detailed examination of the Stamps Act. Did it "regulate conduct in a Commonwealth place"?¹⁷ If so, it was invalid in its application to that Commonwealth place. This regulatory power was the "exclusive subject matter" of the Commonwealth's power to legislate.¹⁸

The general propositions which may be extracted from the four majority judgments stop at this point. All they had done was restate the *Worthing* test for invalidity. The court then examined how the Victorian Act quantified duty in the particular context of the *Allders* lease.

The four majority judges held that the fact that rental under the *Allders'* lease was calculated by reference to aircraft passenger usage of the airport immunised it from Victorian stamp duty¹⁹ because:

1. duty was calculated "by reference to the extent of use of the Commonwealth place for the public purpose for which it was acquired".

or, to put this key comment another way:
2. duty was calculated "by reference to specific characteristics of the land and tenements which, in turn, affect the amount of rent."²⁰

or again:
3. the Stamps Act "burdens the place with a State tax which varies in accordance with features of the place affecting rent".

and again:
4. stamp duty is imposed "by reference to the use of part of a Commonwealth place ... to the extent of the economic activity at that Commonwealth place".

Read in context, none of these views is a general comment about rent. They are particular comments on the *Allders'* rent. These judges did not comment on the fact that *Allders'* rent also depended upon the value of sales at the shop. They are focused on the fact that duty depended upon usage of the airport.

Establishing a connection between the stamp duty and activities occurring at the airport was not yet enough to invalidate the Act in its purported application to the Commonwealth place. Invalidity arose only if that connection was "not tenuous or distant". The court was satisfied that, in this case, the connection was "direct practical and real". They concluded that the Act "affects the place in a real and tangible way".²¹

Does this joint judgment establish all the necessary conditions for establishing stamp duty havens at Commonwealth places? Is it essential to show that the duty is calculated by reference to activities occurring at the Commonwealth place? Probably not. The judges did not say they were supplying an exhaustive test for invalidity. There is no reason to think that the same four

¹⁷ At 222 and see 216.

¹⁸ At 223.

¹⁹ At pages 223 and 224. ²⁰ At 223.

²⁰ At page 223.

²¹ At page 223.

judges would not find other reasons to strike down stamp duties which were not calculated by reference to activities occurring at a Commonwealth place.

WHAT THE CHIEF JUSTICE SAID IN HIS SEPARATE MAJORITY JUDGMENT

The Chief Justice adopted a different approach.

He focused, at least initially, on the Commonwealth law-making powers, not on the States' disabilities. He viewed *Worthing* and the cases which applied its principles²² as cases decided on the footing that the Commonwealth's powers extended to the regulation of conduct and activities occurring in a Commonwealth place:

"But logically the power which section 52(i) confers on the parliament cannot be so confined. It must extend to the legislative control of any act, matter or thing that occurs or exists in the relevant locality."²³

By this point the Chief Justice has cast a far wider net than *Worthing* or the four majority *Allders* ideas. From this point the judgment ceases to focus on Federal powers, although he ends his judgment by suggesting that a Commonwealth law taxing the creation of a leasehold of Commonwealth place would be valid having decided earlier that it was not necessary to consider the matter.²⁴

For the Chief Justice, the issue becomes firstly, one of substance over form (was the State duty in fact a tax upon the creation of the lease or a tax upon the use of premises)²⁵ and secondly, a question of connection (was the connection between the duty and those transactions too tenuous to warrant the conclusion that the Stamps Act was "a law with respect" to the airport).²⁶

In the end the Chief Justice differed from the four majority judges in a number of important respects:

1. he paid respect to the principle that stamp duty was a tax on instruments (its Taxation Character) and concluded that it was "impossible in any practical sense" to separate the instrument from its effect; namely, the creation of the lease.
2. he did not consider whether the duty was a tax upon the use of the premises.
3. he did not consider whether the way the rent was calculated was relevant.²⁷

WHAT THE TWO MINORITY JUDGES SAID

Dawson J was emphatic: a law imposing a tax can only be a law with respect to a Commonwealth place if it falls within the scope of *Worthing*. He sees that case as setting the boundaries for Commonwealth and State tax with respect to Commonwealth places.

²² *R v Phillips* (1970) 125 CLR 93 and *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Limited* (1970) 124 CLR 262.

²³ At page 193.

²⁴ At pages 193-194.

²⁵ See the cases cited at page 196.

²⁶ See cases cited at page 195.

²⁷ Although he had indicated early in the judgment, at page 194, that he intended to consider the provisions of the lease relating to the calculation of rent.

The requirement that a law have a direct and substantial connection with a Commonwealth place allowed Dawson J to consider that a State law could operate within a Commonwealth place but not be law "with respect to a place". A law such as the Victorian Stamps Act, being a law which was properly characterised as a tax on instruments, is such a law.

Toohey J agreed with Dawson J that the Stamps Act did not satisfy the *Worthing* test for invalidity; it did not regulate conduct or activities and was valid.

Toohey J found guidance in the High Court's support for Local Government rates in *Bevelon Investments*.²⁸ There the local tax was levied, not by reference to any interest in land, but by reference to its value and was found to be valid.

THE COMMONWEALTH'S POWER TO TAX: RECONCILING SECTIONS 51(ii) AND 52(i)

The conclusion that the Victorian Stamps Act did not operate with respect to Commonwealth public places by virtue of Constitution section 52(i) must involve the proposition that the Federal Parliament could impose such a tax.

The four majority judges clearly said that it could.²⁹ Dawson J said that it could not.³⁰

The Chief Justice's discussion of the point is not the strongest part of his judgment. He makes only oblique references to the section 51(ii) constraint upon the Commonwealth's taxing power (that a tax must not discriminate against a part of a State).³¹ He does not address the issue. Toohey J seems not to have addressed the point at all.

The court's inability to adopt an agreed position on the symmetry question (what the Commonwealth can do, the States cannot) may prove fertile ground.

²⁸ *Bevelon Investments Pty Limited v Melbourne City Council* (1976) 135 CLR 530.

²⁹ At page 223.

³⁰ At pages 199 and 204: it would be necessary to consider the taxing power in section 51(ii) and this would be problematic.

³¹ At pages 193 and 194.