*Genevieve Ebbeck**

SECTION 117: THE OBSCURE PROVISION

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Section 117 of the Constitution protects one of the fundamental rights enshrined in the Constitution - the right of a person resident in one State to enter another State and receive the same treatment as is accorded that State's residents. Yet since Federation, far from being heralded as a guarantee of a fundamental right, section 117 was leeched of all potency and reduced to a constitutional provision of trivial worth. It was largely ignored for decades on end and, not until the decision of *Street v Queensland Bar Association*[1] in November 1989, was this trend reversed.[2] Particularly in the cases prior to *Henry v Boehm*[3] (which was the last High Court decision on s117 before *Street*), the attention of the High Court was primarily focussed upon ensuring that the States could legislate in particular areas such as taxation without infringing s117. An examination of these cases leads one to the conclusion that "reserved power" reasoning was adopted in the interpretation of s117 even after the doctrine of reserved power had been categorically rejected by the High Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ("Engineers")*.[4] Reliance upon this reasoning was a major factor in the "process" of emasculating s117. Coupled with this was the adoption by many judges of a pedantic, technical approach to interpretation which proved to be a second major factor in this "emasculation" of the section.

The doctrine of reserved power involved a rule of constitutional interpretation that favoured the States over the Commonwealth,[5] whereby Commonwealth powers or prohibitions on the exercise of State power were

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* LLB (Hons).

1 (1989) 63 ALJR 715.

2 Rule 38 and Form 10 of the Queensland Rules of Court were found to be in breach of s117 in that they required Mr Street, a barrister resident in New South Wales, to give up his legal practice in his State of residence in order to be admitted to legal practice in Queensland. Such requirement would not have been equally applicable to him if he had resided in Queensland. The Rules were also found to be in breach of s117 in that they discriminated against Mr Street by requiring him to give up his residence in New South Wales.

3 (1973) 128 CLR 432.

4 (1920) 28 CLR 129.

5 Zines, *The High Court and the Constitution* (Butterworths, Sydney, 2nd ed 1987) p5.

interpreted narrowly so as not to extend into those areas of legislative power seen as "reserved" to the States.[6] This reasoning was also applied so as to interpret narrowly the scope of prohibitions on State power such as section 90 of the Constitution - *Peterswald v Bartley*.[7]

As is widely known, it was not until 1920, in *Engineers*, that the majority of the High Court rejected this technique of construction, and so in a sense it is not completely unexpected that one finds reserved power reasoning in pre-*Engineers* cases involving s117. What is surprising, however, is the fact that reserved power reasoning was applied to a prohibition which can be seen as applying not only to the States but also to the Commonwealth [discussed later]. Surely, then, the concerns about the distribution of power between the States and the Commonwealth, which lay behind the development of the reserved power doctrine, are not relevant to an interpretation of s117. What, then, becomes the justification for the adoption of this reasoning? Further, perhaps the pre-*Engineers* High Court should at least have recognized a distinction between s90 and s117, namely that s117 provides a constitutional guarantee of a fundamental right, whilst s90 does not. Such a distinction should perhaps have influenced the court against too readily applying reserved power reasoning to s117, for, as already explained, the desire behind the development of this doctrine was the protection of States or "States' rights". What also of the rights of individuals?

The process of restricting the meaning and hence effectiveness of s117 as a constitutional guarantee began soon after Federation with *Davies and Jones v WA*.[8] In this case, rates of estate duty were payable under the *Administration Act* 1903 (WA), 1903, which, in relation to beneficiaries who were "persons bona fide residents of and domiciled in Western Australia", were reduced in comparison with those payable generally. Taking, first, a very literal and technical approach, the High Court held that s117 was not infringed because the relevant discrimination was based not just upon residency but also upon domicile. As O'Connor J explained,[9]

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6 Thus, for example, the term "trade marks" in section 51(xviii) of the Constitution, which gives the Commonwealth power to legislate with respect to "copyrights, patents of inventions and designs, and trade marks" was held not to include a mark indicating that members of a trade union had produced the produce: *AG (NSW) v Brewery Employees Union of NSW ("Union Label Case")* (1908) 6 CLR 469.

7 (1904) 1 CLR 497.

8 (1905) 2 CLR 29.

9 At 52.

> no resident of Western Australia can claim the reduction in duty unless he also has his legal domicile in Western Australia, and the Queensland resident not domiciled in Western Australia is in this respect subject to precisely the same discrimination, and to no further and no other.

Barton J stated that it is discrimination based on the sole ground of residence outside the legislating State that s117 aims to prevent.[10] The decision in *Davies* meant, in effect, that the provisions of s117 could easily be circumvented by attaching another requirement to that of residency.

The judges appear also to have been influenced by the subject-matter of the Act in question, namely taxation, and were therefore reluctant to intervene. As Griffith CJ stated,

> Every State can impose such duties in respect of the whole of the personal property of the domiciled citizens of the State, whether that property is situate within or beyond its territorial limits. The State may, therefore, derive a much larger revenue from the estates of such persons than from those of others who merely reside in the State without having their domicil in it. The area of taxation being larger in their case, the legislature may well think it reasonable to reduce the rate in their favour. Moreover, it is a well-known fact that the double liability to...pay...both to the State of domicil and the State in which the property is situate has considerable operation upon the minds of investors, and the legislature might reasonably offer such a reduction as that in question as an inducement to persons to make their permanent home in Western Australia.[11]

O'Connor J, too, explored the fact that the legislature in making the concession was giving up revenue - and therefore he believed it was more probable that the legislature would limit the concessions to those persons whose estates would pay probate duty to the State of Western Australia, and with the distribution of their property after death being regulated by and under Western Australian laws, rather than allow the concession to every permanent resident of Western Australia wherever their legal domicile might be.[12]

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10 At 47.
11 At 43.
12 At 51.

It is submitted that these judges perceived it to be a right of the State legislature to pass such a law without infringing s117; and their desire not to encroach upon this right led them to adopt a very narrow interpretation of the scope of s117.

It is interesting to note that all three members of the High Court sitting in *Davies* had participated in the Convention Debates of the 1890's. Samuel Griffith had attended the 1890 Melbourne Conference and was a delegate for Queensland at the 1891 session; Edmund Barton was a New South Wales delegate in both 1891 and 1897 and led the delegation to London in 1890; and Richard O'Connor represented New South Wales as a delegate in 1897. They would, therefore, have been aware of the heated debate that surrounded the issue of what effect a provision such as s117 would or could have on the States' legislative capacity.

One participant of those Debates, Mr Reid of New South Wales, in discussing the possible wording in the 1898 Draft Bill of what was to become s117 stated his view as follows,

> I really think that the constant attempts which are being made to interfere with the rights of the States, in matters which are left to them expressly, is becoming quite alarming. There are a number of general words already in this Constitution which, I fear, may be used so as to almost destroy the independent powers of legislation of the States, with reference to every conceivable subject that they have left to them.[13]

Mr Symon of South Australia also emphasized the desire not to interfere with the control of each State upon its own citizens.[14]

It is evident from the Convention Debates that a particular concern of many of the participants was both the power of the States to impose taxation and any possible restriction of this power. The issue was often couched in discussion of an "absentee tax".

Although it would seem that the approach of the early High Court in its interpretation of s117 was coloured by such concerns, this does not deny that limits were still placed on the State's capacity to legislate for those within, or entering, its jurisdiction. This point is illustrated by, for example, the High Court decision in *R v Smithers ex parte Benson*,[15] where it was held that a State did not have the power to exclude residents from another State from

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13 *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 1898 at 675.

14 At 676.

15 (1913) 16 CLR 99.

entering its borders. Section 3 of the *Influx of Criminals Prevention Act* 1903 (NSW) made it an offence for any person, other than a New South Wales resident, to enter New South Wales if they had been convicted in another State of an offence for which they were liable to suffer death or imprisonment for at least one year. It was argued that s3 of the Act offended both ss117 and 92 of the Constitution - however, none of the judges decided the matter on the basis of s117.

Griffith CJ was the only judge prepared to discuss s117 and he was inclined, although he did not need to decide the point, to agree with the submissions that,[16]

> 1) for the purpose of the section the residence which is made a ground of disability or discrimination must be contemporaneous with the attempt to enforce the disability or make the discrimination; and
> 2) that an exemption from a penalty for an act on the ground of a previous residence is not within the section.

Instead, Griffith CJ and Barton J viewed as applicable to the Australian situation the American concept of the State's "police power", in other words the general power of regulation of internal affairs.[17] This notion is itself a classic example of reserved power reasoning, namely the idea that the Constitution reserves to the States the right to safeguard the health, safety and morals of its inhabitants.

Griffith CJ and Barton J were prepared to limit the extent to which this doctrine formed part of Australian law. Griffith CJ held that after Federation it was inconsistent with the elementary notion of a Commonwealth to have the States capable of excluding any person whom the government might think an "undesirable immigrant".[18] The former power of the Colonies to do this was "cut down to some extent by the mere fact of federation, entirely irrespective of the provisions of ss92 and 117".[19] To be validly passed pursuant to this "police power" there needed to be some justification on the ground of "necessity", according to Griffith CJ and Barton J, which had not been established here.

The other two members of the Court, Isaacs and Higgins JJ, held that section 3 of the NSW Act infringed freedom of intercourse between the States within the meaning of s92, and was therefore invalid. Neither, then, found it necessary to deal with s117.

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16 At 108.
17 At 106 per Griffith CJ.
18 At 108-109.
19 As above.

One wonders why s117 was not seen as the obvious provision to apply. Why did the two senior members of the Court look instead to an American doctrine, the "police power", for an answer?[20] Isaacs and Higgins JJ disapproved of their analysis, stating respectively that there is no doctrine that the federal power is subject to any reservation of the State "police power"[21] and that to refer to the United States cases on the internal "police power" perplexed rather than assisted.[22] Yet they, too, chose not to discuss the issue in terms of s117.

The year 1920 marks the handing down of what proved to be one of Australia's most important constitutional cases, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd.*[23] Knox CJ, Isaacs, Rich and Starke JJ rejected the use of section 107 of the Constitution[24] as a ground for reading down any of the provisions in section 51 and reserving power to the States thus,[25]

> Section 107 continues the previously existing powers of every State Parliament to legislate with respect to (1) State exclusive powers and (2) State powers which are concurrent with Commonwealth Powers. But it is a fundamental and fatal error to read section 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in section 51, as that grant is reasonably construed, unless that reservation is as explicitly stated.

Higgins J also formed part of the majority, and pointed out that, as there were express limitations in the Constitution such as "Banking other than State banking" in section 51(xiii), such express limitations prevented the implication of limitations by reserved power reasoning (applying the maxim *expressio unius exclusio alterius*).[26]

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20 At 106 per Griffith CJ; at 109-110 per Barton J.

21 At 115.

22 At 118.

23 (1920) 28 CLR 129.

24 Section 107 provides:
Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of a State, continue as at the establishment of Commonwealth, or as at the admission or establishment of the State, as the case may be.

25 *Engineers* at 154.

26 At 162.

After such a clear rejection of the doctrine of reserved power one would expect that the previous interpretation of s117 would be reconsidered. However, reserved power reasoning is still evident in later cases. The tendency to write s117 almost out of the Constitution continued, and in the six decades after s117 had been raised in *R v Smithers*,[27] s117 was discussed only once, by the Queensland Supreme Court in *Commissioner of Taxes v Parks*.[28]

The approach of the Full Court in *Parks* stood in stark contrast to that which the High Court had taken up to this point in time. The court held that the appellant was a resident of New South Wales within the meaning of s117 even though his evidence showed that he was absent from New South Wales in the course of his duty as a master of an interstate trading vessel for the greater portion of the year. Henchman J (delivering the judgment of the court) rejected the submission to the contrary raised by the Commissioner of Taxes in the following manner,[29]

> We cannot accept this contention, the result of which might be to deprive a considerable number of Australians, whose varied occupations take them from time to time to other States, of the constitutional safeguard admittedly given to those who stay at home.

The Court in *Parks* was obviously concerned with the fact that s117 provides a constitutional guarantee - it did not seek to explain possible motives that might have influenced the Queensland legislature when enacting taxation legislation, as had the High Court in *Davies*, nor did it couch its discussion of s117 in reserved power language. Instead, the fundamental principle for the court in *Parks* was that,[30]

> The State cannot, for any purpose whatever, encroach upon rights granted or secured by the supreme law of the land [ie the Constitution].

Manipulation of language and technical distinctions were also avoided.

It was to be another forty years from this time until the meaning and effect of s117 was again considered. Even then, when faced with the facts in *Henry v Boehm*, the majority of the High Court took a very narrow interpretation of the provision. The facts were virtually identical to those in *Street*. By virtue of the Rules of Court (sections 27 & 28), in order to be admitted as a legal

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27 (1913) 16 CLR 99.
28 [1933] St R Qd 306.
29 At 315.
30 At 322.

practitioner in South Australia it was necessary firstly to reside for at least three calendar months in South Australia continuously and immediately before filing notice of application for admission and then, once conditionally admitted, to reside continuously in South Australia for a period of one year. It was held by Barwick CJ, McTiernan, Menzies and Gibbs JJ (Stephens J dissenting) that in their application to a person admitted as a barrister and solicitor of the Supreme Court of Victoria and residing in that State, sections 27 and 28 of the Rules of Court did not infringe s117.

By a remarkable feat of legal reasoning, Barwick CJ (with whom McTiernan J agreed) concluded that "residence is not made the basis of any disability or discrimination let alone any disability or discrimination to which a person resident in South Australia is not equally subject".[31] The explanation provided was that a person resident but not domiciled in South Australia, temporarily absent from the State, if qualified out of the State, would be in precisely the same situation as the plaintiff. And equally, after conditional admission, the resident of South Australia must physically reside there for the requisite one year.[32] Menzies and Gibbs JJ adopted the same reasoning.

The overall impression gained of their judgments is adherence to pedantry, with the result being that, yet again, s117 was rendered ineffectual.

Further, in examining the decision of *Davies*, Barwick CJ (dicta) expressed doubt about Griffith CJ's view that, if residence of any kind in a State was made the basis of a privilege in a State, the State law must accord the like privilege to persons having residence of the same kind in another State. Barwick CJ's rational for this doubt was that, "I find difficulty in fully accepting this proposition. It seems to me to impose on a legislating State too large a limitation".[33]

Implicit in his analysis was the view that it is appropriate for a State to be able to grant a privilege to its residents only - and thus, inter alia, by reserved power reasoning an express constitutional prohibition, a prohibition which also provides a constitutional guarantee of individual rights, was construed narrowly.

Stephen J in dissent was the only judge who based his analysis in light of the fact that s117 provides a constitutional guarantee,[34]

> It is, I think, important to bear in mind that s117 is both a provision of our federal Constitution and the chosen means by

31 *Boehm* at 490.
32 At 489.
33 At 488.
34 At 506.

> which future immunity from discriminatory laws of other States was granted to subjects of the Queen, thereby in some measure conferring equal standing within each State of the Commonwealth upon those subjects resident in any other of the federating States. In *James v Commonwealth*...Lord Wright MR spoke of s117 as analogous to s92 and describing it as providing a constitutional guarantee of equal right of all residents in all States. These considerations provide, to my mind, little encouragement to seek for any narrow definition of the designated beneficiaries of this constitutional guarantee of immunity.

Indeed, rather than being concerned with ensuring the ability of States to legislate in particular areas without offending s117, Stephen J noted that, "Section 117 is concerned with negativing a right on the part of a State to impose disadvantages upon individuals".[35]

In the ensuing years, until *Boehm* was overruled by *Street*, it was to be only the occasional State Supreme Court decision that equipped s117 with any potency at all. Helsham J of the New South Wales Supreme Court in *Australian Building Construction Employees' and Builders' Labourers' Federation v Commonwealth Trading Bank*[36] held that rule 2(1) of Part 53 of the New South Wales Supreme Court Rules, 1970 offended s117. It provided that where a plaintiff was ordinarily resident outside the State the court might order the plaintiff to give such security as the court thought fit, and that the proceedings be stayed until the security was given. Helsham J simply found that rule 2(1) fell squarely within the prohibition contained in s117; he expressly chose not to examine any of the cases which discussed the ambit of s117 - "they do not help at all, so it seems to me, in the resolution of this problem".

The Full Court of the Queensland Supreme Court was bound to follow *Henry v Boehm* in a series of cases concerning residence requirements for admission as a barrister, *Re Sweeny*,[37] *Re Baston*[38] and *Re Quinn*.[39] However, Dowsett J of the Queensland Supreme Court in *Re Loubie*[40] held that the section 16(3) of the *Queensland Bail Act* 1980 (Qld), which prohibited the granting of bail to a person ordinarily resident outside Queensland unless cause was shown, infringed the prohibition in s117. The

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35 At 505.
36 [1976] 2 NSWLR 371.
37 [1976] Qd R 296.
38 [1984] 2 Qd R 300.
39 [1986] 2 Qd R 278.
40 (1985) 62 ALR 139.

Full Court of the Queensland Supreme Court in *Ex parte Veltmeyer*[41] subsequently agreed with Dowsett J that section 16(3) offended s117 because it imposed an additional onus on persons not ordinarily resident in Queensland to show why their detention in custody was not justified, and if they failed to do this, bail was to be refused.[42]

A number of these Supreme Court decisions, namely *Australian Building Construction Employees, Re Loubie* and *Re Veltmeyer*, are worthy of recognition not only because they accorded s117 some potency, but also for the refusal of the judges to adopt technical, pedantic methods of constitutional interpretation divorced from any recognition of the fact that s117 provides a constitutional guarantee. Nor were reserved power concepts raised.

COMMENT ON THE HIGH COURT'S REASONING

The plain language of s117, a constitutional guarantee of a fundamental right, should not be interpreted in such a way as to reduce the nature and scope of its protection. The High Court in the cases prior to *Street* failed to accord s117 sufficient importance, and indeed often dismissed it without significant analysis. This trend was reversed in *Street*, which marks the rejection by all members of the High Court of the highly technical approach evident most particularly in *Davies* and *Boehm*. Further, the High Court gave long-overdue recognition to the fact that s117 is a constitutional guarantee.

However, reserved power reasoning can still be found in the judgment of McHugh J, who was of the opinion that,

> The object of s117 was to make federation fully effective ensuring that subjects of the Queen who were residents of Australia and in comparable circumstances received equality of treatment within the boundaries of any State. But the existence of a federal system of government, composed of a union of independent States each continuing to govern its own people, necessarily requires the conclusion that *some subject-matters are the concern only of the people of each state.*[43]

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41 [1989] 1 Qd R 462.

42 At 467 per Macrossan J; at 472 per Shepherdson J and at 480 per Moynihan J.

43 *Street* at 765. Emphasis added.

The reserved power reasoning relied upon by a number of High Court judges in the s117 cases not only keeps "pre-Engineers ghosts walking",[44] but also becomes untenable upon a consideration of whether or not s117 applies to the Commonwealth. It was made clear in *Street* that s117 renders a State law inoperative to the extent that it discriminates against a particular individual(s), and all the cases on s117 to date have involved a State law. However, Brennan J in *Street* argued that the mere presence of s117 in Chapter V of the Constitution (entitled "The States") does not mean that it has no operation when a disability or discrimination is imposed by or under a law of the Commonwealth.[45] Deane J simply declared that it was unnecessary to decide on the facts of *Street* whether s117 is applicable to Commonwealth laws,[46] Toohey J stated that he did not foreclose any later argument as to this point,[47] and Dawson J merely noted that "perhaps" s117 applies to the Commonwealth.[48] Clearly the question is still unresolved.

Section 117 was inserted to abolish distinctions between residents of different States and to create a common citzenship throughout Australia. Although, as Michael Coper points out, the section "is clearly aimed primarily at the States, the more likely agents of disintegration in a federal system",[49] it would be acting contrary to the purpose of s117 to interpret it as not applying to Commonwealth laws. As s117 is a constitutional guarantee of a fundamental right, it should be interpreted broadly, to include laws made by the Commonwealth. The effect upon the individual must be seen as the focus of any inquiry, rather than the body which imposes the disability or discrimination; protection of the individual within the framework of a common citizenship is the ultimate concern of s117.

If s117 does apply to the Commonwealth, how can reserved power reasoning be pursued in order to determine the section's limits? Whilst the States existed as colonies before 1901 and therefore it is conceptually possible to talk of reserving (ie retaining) their power to legislate over particular subject-matters, a similar analysis is not possible with the Commonwealth, where there is no issue of "giving up" or "retaining" power(s).

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44 *AG (WA) v Australian National Airlines Commission* (1976) 138 CLR 493 per Murphy J at 530.

45 *Street* at 729.

46 At 742.

47 At 751.

48 At 749.

49 Coper, *Encounters with The Australian Constitution* (CCH Australia, Sydney 1987) p339.

Street heralded the abandonment of technical, pedantic methods of interpreting s117 which in the past had been used to make a mockery of any notion of equality and a common citizenship between persons resident in the different States. What the High Court in *Street* did not do was analyse why it was that, in the past, s117 was trivialized, in other words did not examine the history of the High Court's protection of "States' rights". Although *Street* ushered in a shift away from reliance upon reserved power reasoning, as is reflected in the judgement of McHugh J such concepts even today remain influential - and they impair the full and effective operation of one of Australia's fundamental constitutional guarantees.