INTER SE QUESTIONS AND COMMONWEALTH EXCLUSIVE POWERS.

The central notion controlling the operation of the first paragraph of section 74[1] of the Australian Constitution has been authoritatively stated as follows:—

> "The essential feature . . . is a mutuality in the relation of the constitutional powers: a reciprocal effect in the determination or ascertainment of the extent or the constitutional supremacy of either of them."[2]

The precise words of the section expressing that notion are:—

> "any question . . . as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States . . "

Two questions normally arise under section 74 of the Constitution, and they are: first, what is an *inter se* question? and second, in what circumstances will the presence of an *inter se* question invoke the restrictions imposed by section 74? It is not the purpose of this article to examine the answers given to the second of those questions. Those answers have been worked out fairly fully in a series of cases (with some changes of direction in the course of our constitutional history, it is true) and are now sufficiently well settled.[3] The matter proposed for discussion arises under the first question and is with

[1] Sec. 74 of the Constitution reads:—No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the Hight Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

[2] *Ex parte* Nelson (No. 2), (1929-1930) 42 Commonwealth L.R. 258, *per* Dixon J. at 272.

[3] See, for example, Baxter v. Commissioner of Taxation (N.S.W.), (1907) 4 Commonwealth L.R. 1087; Commonwealth of Australia v. Bank of New South Wales, [1950] A.C. 235; Nelungaloo Pty. Ltd. v. Commonwealth of Australia, [1951] A.C. 34; Nelungaloo Pty. Ltd. v. The Commonwealth, (1951-1952) 85 Commonwealth L.R. 545, and in particular the explanation of the cases given by Dixon J. at 571-3 and Perpetual Executors Trustees and Agency Co. (W.A.) Ltd. etc. v. George Alfred Maslen, [1952] A.C. 215.

respect to one aspect of that question only. In particular it is whether or not a question as to the limits of a Commonwealth exclusive *legislative* power may be an *inter se* question within the meaning of section 74 of the Constitution.

Certain propositions about the application of section 74 appear now to be beyond dispute:

(i) Only questions involving the determination of the extent, or the limits, or the supremacy or subordination, of constitutional *powers* of the Commonwealth or of the States are comprehended by the section.[4]

(ii) It follows from that proposition that a question as to whether or not a State law is inconsistent with a Commonwealth law cannot of itself raise an *inter se* question. The question of powers must be decided before the question of inconsistency can be raised for decision.[5]

(iii) It also follows that a question merely as to whether or not a public authority of the Commonwealth or of a State has exceeded its powers under its relevant statute will not be an *inter se* question.

(iv) But the words *"inter se"* in the section prevent every question as to constitutional power being one affected by the section. It is only those questions which have a mutual or reciprocal effect upon Commonwealth and State constitutional powers that are affected. It follows that no *inter se* question will arise when a Commonwealth or State law is challenged as offending a constitutional prohibition of the kind contained in section 92. This is because the determination of the scope of such a prohibition merely defines what is withdrawn from the Commonwealth and the States alike and it does not touch

4 See, for example, *Ex parte* Nelson (No. 2), (1929-1930) 42 Commonwealth L.R. 358 *per* Dixon J.

5 See, for example, Baxter v. Commissioner of Taxation (N.S.W.), (1907) 4 Commonwealth L.R. 1087, and O'Sullivan v. Noarlunga Meat Ltd. (No. 2), (1955-1956) 94 Commonwealth L.R. 367. It may be that as a matter of high theory a question under sec. 109 of the Constitution as to the true meaning to be given to the word "inconsistent" in that section may raise an *inter se* question—See O'Sullivan v. Noarlunga Meat Ltd. (No. 2) *supra,* and the same case before the Judicial Committee of the Privy Council, [1957] A.C. 1, and (1956) 95 Commonwealth L.R. 177. But in view of the fact that the meaning of "inconsistent" in sec. 109 appears now to be established by the highest authority this point is likely to remain one of high theory.

the "limits *inter se*" of their respective constitutional powers. Similarly no *inter se* question arises when a Commonwealth or State law is challenged as offending the prohibition contained in section 117 of the Constitution. That position is not quite so obvious as the position created by section 92 but it is none the less clear.[6]

From the earliest days of the Australian Constitution it seems to have been assumed that questions as to the extent or the limits of Commonwealth exclusive powers could be *inter se* questions within the meaning of section 74, but that *inter se* questions would not be restricted to such questions.[7] Certainly in the general discussions by the High Court and the Judicial Committee of the Privy Council until recently there seems nothing to suggest that an *inter se* question may not be raised by an issue relating to the limits of a Commonwealth exclusive power. In fact in 1909 the Judicial Committee held that an issue as to the limits of a Commonwealth exclusive power did raise an *inter se* question.[8] Dixon J.'s well known discussion of the nature of an *inter se* question in *Ex parte Nelson* (No. 2),[9] if anything, supports the view that an issue as to the limits of an exclusive Commonwealth power may raise an *inter se* question.

But in *Nelungaloo Pty. Ltd. v. The Commonwealth*[10] the Judicial Committee of the Privy Council said that an exclusive power of the Commonwealth cannot raise an *inter se* question. Their Lordships in the passage cited referred to the question whether or not the interpre-

6 See, for example, Lee Fay v. Vincent, (1908-1909) 7 Commonwealth L.R. 389, and in particular the reasoning of Dixon J. in *Ex parte* Nelson (No. 2), (1929-1930) 42 Commonwealth L.R. 258 at 272 *et seq.* The problems created by constitutional prohibitions deserve further attention. Those found in the Australian Constitution work in different ways—e.g. sec. 92 withdraws powers from States and Commonwealth alike (at least since James v. The Commonwealth, [1936] A.C. 578). Sec. 115 is addressed to the States alone and operates merely to make a portion of the Commonwealth's power conferred by sec. 51 (xii) exclusive. Sec. 116 is addressed to the Commonwealth alone and may well provide a boundary marking the limit of Commonwealth legislative power and State absolute legislative power. Sec. 117 has already been mentioned in the text. Sec. 114 contains three distinct prohibitions working each in a different way.

7 See, for example, QUICK & GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH (1901), at 755-9; MOORE, COMMONWEALTH OF AUSTRALIA (Students' Edition) (1910), at 152-160; Bailey, *What is an Inter Se Constitutional Question?*, (1936), 1 RES JUDICATAE 81, at 83.

8 Attorney-General for New South Wales v. Collector of Customs for New South Wales, [1909] A.C. 345.

9 (1929-1930) 42 Commonwealth L.R. at 269 *et seq.*

10 [1951] A.C. 34, at 48.

tation of a constitutional prohibition, which declares "that neither the Commonwealth nor the States shall have power to make laws of a certain effect" (e.g. section 92) could raise an *inter se* question and decided that it had been well established that such questions were not questions *inter se*. They said:

> "This principle has been firmly established, and its was in accordance with it that in the *Banks Case* it was accepted that no *inter se* question could arise under section 92."

Their Lordships unfortunately went on:

> "Equally, when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth or those of any State, and on this point the reasoning of Dixon J. in *Ex parte Nelson* (No. 2) appears to their Lordships to be conclusive."

It has already been pointed out that Dixon J.'s reasoning in *Ex parte Nelson* (No. 2) in no way went to the establishment of that proposition.[11] The *Nelungaloo Case* was approved and applied in *Grace Bros. Pty. Ltd. v. The Commonwealth*[12] and the Judicial Committee, in the *Boilermakers' Case,*[13] has again repeated the proposition that the interpretation of an exclusive power of the Commonwealth does not raise an *inter se* question.

In *Nelungaloo Pty. Ltd. v. The Commonwealth* in the High Court, Dixon J. said[14] with reference to the Privy Council's dictum about Commonwealth exclusive powers,

> "It certainly states new doctrine if it means that no question *inter se* can exist where the legislative power of the Commonwealth over a subject matter is exclusive up to the exact limits

11 See note of the Nelungaloo Case by D. P. Derham in 33 J. COMP. LEG. 1085 (3rd series) and the criticism by S. E. K. Hulme in *What is an Inter Se Question?* (1954) 6 RES JUDICATAE, 337. Dixon J.'s reasoning in *Ex parte* Nelson (No. 2) was directed to showing the difference between a question as to whether or not a State law was permitted by sec. 92, and a question as to whether a State law was beyond power because it infringed upon an area of Commonwealth power all of which was exclusive to the Commonwealth and the interpretation of which was in issue. The effect of a general constitutional prohibition (or even of some of the prohibitions directed by the Constitution to the States alone) is different from the effect on Commonwealth-State power relations of the Constitution stating that the Commonwealth shall enjoy exclusive power over a given subject matter.

12 [1950] A.C. 53.

13 Attorney-General for Australia v. The Queen and The Boilermakers' Society of Australia and others, [1957] A.C. 288, at 324.

14 (1952) 85 Commonwealth L.R. 545, at 573-4.

of the power, so that the boundary line of Federal exclusive legislative power is necessarily the boundary line of State legislative power."

This is the question to be examined, but first certain collateral questions should be mentioned if only to be set aside. It should always be remembered that section 74 of the Constitution goes to the mutual relations of "constitutional powers" and not merely of constitutional *legislative* powers.

Thus it seems clear that a case concerning the limits of Commonwealth exclusive *legislative* power may raise an *inter se* question where the issue goes to the mutual relations of such a power and a State *executive* power. For example, a question as to the limits of the Commonwealth's exclusive power to impose custom duties as seen in the case of the *Attorney-General for New South Wales v. Collector of Customs for New South Wales*[15] was held by the Judicial Committee to be an *inter se* question. Similarly,

> "when the independence of the *executive* power of the Commonwealth has been secured by assigning a limit to the *legislative* power of the States, this has been considered to be a decision upon a question as to the limits *inter se* of State and Commonwealth power. In the same way a claim that the State *legislative* power could not be used to regulate the conduct of an officer of the Commonwealth *executive* was held to raise such a question."[16] (Italics added.)

And again in *Commonwealth v. Kreglinger & Fernau Ltd.*[17] it was held that an issue as to the validity of section 39(2)(a) of the Judiciary Act 1903-1920 raised an *inter se* question, and, upon one view at least (that of Isaacs J.[18]), it was so held because an issue as to whether the *judicial* power of a State could be limited by the exercise of the *legislative* power of the Commonwealth raised an *inter se* question within the meaning of section 74 of the Constitution.

If the Constitution does give the Commonwealth legislative power over a certain subject and declares that power to be exclusive, and if the limits of that exclusive legislative power mark also the limits to Commonwealth legislative power of whatever kind, then a question

15 *Supra* at note 8.

16 *Per* Dixon J. in *Ex parte* Nelson (No. 2), *supra,* at 271 referring to Baxter v. Commissioner of Taxation for New South Wales *supra* and Pirrie v. Macfarlane, (1925) 36 Commonwealth L.R. *per* Isaacs J. at 194-5 respectively.

17 (1926) 37 Commonwealth L.R. 393.

18 At 417-420.

going to those limits would be an *inter se* question. This is necessarily so because to say that a Commonwealth power is exclusive is merely to say that the Commonwealth has it and the States have not; and to determine the limits of the Commonwealth power is at the same time to determine the limits of the undefined residue of absolute power enjoyed by the States and so to provide the essential correlative effect. This was always thought to be the very clearest example of an *inter se* question that could be imagined and, with respect, it is submitted that the Judicial Committee's *dicta* would not merely create new doctrine but would produce unjustifiable inconsistencies in the law if it were given effect, according to the words actually used, to deny that an *inter se* question arises in such a case. It would be unjustifiable not merely because it would be logically untenable but because it would be inconsistent with the reasoning which supports the now firmly established doctrine that a decision as to the limits of a Commonwealth concurrent legislative power raises an *inter se* question.[19]

It might have been thought that their Lordships had no intention of creating new doctrine. In the *Noarlunga Meat Case* their Lordships, when referring to Dixon J.'s view expressed in the *Nelungaloo Case*[20] that the conception of *inter se* questions which had prevailed in the High Court would not require any "radical" revision in the light of the Privy Council's judgments, said:

> "With this statement their Lordships are in full agreement except that they think that the word 'radical' suggests an unnecessary qualification: they do not think that any revision is demanded."[21]

This might have been thought a sufficient recantation of the "new doctrine." But the subsequent restoration of the earlier *dicta* by their Lordships in the *Boilermakers' Cases* where it was said: "If the power is one, of which the exercise is exclusively vested in the Commonwealth, no such question arises",[22] makes it unwise to let the matter rest unexamined.

In the *Nelungaloo Case,* Dixon J. suggested an explanation of the Privy Council's *dicta* by saying,

> "But the judgment of the Privy Council may very well refer to another type of exclusive power. If a Federal legislative power is

19 See—Jones v. Commonwealth Court of Conciliation and Arbitration, [1917] A.C. 528; *Ex parte* Nelson (No. 2) *supra;* Nelungaloo Pty. Ltd. v. The Commonwealth, [1951] A.C. 34; Grace Bros. Pty. Ltd. v. The Commonwealth, [1951] A.C. 53; O'Sullivan v. Noarlunga Meat Ltd., [1957] A.C. 1; The Boilermakers' Case *supra.*

20 (1952) 85 Commonwealth L.R. at 577.

21 [1957] A.C. at 25.

22 [1957] A.C. at 324.

conferred over a subject matter and the power over part only of the subject matter is made exclusive, then the definition of the exclusive power does not give a common boundary between State power and Federal power. The boundary of Federal legislative power extends beyond the boundary of so much as is exclusive. The boundary of the exclusive power tells you nothing about the extent of the Federal power. It tells you only that within the boundary there is no State power. This is the case with customs and excise (section 90), which form the exclusive part of the power to make laws with respect to Taxation."[23]

This analysis, with respect, is clearly correct. A question as to the limits of the Commonwealth's exclusive power to impose excise taxes undoubtedly affects the States' powers to impose taxes but it in no way affects either the existence, the extent, or the supremacy of Commonwealth legislative power. The Commonwealth's power is a power to make laws with respect to taxation and is wider than and includes the excise taxing power. A decision therefore as to the extent of the Commonwealth's excise taxing power, although it draws a line which limits the States' legislative powers with respect to taxation, has no effect on the Commonwealth's legislative powers whatever. It follows that such a question cannot of itself be an *inter se* question within the meaning of section 74.

This means of course that Evatt J.'s reasoning in *Hopper v. The Egg and Egg Pulp Marketing Board*[24] must be rejected. It also means that few of the Commonwealth's exclusive legislative powers, if the question is merely as to the proper interpretation of the constitutional provisions conferring them and hence as to their extent as affecting

23 85 Commonwealth L.R. at 574.

24 (1939) 61 Commonwealth L.R. 665, at 681-2. In that case Evatt J. expressed the view that a decision as to whether a State law imposed a duty of excise was necessarily one upon an *inter se* question. He said *(inter alia)*: "But the decision of the Court must (1) impliedly, at least, lay down some definition of a 'duty of excise', and in that sense assist in the fixation of a boundary at which both State power ends and Commonwealth exclusive power begins, and (2) assert the absence (or presence) of power in the State to pass the particular legislation. In (2) it will be held that the power claimed by the State to pass the particular enactment crosses or does not cross the boundary separating State powers from Commonwealth exclusive powers. In respect of both (1) and (2) the decision will of necessity be a decision 'as to' the limits *inter se* of the Commonwealth and State powers."

All but the last sentence may well be true but it does not support the conclusion because it is not shown that to establish the limit of the Commonwealth exclusive power has any effect on Commonwealth power at all—and hence no mutual relation or correlative effect is shown.

State *legislative* powers, raise *inter se* questions. That is so because most of the exclusive legislative powers of the Commonwealth are either like the excise taxing power and contained within a wider legislative power of the Commonwealth, or are powers which were never enjoyed by the States and which do not have a "common boundary" with State legislative power.

The Commonwealth's exclusive legislative powers fall naturally into two groups, thus:—

1. Those expressly declared to be exclusive whether by use of the word "exclusive" as a description of the power or by direct withdrawal from the States in another section of the Constitution.

   e.g. Section 51 (ii) —Taxation—So far as customs and excise taxes are concerned, made exclusive by section 90.

   Section 51 (iii)—Bounties—made exclusive by section 90.

   Section 51 (vi)—Defence—made exclusive, so far as raising or maintaining naval or military forces, by section 114.

   Section 51 (xii)—Currency, coinage and legal tender—so far as coinage is concerned, made exclusive by section 115.

   Section 52—All the legislative powers conferred by this section are expressed to be exclusive.

2. Those powers which the States did not enjoy before federation and which have not been conferred upon them since, or powers which in their very nature could only be exercised by the Commonwealth.

   e.g. Section 51 (iv)—Borrowing money on the public credit of the Commonwealth.

   Section 51 (x)—Fisheries in Australian waters beyond territorial limits.

   Section 51 (xxx)—The relations of the Commonwealth with the islands of the Pacific.

   Other legislative powers, or parts of them, may fall into this group also—

   e.g. the Commonwealth Parliament's powers conferred by sections 101, 102, 105A(2) and (3), 128.[25]

[25] The powers of the Commonwealth Parliament conferred by Chapter III of the Constitution raise special problems and the determination of the extent of some of them may raise *inter se* questions even though they are exclusive

In both groups where the exclusive power is discovered to be contained within larger legislative powers of the Commonwealth, an issue as to the extent or limits of the exclusive part will not, of itself and in relation to State legislative powers, raise an *inter se* question, for the reasons given above with respect to the excise taxing power. In the second group in respect of some powers it may well be that even where the extent and limits of the Commonwealth's exclusive power coincide with the extent and limits of its legislative power, of whatever kind, there will still not be an *inter se* question when such extent or limits are in issue. That is because there may be no common boundary of power with the States, as when the States have no constitutional powers in the general constitutional area at all, and therefore have no residue of power defined by reference to the powers exclusively enjoyed by the Commonwealth. In such case a decision as to the extent or the limits of such a power would not affect State powers because if the Commonwealth does not have the power claimed then no Australian Parliament has it and if the Commonwealth does have it the States' powers are unaffected. There is, therefore, no mutual or correlative effect.[26]

But some powers enjoyed exclusively by the Commonwealth are not of either of those kinds. Some are exclusive to the Commonwealth right to a boundary of power with the States. First perhaps should be mentioned the power discussed by Dixon J. in *Nelungaloo Pty. Ltd. v. The Commonwealth* when he said:

> "Assuming that bounties could not be granted under a power found in sections 81-83 (cf. *Attorney-General for Victoria; Ex rel. Dale v. The Commonwealth* (1945) 71 C.L.R. 237), the definition of a bounty on the production or export of goods marks at once the boundary of State power and Federal power and in such case a question where the boundary was, it was considered, the most conspicuous example of a question of the limits *inter se* of the constitutional powers of State and of Commonwealth."[27]

in whole or in part.

Other powers such as those discovered in secs. 3, 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 65, 66, 67, 87, 93, 94, 96, 97 (almost all of which are comprehended by sec. 51 (xxxvi) of the Constitution) are also exclusive in nature but perhaps for different reasons. Sec. 96 is in rather a special position and is probably not comprehended by sec 51 (xxxvi) —See Victoria v. The Commonwealth, [1957] Argus L.R. 761, at 767-8 *per* Dixon C.J.

26 But *cf.* particularly with respect to sec. 51 (x), the reference to sec. 52 (i) of the Constitution below and the possibility of there being a mutual boundary of powers at a geographical and not merely a conceptual line.

27 (1951-1952) Commonwealth L.R. at 573-4.

Earlier in his judgment his Honour had said:

> "When the question relates to powers which are both legislative this is best seen where the Constitution in bestowing a power upon the Commonwealth Parliament withdraws it completely and absolutely from the Parliaments of the States. In such a case to affirm that, within a defined area of subject matter, a legislative power belongs to the Commonwealth is necessarily to deny that within that area any legislative power exists in the States. For example, to affirm that a particular class of benefit granted to manufacturers of an article is a bounty upon the production of goods and so falls within the Federal legislative power conferred by s.51(iii) is, because of s.90, necessarily to deny that the States possess any power to give that particular class of benefit to manufacturers. There is thus a mutual relation between the two powers consisting of a common boundary."[28]

Another power is that contained in section 52(i) of the Constitution where it is provided that the Parliament shall "have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to—(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes." Here it may be argued that there is no boundary of subject matter between Commonwealth and States because the States simply have no power to make laws with respect to the subject matter concerned. But there is here necessarily a clear geographical boundary so that the Commonwealth's legislative power with respect to a place "acquired by the Commonwealth for public purposes" can only be exercised by assuming a common boundary with State legislative power to make laws for the peace, order and good government of the State within which the "place" is. If the limits of the Commonwealth's power to make laws with respect to the "place" is challenged on an issue as to whether or not the law is properly one with respect to that "place", when it purports to have some operation across the geographical boundary and in the territory of the State concerned, then there could surely be a clear question as to the limits *inter se* of Commonwealth and State legislative powers.

Other examples can be drawn from the Constitution but for present purposes completeness is not necessary. It is clear that to say that an exclusive legislative power of the Commonwealth cannot raise an *inter* se question is too large a proposition and cannot be relied on notwithstanding that it is stated and restated by the Judicial Com-

[28] *Ibid.*, at 562-3.

mitee of the Privy Council. It is equally clear that to say that all such exclusive powers raise *inter se* questions is too large a proposition and cannot be relied upon. In each case the issues involved must be analysed and the question asked:—will a determination of those issues provide a mutual and correlative effect on the definition of State and Commonwealth constitutional powers, whether legislative, executive or judicial? If there is such a mutual and correlative effect then an *inter se* question is raised whether or not the powers concerned are exclusive or concurrent.

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