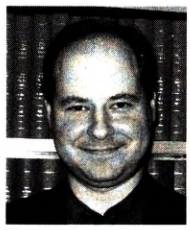
Mirror not broken:
mirror taxes in the High Court
Permanent Trustee Australia Ltd v Commissioner of State Revenue[1]



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In May 2001, Permanent Trustee Australia Limited (**PT**) objected to lease duty of over $762,000 assessed by the Commissioner of State Revenue (**Commissioner**) in respect of a Development Agreement concerning the development of the new Hilton Hotel at Melbourne Airport – a Commonwealth place. The assessment was issued under the *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth) (**MTA**) which applied the *Stamps Act* 1958 (Vic) (**Stamps Act**) to Commonwealth places[2].

In its objection, PT sought to have the Stamps Act declared invalid to the extent that it purports to charge a lease or an agreement for a lease of land or tenements situated within a Commonwealth place with stamp duty, on the basis that section 52(i) of the *Commonwealth Constitution* (**Constitution**) gives to the Commonwealth exclusive legislative power with respect to Commonwealth places. PT also challenged the constitutional validity of the MTA on grounds including that it was a law dealing with more than just the imposition of taxation (**first limb**); and dealing with more than one subject of taxation (**second limb**) – both contrary to section 55 of the Constitution. Further grounds of objection related to an asserted impermissible delegation of the legislative power of the Commonwealth, discrimination between States or parts of States contrary to section 51(ii) of the Constitution, and the giving of preference to a State or part thereof over another State or part thereof contrary to section 99 of the Constitution.

The objection of PT was set down for hearing before the Supreme Court of Victoria. In October 2003, the constitutional issues were removed into the High Court pursuant to section 40 of the *Judiciary Act* 1903 (Cth) and a case stated was heard by the Court in Canberra on 4 March 2004.

On 12 November 2004, by a majority of 5:2, the High Court decided those constitutional issues in the Commissioner's favour and upheld the validity of the MTA, thereby allowing States to continue to collect their taxes on Commonwealth places, such as airports and Commonwealth-owned buildings. Nationally, these amount to about $350 million per year with about $90-100 million in Victoria alone. Through an elaborate inter-governmental statutory scheme, the MTA introduced a scheme whereby the State Revenue authorities have, pursuant to federal law, been authorised to collect, effectively on behalf of the Commonwealth, and to pay into the federal Consolidated Revenue Fund, taxes levied, in accordance with state taxing laws applied as Commonwealth laws, the sums thereby raised being disbursed to the States by the Commonwealth.

The enactment of the MTA was a "sequel" to the decision of the High Court in *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (***Allders***)[3]. In *Allders*, the Court held that section 52(i) of the Constitution denied any operation of the Stamps Act to charge a lease of shop premises at Tullamarine Airport with stamp duty. The Court further held that the circumstance that the Stamps Act had general application and was not limited in operation to a Commonwealth place did not necessarily deny to the law the character of a law with respect to a Commonwealth place. In that regard the earlier decision in *Worthing v Rowell and Muston Pty Ltd*[4] was applied. During the course of the hearing in *Permanent Trustee*, the High Court refused an application by the Commissioner to re-open *Worthing* and, thus, *Allders*.

In relation to section 55 of the Constitution, the joint judgement of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ first found that in view of the conferral of legislative power by section 52(i) being made "subject to this Constitution", laws (such as the MTA) enacted under the latter provision were constrained by the requirements of section 55. With regard to the first limb of s.55, the High Court decided that it was unnecessary to separate out the provisions dealing with imposition of a tax from assessment, collection and recovery provisions, where a legislative purpose could only be achieved with difficulty by splitting such provisions into separate Acts. This was the case with the MTA, which was a law which imposes taxation, as well as dealing with the assessment, collection and recovery of taxation, but without falling foul of the first limb of s.55[5].

The MTA also bundled together several State tax laws and so, was under threat of being held invalid under the second limb. Nevertheless, the Court held that the MTA dealt with only one subject of taxation, namely, the application of State tax laws to Commonwealth places as a "single legislative initiative" intended to protect State revenues following *Allders*, and so did not breach the second limb of section 55(6)[6].

By a 5:2 majority, the Court also held that whilst the prohibition in section 99 of the Constitution, which prevented Commonwealth revenue laws from giving preference to one State or part thereof, applied to a law such as the MTA supported by section 52(i), the MTA did not breach the requirements of section 99. While the MTA produced differences in tax rates between Commonwealth places in each State, the Court accepted the Commissioner's argument that this was due to differences between State tax rates and regimes, with a Commonwealth place assimilated to other parts of the State in which it is located. In the words of the joint judgment: "[t]he differential treatment and unequal outcome that is involved here is the product of distinctions that are appropriate and adapted to a proper objective"[7]. McHugh and Kirby JJ, on the other hand, held that the MTA infringed section 99. Both of their Honours indicated that the policy or object behind the MTA was irrelevant[8]. What was relevant in the view of their Honours, was that the discrimen applied by the MTA was State locality[9].

The joint judgment held that, following *Allders*, a law imposing taxation which was otherwise one with respect to Commonwealth places was not subject to the prohibition against discrimination in section 51(ii)[10]. According to the joint judgment, there is also no "abdication" of the legislative power of the Federal Parliament effected by the MTA given that the Parliament retains the power to repeal or amend any provision of the MTA at any time[11]. It is certainly reassuring from the Commissioner's viewpoint, that the ghost of *Allders* has been laid to rest. ■

1 (2004) 211 ALR 18; 57 ATR 232 (HC). Hereafter referred to as "Judgment".
2 The expression "Commonwealth place(s)" is used in the sense of "all places acquired by the Commonwealth for public purposes" within the meaning of section 52(i) of the Constitution.
3 (1996) 186 CLR 630. See joint judgment of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in the Judgment at para.4.
4 (1970) 123 CLR 89.
5 Para.72 of the Judgment.
6 Para.54 of the Judgment.
7 Para.91 of the Judgment.
8 See paras.106, 158 per McHugh J and paras.229-230 per Kirby J.
9 See para.126 per McHugh J and paras.211, 227 per Kirby J.
10 Although finding it unnecessary to answer the s.51(ii) point, Kirby J suggested, obiter, that the legislative scheme established by the MTA would be a "forbidden discrimination in taxation within s.51(ii)": para.222.
11 Para.77 of the Judgment.