

# 'PEACE, ORDER AND GOOD GOVERNMENT': A LIMITATION ON LEGISLATIVE COMPETENCE

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[This article traces the history of the doctrine of extra-territorial competence and the history of the empowering words used in the State and Commonwealth Constitutions, and discusses the derivation of that doctrine from those words. The article also examines what other limitations on legislative competence arise from the empowering words, and the author concludes that a general limitation arises from the words 'peace, order and good government'.]

## 1. INTRODUCTION

The Constitutions of each of the States and the Commonwealth are regarded as containing few, if any, human rights provisions. However, six of the Australian legislatures are provided, either by their constitutions or by the Imperial empowering legislation,<sup>1</sup> with legislative power which is defined as being 'for the peace, order [or welfare] and good government' of the State or the Commonwealth. Those words (in addition to having the same extra-territorial ramifications found in the remaining State's constitution, 'in and for Victoria'<sup>2</sup>) were construed by two members of the New South Wales Court of Appeal in *B.L.F. v. Minister for Industrial Relations*,<sup>3</sup> as imposing a general limitation on the legislature's power to enact legislation which interferes with fundamental democratic rights.

While that proposition has been rejected by the full High Court,<sup>4</sup> it is the object of this article to review the history of the empowering phrases and to re-examine the question of what limitations on legislative power arise from the phrases. That examination will lead to the following conclusions:

- (i) while the empowering phrases 'for the peace, order and good government of the State' and 'for the peace, welfare and good government of the State' can be considered to be of identical meaning, the empowering phrase 'in and for the State' is not synonymous with those phrases;
- (ii) those phrases do not have the function of evincing a plenary grant of legislative power; and

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<sup>1</sup> This article proceeds on the basis that Australian constitutions derive their authority from Imperial empowering legislation. See *Attorney-General (N.S.W.) v. Trethowan* (1931) 44 C.L.R. 394, 424-5 (per Dixon J.); compare the views expressed by Murphy J. in *Bisticic v. Rokov* (1976) 135 C.L.R. 552, 565-8.

<sup>2</sup> Lumb, R. D., *The Constitutions of the Australian States* (1977) 26, 81; Cowen, Z., 'A Historical Survey of the Victorian Constitution, 1856 to 1956' (1957) 1 M.U.L.R. 9, 14; Keith, A. B., *Responsible Government in the Dominions Vol. 1* (1928) 302.

<sup>3</sup> (1986) 7 N.S.W.L.R. 372.

<sup>4</sup> *Union Steamship Co. of Australia v. King* (1988) 62 A.L.J.R. 645, 648.

- (iii) the first and second of those empowering phrases give rise to both a general and an extra-territorial limitation upon legislative power, while the latter phrase only gives rise to an extra-territorial limitation.

## 2. USAGE OF EMPOWERING PHRASES

### A. 1822 to 1842

The practice of granting legislative powers to Australian colonies by reference to the 'peace, welfare and good government of the colony' formula began with Imperial legislation of 1823, 1828 and 1842 providing for the establishment of Legislative Councils for New South Wales and Van Diemen's Land.<sup>5</sup> That formulation had, however, been used in legislation as early as 1774 in relation to Canadian colonies<sup>6</sup> and similar phrases had also been used in commissions to colonial governors dating from at least 1673.<sup>7</sup>

The alternative 'peace, order and good government' formula was, however, adopted in relation to Western Australia in 1829<sup>8</sup> and South Australia in 1834, 1838 and 1842,<sup>9</sup> as well as in legislation of 1840 and 1842 allowing for the separation of territory from New South Wales and the erection therein of new colonies.<sup>10</sup>

Whether the Imperial Parliament regarded these phrases as having any different legal significance is not clear. It is, however, worthy of note that in Act 5 & 6 Vict., C. 76 of 1842 both formulations were used, with the result that the Legislative Council of New South Wales was granted 'peace, welfare and good government' powers while a Legislative Council of a colony separated from New South Wales was to be empowered using the alternative phrase.<sup>11</sup>

### B. 1850 onwards

The constitutional development of the Australian colonies underwent a considerable change following the passing of Act 13 & 14 Vict., C 59 in 1850 (referred to hereafter as the Australian Constitutions Act 1850). That Act provided for the separation of Victoria from New South Wales, the creation of a Legislative Council for the new Colony, the establishment of new Legislative Councils for Van Diemen's Land and South Australia and the establishment of a Legislative Council in Western Australia.<sup>12</sup>

Those Councils were empowered by s. 14 of that Act to make laws for the 'Peace, Welfare and good Government' of their respective colonies and, by

<sup>5</sup> 4 Geo. IV, C. 96 (1823) ss 24, 44; 9 Geo. IV, C. 83 (1828) ss 20, 21, 5 & 6 Vict., C. 76 (1842) ss 1, 29.

<sup>6</sup> 14 Geo. III, C. 83; 31 Geo. III, C. 31.

<sup>7</sup> Labaree, L.W. (ed.), *Royal Instructions to British Colonial Governors 1670-1776 Vol. 2* (1935) 812.

<sup>8</sup> 10 Geo. IV, C. 22 (1829) s. 1.

<sup>9</sup> 4 & 5 Will. IV, C. 95 (1834) s. 2; 1 & 2 Vict., C. 60 (1838) s. 1; 5 & 6 Vict., C. 61 (1842) ss 5, 6.

<sup>10</sup> 3 & 4 Vict., C. 62 (1840) ss 2, 3; 5 & 6 Vict., C. 76 (1842) ss 51, 52.

<sup>11</sup> 5 & 6 Vict., C. 76 (1842) ss 29, 52.

<sup>12</sup> ss 1, 2, 7, 8.

s. 32, they and the Legislative Council of New South Wales were each empowered to, *inter alia*,

establish in the said Colonies respectively, instead of the Legislative Council, a Council and a House of Representatives, or other separate Legislative Houses . . . and to vest in such . . . separate Legislative Houses the Powers and Functions of the Legislative Council for which the same may be substituted.

(i) *Tasmania*

Acting on these powers, the Legislative Council of Van Diemen's Land passed its Constitution Act in 1854 which, by s. 1, established a bicameral legislature which was expressed to have 'all the powers and functions of the said existing Legislative Council'. That Act was repealed by the Constitution Act 1934 of the renamed State of Tasmania. The 1934 Act, however, makes no reference to the legislative powers of its legislature. As such, it is from sections 14 and 32 of the Australian Constitutions Act 1850, that the Tasmanian Parliament now derives its legislative power.<sup>13</sup>

(ii) *South Australia*

A similar situation exists in relation to South Australia in that s. 1 of the Constitution Act 1855-6 of that Colony granted legislative power to its new legislature by reference to the 'powers and functions of the existing Legislative Council'. That Act was replaced by the Constitution Act 1934, s. 5 of which continues the practice of granting legislative power by reference to the powers of the old Legislative Council. This practice led Quick and Garran to consider that the South Australian Constitution Act

was in fact not a Constitution, but, like that of Tasmania, a graft on, or a development of a pre-existing Constitution.<sup>14</sup>

(iii) *New South Wales*

The Legislative Council of New South Wales also attempted to exercise the powers granted to it by the 1850 Act and passed a Constitution Bill in 1853. That Bill, however, exceeded the powers granted by the 1850 Act with the result that the Imperial government elected, rather than to return the Bill to New South Wales for amendment, to amend it itself and to pass Imperial legislation to empower assent to be given to the Bill in its amended form.<sup>15</sup> That Imperial Act was passed in 1855<sup>16</sup> (referred to hereafter as the New South Wales Constitution Statute) to which the Bill (the New South Wales Constitution Act 1855) was appended as a schedule. Section 1 of the Constitution Act, unlike the South Australian and Tasmanian Constitution Acts, did not grant legislative powers by reference to the powers granted to the Legislative Council by the 1850 Act, but provided that

<sup>13</sup> *The Public General Acts of Tasmania (Reprint) Classified and Annotated, 1826-1936* (1936) 823-4.

<sup>14</sup> Quick, J. and Garran, R. R., *The Annotated Constitution of the Australian Commonwealth* (1901) 65.

<sup>15</sup> Lumb, R. D., *op. cit.* n. 2, 23.

<sup>16</sup> Quick, J. and Garran, R. R., *op. cit.* n. 14, 44; 18 & 19 Vict., C. 54 (1855).

Her Majesty shall have Power, by and with the Advice and Consent of the said Council and Assembly, to make laws for the Peace, Welfare, and good Government of the said Colony in all Cases whatsoever.

This Act was repealed by the New South Wales Constitution Act 1902<sup>17</sup> and the legislative power of that State's legislature is now provided for in s. 5 of that Act which reads:

The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever.

(iv) *Victoria*

Similar problems arose in relation to the Constitution Bill passed by the Victorian Legislative Council in 1854 necessitating the amendment of the Bill and the passing of Imperial legislation in 1855 (the Victorian Constitution Statute)<sup>18</sup> to which the Victorian Bill (the Constitution Act 1855) was appended as a schedule.

Section 1 of the Act provided the Victorian legislature with legislative powers using a new formula, viz. power 'to make Laws in and for Victoria, in all Cases whatsoever'. The reason for the departure from the more familiar forms of empowering phrase is not clear. The Act was drafted by a committee of twelve members of the Legislative Council<sup>19</sup> which also prepared a report detailing its resolutions which formed the basis for the Act.<sup>20</sup> The forty-fifth of those resolutions was

That the Parliament should be empowered to make laws for the good government of the colony of Victoria.<sup>21</sup>

How the phraseology of the empowering clause grew out of this resolution remains a mystery. It may well be that the committee considered that the different wording was of legal significance in that the preamble to the Act recited that the Act operated to vest powers and functions in the legislature greater than those vested in the previous Legislative Council. However, as a similar recital appears in the preamble to the New South Wales Constitution Act, it would appear that this cannot necessarily be taken as an indication on the part of the Victorian Council that it regarded 'in and for Victoria' as having any different operation to the more traditional forms of empowering phrase.

A better explanation appears to be that the wording derived from a sense of colonial individualism. This is reflected in the observation in the drafting committee's report that, although they had followed, in drafting the Act, the Bills proposed for New South Wales and South Australia,

From the great extent of Australia, and the widely differing circumstances of its several colonies, your committee do not think it essential for local legislatures that uniformity of institutions should prevail.<sup>22</sup>

<sup>17</sup> s. 2(1) and Schedule 1.

<sup>18</sup> 18 & 19 Vict., C. 55.

<sup>19</sup> Jenks, E., *The Government of Victoria (Australia)* (1897) 191; Great Britain, *Further Papers Relative to the Alterations in the Constitutions of the Australian Colonies* (1854) Cmnd 1827, 73 in *British Parliamentary Papers, Colonies, Australia Vol. 18* (1969).

<sup>20</sup> Great Britain, *ibid.* 73-9.

<sup>21</sup> *Ibid.* 76.

<sup>22</sup> *Ibid.* 74.

Whatever the intention behind the use of 'in and for Victoria' in the Act, the issue was not touched upon in the debates in the Westminster Parliament,<sup>23</sup> and the Act remained in operation in Victoria until repealed and replaced by the Constitution Act 1975.<sup>24</sup> Section 16 of that Act retains the empowering words used in s. 1 of the 1855 Act.

(v) *Western Australia*

The power granted by the Australian Constitutions Act 1850 to establish a bicameral legislature in Western Australia was not successfully pursued until 1890. A Bill for that purpose (the Western Australian Constitution Act 1889) was passed by the Western Australian Legislative Council in 1889, but, like those of Victoria and New South Wales, it exceeded the powers granted by the 1850 Act, necessitating further Imperial legislation (the Western Australian Constitution Statute 1890)<sup>25</sup> to which the Act was scheduled. Section 2 of the Constitution Act established the bicameral legislature with power 'to make laws for the peace, order and good government of the colony' as well as with 'all the powers and functions of the now subsisting Legislative Council.'

Western Australia, therefore, was the only colony to adopt the 'peace, order and good government' formula, but, like Tasmania and South Australia, also adopted 'peace, welfare and good government' powers by the reference to the powers of the Council. That Act remains in force in that State, with s. 2 renumbered as s. 2(1).

(vi) *Queensland*

At the time of the Australian Constitutions Act, Queensland was not yet a separate colony although provision had been made in 1842<sup>26</sup> as well as in s. 35 of that Act for the establishment of new colonies in territory separated from New South Wales. Similar provision was made in the New South Wales Constitution Statute, section 7 of which allowed for the erection of a separate colony by Letters Patent, and the establishment of a legislature similar to that existing in New South Wales at the time of separation.

In pursuance of these powers, Letters Patent erecting Queensland into a separate colony were issued on 6 June 1859 and an Order in Council was made on the same date establishing a bicameral legislature for that Colony. Section 2 of the Order in Council provided, *inter alia*, that

within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace, welfare and good government of the Colony in all cases whatsoever.

That Order in Council remained in force until substantially repealed in 1867 and replaced by the Constitution Act 1867,<sup>27</sup> section 2 of which retains the

<sup>23</sup> Great Britain, *Parliamentary Debates, 3rd series Vol. 138*, House of Commons (1855) 379-84, 1956-89; *Vol. 139*, 80-100, 297; House of Lords (1855) 363, 652-7, 849.

<sup>24</sup> s. 96 and First Schedule.

<sup>25</sup> 53 & 54 Vict., C. 26 (1890).

<sup>26</sup> 5 & 6 Vict., C. 76 (1842) ss 51, 52.

<sup>27</sup> 31 Vict., No. 9 (Qld) s. 2; 31 Vict., No. 38 (Qld).

empowering words used in section 2 of the Order in Council. That Act remains in force in Queensland and the empowering provision remains unchanged save for the excision of the reference to the Legislative Council which was abolished in that State in 1922.<sup>28</sup>

(vii) *Commonwealth*

At the establishment of the Commonwealth the framers had, therefore, three versions of empowering provision from which to choose. It would seem that the issue was not one considered to be of any moment by the majority of delegates and stimulated little interest at the conventions,<sup>29</sup> with the result that ss 51 and 52 of the Commonwealth Constitution empower the Parliament to 'make laws for the peace, order and good government of the Commonwealth with respect to' the matters enumerated in those sections.

### 3. EMPOWERING WORDS AS A LIMITATION UPON EXTRA-TERRITORIAL LEGISLATIVE COMPETENCE

The empowering words have, at least since the 1932 decision of the Privy Council in *Croft v. Dunphy*<sup>30</sup> been generally regarded as the source of the doctrine of colonial extra-territorial legislative incompetence. This doctrine concerns the capacity of a legislature to enact 'legislation which attaches significance for courts within the jurisdiction to facts and events occurring outside the jurisdiction',<sup>31</sup> rather than the capacity of the legislature to enforce that legislation in other jurisdictions.

The doctrine has, however, been described as being a subject 'full of obscurity' as well as being 'colonial in its origins, vague and uncertain in its nature and often inconvenient in its operation'.<sup>32</sup> It is necessary, therefore, to remove some of this obscurity by examining the development of the doctrine, both in terms of perceptions as to its source as well as its scope.

The earliest developments of the doctrine appear, as O'Connell and Riordan<sup>33</sup> have pointed out, to have been undertaken by the Law Officers of the Crown in the mid-nineteenth century, rather than by the courts. Their opinions appear to have been provided principally for the purpose of assisting the Colonial Office to develop a consistent practice regarding the reservation and disallowance of colonial legislation. As such, the doctrine seems, in the first instance, to have been created as a matter of policy, in that

Relationships with foreign nationals outside the colonial boundaries raised questions of inter-

<sup>28</sup> Constitution Act Amendment Act 1922 (Qld).

<sup>29</sup> Quick, J. and Garran, R. R., *op cit.* n. 14 513-4; Craven, G., 'A Guide to the Evolution of the Commonwealth of Australia Constitution Act 1900' in Craven, G. (ed.), *The Convention Debates 1891-1898: Commentaries, Indices and Guides* (1986) 331, 424-5.

<sup>30</sup> [1933] A.C. 156.

<sup>31</sup> Wheare, K. C., *The Constitutional Structure of the Commonwealth* (1960) 43.

<sup>32</sup> Great Britain, *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation* (1929) Cmnd 3479, 16; *Robinson v. Western Australian Museum* (1977) 138 C.L.R. 283, 303 (*per* Gibbs J.).

<sup>33</sup> O'Connell, D. P. and Riordan, A. (eds), *Opinions on Imperial Constitutional Law* (1971) vi.

national law affecting the Imperial Government, and the latter could not be compromised by possibly irresponsible colonial legislation.<sup>34</sup>

However, while there may have been sound policy reasons for the creation of such a limitation upon colonial legislative power, it was necessary to find some doctrinal basis to support its application. In this regard, the opinions of the Law Officers were, at first, not very forthcoming, in that they merely provided blunt statements of the operation of the doctrine, without expanding on its basis. For example, an opinion of 1839 regarding the legislative competence of the legislature of St. Christopher stated that

the authority of a Colonial Legislature is strictly local, binding only those within the limits of the Colony and cannot be lawfully exercised in regard to extra-Colonial offences.<sup>35</sup>

Similarly, an opinion of 1840 regarding St. Vincent asserted that the colony's legislature had

no right to legislate for offences committed beyond the precincts of the island.<sup>36</sup>

There were, however, some views expressed at about this time which related the doctrine to the empowering provisions. In an 1841 opinion by the Lords of the Committee of the Privy Council for Trade, their Lordships noted that the South Australian legislature was, at that time empowered to make laws 'for the Peace, Order and good Government of Her Majesty's Subjects and others *within the said province*' (their Lordships' emphasis) and expressed the following view:

My Lords conceive that under the Parliamentary authorization above quoted it is not competent to make laws regulating the conduct of any persons who are not locally within the province.<sup>37</sup>

Similarly, in a circular dispatch from the Colonial Office of 16 December 1842, it was stated that Her Majesty's Government had adopted the view that

When the operation of a Colonial Act is confined to a range not exceeding one league from the shore, and relates to matters of local interest, the regulation of which, by local enactment, is indispensable to *the welfare of the Colony*, no objection will be made to such an Act on the ground of the local range and extent of its operation exceeding the limits of the jurisdiction of the Colonial Legislature<sup>38</sup> [emphasis added].

This circular, while intended to clarify the position for Colonial Governors, in fact presents a confusing picture of the extra-territorial competence of colonial legislatures. While acknowledging that the competence of such legislatures was strictly limited to the territory of the Colony (which the Colonial Office appears to have regarded as terminating at the shore line), the circular authorized Governors not to object to legislation which purported to operate beyond territory, but within one league from shore (a concept of international law origin) *and* which was 'indispensable to the welfare of the Colony' (presumably a reference to the empowering words). This circular, like many of the Law Officers' opinions, as O'Connell put it, 'hint(s) at a tangled skein of international law and constitutional law conceptions which dictated their thinking'.<sup>39</sup> The

<sup>34</sup> O'Connell, D. P., 'Problems of Australian Coastal Jurisdiction' [1958] *British Year Book of International Law* 199, 248-9.

<sup>35</sup> O'Connell, D. P. and Riordan, A., *op. cit.* n. 33, 85.

<sup>36</sup> *Ibid.* 86.

<sup>37</sup> *Ibid.* 19.

<sup>38</sup> *Ibid.* 89.

<sup>39</sup> O'Connell, D. P., *op. cit.* n. 34, 249.

position was simplified somewhat by 1854, although still influenced by such conceptions, when the legislative competence of the Falkland Islands was described as extending to

within three marine miles (or a marine league) from the coast, such being the distances to which, according to the modern interpretation and usage of nations a cannon-shot is supposed to reach.<sup>40</sup>

The Law Officers expressed a similar view in the following year, but also indicated that a Colonial legislature may have broader territorial competence in certain circumstances. In their opinion,

the Colonial Legislature cannot legally exercise its jurisdiction beyond its territorial limits (three miles from shore), or at the utmost can only do this over persons domiciled in the Colony, who may offend against its ordinances even beyond those limits, but not over other persons.<sup>41</sup>

Whatever the source of the doctrine, it is apparent from such opinions that by this time the Law Officers were prepared to concede legislative competence beyond shore to the three mile limit in all cases (which seems to reflect their view that colonial territory extended to that point),<sup>42</sup> and beyond that point in relation to legislation affecting those domiciled in the colony. In the courts, however, the attitude to the origin and scope of the limitation was less clear.

The Victorian Supreme Court, for example, had two opportunities in 1881 to express its views on these questions. In the first matter, *R. v. Call, ex parte Murphy*,<sup>43</sup> the Court considered the validity of Victorian legislation which, it was argued, empowered the removal of persons from the Colony to another jurisdiction. The court had previously, in 1875,<sup>44</sup> considered the effect of similar New South Wales legislation and had determined, in the words of Stephen J. that

the [New South Wales] Legislature has full power over the person of the individual so long as he is within the limits of the colony. It has, however, no power over him when he leaves the boundary of the territory.<sup>45</sup>

In considering the effect of the Victorian legislation, both members of the majority (Stawell C.J. and Stephen J.) dealt with the question as one of construction but implied that, if the legislation was clearly intended to have an extra-territorial operation, the Court would give effect to that intention. As Stephen J. put it,

we are not to make it extend beyond the local limits of the jurisdiction of this colony, *unless the language obliges us to do so*<sup>46</sup> [emphasis added].

This apparent willingness to accept colonial extra-territorial competence was not evident, however, in the second 1881 case, *In re Victorian Steam Navigation Board, ex parte Allan*.<sup>47</sup> In that matter the Court had to consider whether a Victorian board had jurisdiction to enquire into the cause of an accident which occurred to a British ship off South Australia. The Court gave, on this occasion, consideration to the source of the limitation and Stawell C.J. took the view that it

<sup>40</sup> O'Connell, D. P. and Riordan, A., *op. cit.* n. 33, 159 (opinion of Harding, J.).

<sup>41</sup> *Ibid.* 125 (opinion of Harding, J. D., Cockburn, A. E., and Bethell, R.).

<sup>42</sup> *Cf. New South Wales v. Commonwealth (The Seas and Submerged Lands case)* (1975) 135 C.L.R. 337.

<sup>43</sup> (1881) 7 V.L.R. 113.

<sup>44</sup> *Ray v. M' Mackin* (1875) 1 V.L.R. 274.

<sup>45</sup> *Ibid.* 283.

<sup>46</sup> (1881) 7 V.L.R. 113, 120; and see 119 (*per* Stawell C.J.).

<sup>47</sup> (1881) 7 V.L.R. 248.

arose from the empowering words 'in and for Victoria' in that any attempt to confer extra-territorial jurisdiction on the board would have been 'in violation of the powers conferred by the Constitution'<sup>48</sup> and, therefore, *ultra vires*. Stephen J., although concurring with the Chief Justice, expressed his view regarding the source of the doctrine which he ascribed to 'the comity that exists between states'.<sup>49</sup>

The approach reflected in these cases, therefore, demonstrates a similar lack of certainty concerning the origin of the territorial limitation to that expressed by the Law Officers. The Court appears, however, in the final analysis, to have regarded the restriction as having a more strict application. The legislature's jurisdiction, in the Court's view, terminated at the limit of its territory, whereas the Law Officers were prepared to accept, at least for the purposes of reservation and disallowance, that colonial legislatures had extra-territorial competence over those domiciled in the colony.

The extreme view of the scope of the restriction appears to be confirmed by, what can be regarded as the first landmark decision regarding colonial extra-territorial legislative incompetence, the 1891 Privy Council decision in *MacLeod v. Attorney-General (N.S.W.)*.<sup>50</sup> That case concerned the validity of colonial legislation which, on its widest construction, rendered bigamy committed in any part of the world an offence in New South Wales. Lord Halsbury L. C., in delivering judgment for the Committee, dealt with the question as one of construction, holding that the words in the provision under consideration, "Whosoever being married" mean "Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales" and that 'the words "Wheresoever such second marriage takes place", mean "wheresoever in this Colony the offence is committed"'.<sup>51</sup>

However, after noting that the offence was committed outside the jurisdiction of the colony, his Lordship continued:

It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain the indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass . . . The more reasonable theory to adopt is that the language was used, subject to the *well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony* [emphasis added].<sup>52</sup>

There are a number of important things to note regarding this decision, the first being that it is commonly claimed that these observations of Lord Halsbury L. C. were *obiter* in that, as Latham has remarked:

Before reaching this part of the judgment their Lordships had already held, on the construction of the statute, that the conviction must be set aside.<sup>53</sup>

The better view, it is submitted, is that taken by Edwards J. in *R. v. Lander*

<sup>48</sup> *Ibid.* 265.

<sup>49</sup> *Ibid.*

<sup>50</sup> [1891] A.C. 455.

<sup>51</sup> *Ibid.* 457.

<sup>52</sup> *Ibid.* 458-459.

<sup>53</sup> Latham, J. G., *Australia and the British Commonwealth* (1929) 73.

that the passage cited 'is the very ground upon which their decision in the case rested' in that it formed the basis upon which the restrictive construction adopted was required.<sup>54</sup>

Secondly, it is to be observed that the rule laid down by the Judicial Committee was a 'special rule applicable only to colonial legislatures, and not a general principle of constitutional law'.<sup>55</sup> This was demonstrated by the decision of the House of Lords in the *Trial of Earl Russell*<sup>56</sup> where English legislation,<sup>57</sup> similar to that being considered in *MacLeod*, was held capable of supporting a conviction for bigamy where the offence had been committed in America.

Thirdly, the Judicial Committee expressed no view whatsoever regarding the source of the doctrine. The case has been regarded, therefore, by Trindade, as establishing a 'common law' basis for the limitation.<sup>58</sup>

Finally, the scope of the limitation appears far greater than that proposed by the Law Officers, in that the Privy Council seems to have adopted the view that colonies had no legislative competence in respect of acts committed outside of colonial territory. It is to be noted, however, that in referring to the 'well-known and well-considered limitation', their Lordships referred to legislative powers limited *both* to those 'within their jurisdiction, and within the limits of the Colony'.<sup>59</sup> Although Latham considered that the 'words "within their jurisdiction" appear to mean nothing',<sup>60</sup> it would seem that those words, when considered with their Lordships' observation that the widest construction of the legislation would comprehend 'a great deal more than Her Majesty's subjects', may indicate that their Lordships would have allowed some scope for extra-territorial legislative competence regarding the acts of residents of the colony. This interpretation is, however, weakened considerably by the construction adopted of the word 'wheresoever' so as to read 'wheresoever in this Colony the offence is committed'.<sup>61</sup> In other words, if their Lordships had considered that colonies had legislative competence regarding their residents, it would not have been necessary to construe the word 'wheresoever' so restrictively so as to save it from invalidity.

From the extreme position apparently adopted in *MacLeod*, the first signs of retreat were rapid. Two years after the decision in that case, the Privy Council approved, in *Ashbury v. Ellis*,<sup>62</sup> a New Zealand law which authorized local courts to proceed in the absence of the defendant in determining cases arising out of contracts made or to be performed in that Colony and stated the proposition that

<sup>54</sup> [1919] N.Z.L.R. 305, 324 (*per* Edwards J.), 329 (*per* Chapman J.), 337 (*per* Hosking J.); O'Connell, D. P., 'The Doctrine of Colonial Legislative Incompetence' (1959) 75 *Law Quarterly Review* 318, 324.

<sup>55</sup> Salmond, J. W., 'The Limitations of Colonial Legislative Power' (1917) 33 *Law Quarterly Review* 117, 119.

<sup>56</sup> [1901] A.C. 446.

<sup>57</sup> It is to be noted that that legislation was not amenable to the saving construction adopted in *MacLeod*; see Salmond, J. W., *op. cit.* n. 55.

<sup>58</sup> Trindade, F. A., 'The Australian States and the Doctrine of Extra-Territorial Legislative Incompetence' (1971) 45 *Australian Law Journal* 233, 234.

<sup>59</sup> [1891] A.C. 455, 459.

<sup>60</sup> Latham, J. G., *op. cit.* n. 53.

<sup>61</sup> [1891] A.C. 455, 457.

For trying the validity of the New Zealand laws it is sufficient to say that the peace, order and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand.<sup>63</sup>

In so deciding, their Lordships gave the first authoritative indication that the doctrine of extra-territorial incompetence has its source in the empowering provisions and that the legislative authority of the colonies were not strictly limited by their land boundaries or territorial waters.

This case was followed by a further Privy Council decision in *Attorney-General of Canada v. Cain*<sup>64</sup> where it was held that a colonial statute authorizing the taking into custody of a prohibited immigrant for the purpose of being returned to the country of origin was valid. The approach taken by their Lordships appears to support the view that the empowering words are the yardstick and source of the doctrine. Their Lordships considered that if, by virtue of the Colony's power to make laws for the peace, order and good government of that Colony, it had power to prevent the entry of illegal aliens, which they held it did, then those words would also grant the power of expulsion, despite the fact that it involved extra-territorial restraint, 'as a complement of the power of exclusion'.<sup>65</sup>

Despite these indications by the Privy Council of a less restrictive application of the doctrine, views expressed by the High Court of Australia<sup>66</sup> and, for that matter, the Supreme Court and Court of Appeal of New Zealand<sup>67</sup> during the following years involved, almost without exception,<sup>68</sup> an acceptance of the restrictive operation of the doctrine as established by *Macleod*, with *Cain* being considered as a specific exception<sup>69</sup> and *Ashbury* being either ignored or confined to its facts.<sup>70</sup> Those cases do, however, demonstrate that, at least for some of the members of those courts, the source of the doctrine was to be found in the empowering provisions, as *MacLeod* was to be regarded as 'authoritative with

<sup>62</sup> [1893] A.C. 339.

<sup>63</sup> *Ibid.* 344-5.

<sup>64</sup> [1906] A.C. 542.

<sup>65</sup> *Ibid.* 547.

<sup>66</sup> For example: *Robtelmes v. Brennan* (1906) 4 C.L.R. 395; *Morgan v. White* (1912) 15 C.L.R. 1; *Merchant Services Guild of Australia v. Commonwealth Steamship Owners Association* (1913) 16 C.L.R. 664; *Commissioner of Stamps (Old) v. Weinholt* (1915) 20 C.L.R. 531; *Delaney v. Great Western Milling Co. Ltd* (1916) 22 C.L.R. 150; *Hughes v. Munro* (1909) 9 C.L.R. 289; *F.C.T. v. Munro* (1926) 38 C.L.R. 153; *Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd* (1920) 38 C.L.R. 12.

<sup>67</sup> *In re the Award of the Wellington Cooks and Stewards' Union* (1907) 26 N.Z.L.R. 394; *R. v. Lander* [1919] N.Z.L.R. 305.

<sup>68</sup> Note the spirited dissents of Stout C.J. in *In re the Award of the Wellington Cooks and Stewards' Union* (1907) 26 N.Z.L.R. 394, 402; *R. v. Lander* [1919] N.Z.L.R. 305, 310. See also the views expressed by Gavan Duffy and Rich JJ. in *Delaney v. Great Western Milling Co. Ltd* (1916) 22 C.L.R. 150, 170.

<sup>69</sup> *Robtelmes v. Brennan* (1906) 4 C.L.R. 395, 404-6 (per Griffith C.J.), 415 (per Barton J.) and 420-1 (per O'Connor J.); *Merchant Services Guild of Australasia v. Commonwealth Steamship Owners Association* (1913) 16 C.L.R. 664, 690 (per Isaacs J.); *Delaney v. Great Western Milling Co. Ltd.* (1916) 22 C.L.R. 150, 165 (per Isaacs J.); *R. v. Lander* [1919] N.Z.L.R. 305, 327 (per Edwards J.), 330 (per Chapman J.), 338-9 (per Hosking J.). See also *Sickerdick v. Ashton* (1918) 25 C.L.R. 506 and *Simple v. O'Donovan* [1917] N.Z.L.R. 273 where extra-territorial competence was conceded in relation to legislation for defence purposes.

<sup>70</sup> *Delaney v. Great Western Milling Co. Ltd.* (1916) 22 C.L.R. 150, 163 (per Griffith C.J.), 166 (per Isaacs J.); *R. v. Lander* [1919] N.Z.L.R. 305, 331 (per Chapman J.), 337 (per Hosking J.). Note, however, the acceptance of the import of *Ashbury* by Gavan Duffy and Rich JJ. in *Delaney* at 174.

regard to the legislative powers conferred on the colonies by the formula of "peace, order, and good government".<sup>71</sup>

Possibly the most important development in relation to the doctrine occurred in 1932 with the decision of the Privy Council in *Croft v. Dunphy*.<sup>72</sup> That case concerned the validity of Canadian legislation which operated to authorize the seizure of vessels and cargo outside Canadian territorial waters. The Canadian Parliament was empowered by s. 91 of the British North America Act 1867 'to make laws for the Peace, Order, and good Government of Canada.' Without reference to *Macleod*, their Lordships held that s. 91 supported the validity of the legislation despite its extra-territorial operation and stated that

Once it is found that a particular topic of legislation is among those which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.<sup>73</sup>

In other words, the Judicial Committee accepted that the Dominion of Canada had jurisdiction to make its laws operate outside of Canada in so far as such operation was required in the exercise of its power to make laws 'for the peace, order and good government of Canada' or in respect of any of the specified subject matters.

O'Connell has argued that the reference to 'a fully Sovereign State' indicates that this principle was not intended by the Judicial Committee to be applicable to all colonies, but only to those which had, through the process of constitutional development, attained the status of having 'independent legislatures' (such as Australia, Canada, New Zealand and South Africa) rather than other colonies such as the Australian States.<sup>74</sup>

Whether O'Connell's assessment of the Board's intention is correct or not,<sup>75</sup> it is to be observed that in the same year the High Court was twice prepared to adopt a similar approach in relation to State laws to that adopted in *Croft*. In the first of those cases, *Barcelo v. Electrolytic Zinc Company of Australia Ltd*<sup>76</sup>, the Court considered, *inter alia*, the validity of Victorian legislation which purported to reduce the interest payable on mortgage debentures located out of Victoria. Starke J. expressed the view that

The constitutional basis of the Acts is the authority given to the Legislature of the State of Victoria by the *Constitution Act* to make laws 'in and for Victoria in all cases whatsoever'. It is within its competence to make laws for persons and property within territory, and it is not without its territorial jurisdiction to make laws in cases of contracts made or to be performed in Victoria . . . In my opinion, therefore, the meaning and scope of the words 'every mortgage' in the *Financial Emergency Acts* are only limited by the constitutional authority of the State of Victoria. It is not

<sup>71</sup> *R. v. Lander* [1919] N.Z.L.R. 305, 337 (*per* Hosking J.), 332 (*per* Chapman J.), 334 (*per* Sim J.); *In re. the Wellington Cooks and Stewards' Union* (1907) 26 N.Z.L.R. 394, 423 (*per* Chapman J.); *Commissioner of Stamps (Old) v. Weinholt* (1915) 20 C.L.R. 531, 540; *Delaney v. Great Western Milling Co. Ltd* (1916) 22 C.L.R. 150, 173-4 (*per* Gavan Duffy and Rich JJ.).

<sup>72</sup> [1933] A.C. 156.

<sup>73</sup> *Ibid.* 163.

<sup>74</sup> O'Connell, D. P., 'Problems of Australian Coastal Jurisdiction' [1958] *British Year Book of International Law* 199, 251-2; O'Connell D. P., 'The Doctrine of Colonial Extra-territorial Legislative Incompetence' (1959) *75 Law Quarterly Review* 318, 325-6.

<sup>75</sup> See the criticisms of O'Connell's argument in Castles, A. C., 'Limitations on the Autonomy of the Australian States' (1962) *Public Law* 175, 196-197 and Trindade, F. A.; *op. cit.* n. 50, 239-40.

<sup>76</sup> (1932) 48 C.L.R. 391.

necessary in this case to consider the utmost limit of that authority. But I think it extends to . . . every mortgage of property in Victoria, and every mortgage of which the proper law of the contract is that of Victoria.<sup>77</sup>

Dixon J. was of a similar view and was prepared to discuss the scope of the limitation. In that regard he said

It is true that the Victorian Parliament is empowered only to make laws in and for Victoria, and from this circumstance a territorial limitation of a constitutional character arises . . . A statute discharging obligations might be considered a law in and for Victoria if its operation were expressly based upon any one of a great number of things which touch and concern Victoria . . . But if any such enactment were considered a law in and for Victoria the reason would be that it is a law made with respect to the matter upon which its operation is based and that the matter is one of Victorian concern . . . [T]he extent of the power to legislate in and for Victoria . . . includes authority to adopt any fact or matter or thing concerning Victoria as the ground of exercising legislative jurisdiction over any right or obligation affecting such fact, matter or thing.<sup>78</sup>

His Honour, therefore, regarded the doctrine as having a very unrestrictive operation in that, provided that the legislation selected a matter of 'Victorian concern' for its operation, it would fall within the constitutional power provided by the phrase 'in and for Victoria'.

It remained to be determined, however, what operation the doctrine would have in those States which, unlike Victoria, were granted power to make laws 'for the peace, order (or welfare) and good government of the' State. This issue arose in another matter before the Court in that year, *Commissioner of Stamp Duties (N.S.W.) v. Millar*.<sup>79</sup> The issue in this matter was the validity of New South Wales legislation which purported to impose death duty in relation to shares, held by a person who was not domiciled or resident in that State, in a company which had no connection with the State other than carrying on business there. Gavan Duffy C. J. and Evatt J., in dissent, considered the legislation valid and appear to have adopted a test similar to that applied by Dixon J. in *Barcelo* when they expressed the opinion that

It is . . . competent to the New South Wales Legislature to select any event, circumstance, or course of activity within its borders as the foundation of liability to contribute to the revenue of the State.<sup>80</sup>

The majority of the Court, however, while not disagreeing with this statement of principle, considered the connection with the State in that instance to be too tenuous to support the legislation in question.<sup>81</sup>

In the following year, Evatt J. took the opportunity presented by the issues in *Trustees Executors & Agency Co. Ltd v. F.C.T.*<sup>82</sup> to discuss the origin and scope of the doctrine and the relevance of the words 'peace, order and good government' in s. 51 of the Commonwealth Constitution to those questions. His Honour considered that the principles relating to the source and scope of the doctrine could be summarized as follows:

- (1) The mere exhibition of non-territorial elements in any challenged legislation does not invalidate the law.
- (2) The presence of such non-territorial elements may, however, call attention to the necessity for enquiring whether the challenged law is truly a law with respect to the 'peace, order and good

<sup>77</sup> *Ibid.* 409, 415.

<sup>78</sup> *Ibid.* 425-8.

<sup>79</sup> (1932) 48 C.L.R. 618.

<sup>80</sup> *Ibid.* 628.

<sup>81</sup> *Ibid.* 632-3 (*per Rich, Dixon and McTiernan JJ.*), 636 (*per Starke J.*).

<sup>82</sup> (1933) 49 C.L.R. 220.

government' of the Dominion—the words employed in the constitutional statute to define and limit the legislative power.

(3) It is the duty of the Courts of the Dominion to make this enquiry in a proper case.

(4) The test is not quite . . . whether the law is a 'bona fide exercise of the subordinate legislative power' . . . because the bona fides of the exercise of legislative power cannot be impugned in the Dominion's own Courts.

(5) The test is whether the law in question does not, in some aspects and relations, bear upon the peace, order and good government, of the Dominion, either generally or in respect to specific subjects.

(6) If it does not bear any relation whatever to the Dominion, the Courts must say so and declare the law void. If it bears any real and substantial relation, then it is a law for the peace, order and good government of the Dominion.

(7) In the latter event, it may still be *ultra vires* and void where the Legislature of the Dominion has only power to legislate, under its controlling Constitution, with respect to certain matters.<sup>83</sup>

It would appear, from these propositions, therefore, that His Honour did not regard the words 'peace, order and good government' as requiring a test different to that applicable in Victoria as discussed by Dixon J. in *Barcelo*. All that was required was that the law have some 'real and substantial' connection with the jurisdiction to fall within the constitutional power. It is to be noted, however, that his Honour, earlier in his judgment, referred to the need for the law in question to 'forward its [the Dominion's] welfare'<sup>84</sup> in order to be valid, and, as such, his Honour's views on this issue are not entirely clear.

His Honour, however, did make it clear that he regarded the propositions quoted as being derived from *Ashbury* and *Croft*. He also considered that they were not applicable solely to Dominions but 'should settle most doubts upon the subject, and should result in confining to a very small compass indeed the supposed territorial restrictions upon the legislative powers of the seven Parliaments of Australia'.<sup>85</sup>

If any doubts remained regarding the scope and origin of the doctrine and the applicability of *Croft v. Dunphy* to the Australian States, these must have been removed by the 1937 decision of the Court in *Broken Hill South Ltd (Public Officer) v. Commissioner of Taxation (N.S.W.)*<sup>86</sup> All members of the Court accepted that the test of constitutional validity of State extra-territorial legislation was whether it had any sufficient connection with matters of concern to the State.<sup>87</sup>

Dixon J., once again, took the opportunity to provide an elaborate statement of principle regarding the operation of the doctrine as it applied to legislatures empowered to make laws 'for the peace, order (or welfare) and good government' of a State, and it will be noted that the views expressed were not significantly different to those which he put in *Barcelo*, or those expressed by Evatt J. in *Trustees Executors*. His Honour considered that

The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicile, residence or otherwise. *But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned*

<sup>83</sup> *Ibid.* 240.

<sup>84</sup> *Ibid.* 236.

<sup>85</sup> *Ibid.* 235.

<sup>86</sup> (1937) 56 C.L.R. 337.

<sup>87</sup> *Ibid.* 358 (*per* Latham J.), 361 (*per* Rich J.), 365-6 (*per* Starke J.), 375 (*per* Dixon J.) and 377-80 (*per* Evatt J.).

therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections. *If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers . . .* But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen.<sup>88</sup> [emphasis added].

The principles outlined in this statement were subsequently approved and applied by the Privy Council in *Johnson v. Commissioner of Stamp Duties*<sup>89</sup> and *Thompson v. Commissioner of Stamp Duties*<sup>90</sup> and have, together with the statements of the Judicial Committee in *Croft*, formed the foundation for the subsequent application of the doctrine.<sup>91</sup>

Although the doctrine as interpreted by Dixon J. seems relatively easy to satisfy, in that all that is required, in essence, is a real and substantial connection with matters of concern to the State, subsequent cases have demonstrated that this connection must not be too remote.

In *O'Sullivan v. Dejneco*<sup>92</sup> it was held that it was within the competence of New South Wales to impose upon the South Australian owner of a commercial goods vehicle, or the person in whose name the vehicle was registered in South Australia, the obligation to make contributions as required by New South Wales road maintenance legislation in respect of the use of that vehicle in that State. However, in *Welker v. Hewitt*<sup>93</sup> and *Cox v. Tomatt*<sup>94</sup> it was held that there was no sufficient territorial connection where the person who was sought to be levied had no connection with the State aside from being a director of the foreign company which owned the vehicle.

Despite the acceptance of the principles laid down in the *Croft* and *Broken Hill South* cases, the references to 'peace, order and good government', in these and other decisions, as being the source of the restriction led the application of the doctrine to be thrown into confusion following the decision of the High Court in *Robinson v. Western Australian Museum*.<sup>95</sup> In that matter, the majority (Barwick C.J., Jacobs and Murphy JJ.) of the Court held that it was beyond the legislative competence of the Western Australian Parliament to enact legislation purporting to vest the Western Australian Museum with proprietary and possessing rights in 'historic wrecks' lying off the coast of that State. Only four members of the Court considered the question of the extra-territorial powers of the State legislature, but there was no consensus of views regarding this issue.

<sup>88</sup> *Ibid.* 375.

<sup>89</sup> [1956] A.C. 331, 353.

<sup>90</sup> [1968] 1 A.C. 320, 335.

<sup>91</sup> Among the cases which have applied or discussed the doctrine are *O'Sullivan v. Dejneco* (1964) 110 C.L.R. 498; *Welker v. Hewitt* (1969) 120 C.L.R. 503; *Cox v. Tomatt* (1972) 126 C.L.R. 105; *Bonser v. La Machia* (1970) 122 C.L.R. 177; *R. v. Bull* (1973) 131 C.L.R. 203; *Pearce v. Florenca* (1976) 135 C.L.R. 507; *Robinson v. Western Australia Museum* (1977) 138 C.L.R. 283; *Ex Parte Iskra* [1963] N.S.W.R. 1593; *Giles v. Tumminello* (1963) S.A.S.R. 96; *Myer Emporium Ltd v. Commissioner of Stamp Duties* [1967] 2 N.S.W.R. 230; *McLaine Watson & Co. Private v. Bing Chen* [1982] 1 N.S.W.L.R. 163; *Traut v. Rogers* (1984) 27 N.T.R. 29; *Searles v. Searles* [1965] V.R. 83.

<sup>92</sup> (1964) 110 C.L.R. 498.

<sup>93</sup> (1969) 120 C.L.R. 503.

<sup>94</sup> (1972) 126 C.L.R. 105.

<sup>95</sup> (1977) 138 C.L.R. 283.

Of those members who looked to the question, Barwick C.J. and Murphy J. regarded the legislation as *ultra vires*. Murphy J., after noting that the territory of the State terminated at the low water mark, as had been decided in *New South Wales v. Commonwealth* (the *Seas and Submerged Lands Case*),<sup>96</sup> contented himself with observing that

Assertion of dominion and control over wrecks and archaeological sites outside its territory is not within the extra-territorial competence of a State.<sup>97</sup>

This approach, it is submitted, appears to amount to a reversion to that taken in *MacLeod* and cannot be regarded as an accurate statement of the law concerning the extra-territorial competence of States.

Barwick C.J. proposed and applied a far more elaborate test which seems to have been intended to give some application to the words 'peace, order and good government' which the principles explained in *Broken Hill South* do not allow for. His Honour's test appears to involve the examination of a challenged law as against 'peace, order and good government' not once, but twice. Accordingly a State's laws

must first be seen to be laws for the peace, order and good government of the State and thereafter when they answer that criterion they may operate extra-territorially so long as the extra-territorial operation is still something which can be for the peace, order and good government of the State.<sup>98</sup>

That his Honour's test, or tests, requires an examination of the legislation against the words 'peace, order and good government', and therefore requires more than a mere real or substantial connection with the State, was demonstrated when it was observed that

No doubt the Western Australian Museum is a Western Australian institution and no doubt its establishment and maintenance is for the peace, order and good government of Western Australia . . . [B]ut to my mind by no stretch of the imagination could it be said that the declaration of marine archaeological sites or of ancient wrecks on the bed of the sea 'off the coast of Western Australia' was really a matter of concern for the peace, order and good government of Western Australia<sup>99</sup> [emphasis added].

The other members of the Court who considered the issue, Gibbs and Mason J.J., regarded the legislation as valid and applied tests in line with that adopted in *Broken Hill South*. Mason J. considered that, as the object of the legislation was the preservation of the wrecks for the benefit of the State and its citizens, 'the Acts are Acts for the peace, order and good government of the State and have a sufficient relationship with the State.'<sup>1</sup>

In reaching the same conclusion, Gibbs J. referred to the views which he expressed in *Pearce v. Florenca*.<sup>2</sup> In that case, after quoting the decision of the Judicial Committee in *Croft*, his Honour observed that

In accordance with those reasons, it is now often said that the test of validity of a State statute is simply whether it is legislation for the peace, order and good government of the State . . . and that no additional restrictions placed upon the mere territorial considerations should be placed upon the constitutional powers of a State . . . However, the test whether a law is one for the peace, order and good government of a State is, as so stated, exceedingly vague and imprecise, and a rather more specific test has been adopted; it has become settled that a law is valid if it is

<sup>96</sup> (1975) 135 C.L.R. 337.

<sup>97</sup> (1977) 138 C.L.R. 283, 344.

<sup>98</sup> *Ibid.* 294-5.

<sup>99</sup> *Ibid.* 295.

<sup>1</sup> *Ibid.* 331.

<sup>2</sup> (1976) 135 C.L.R. 507.

connected, not too remotely, with the State which enacted it, or, in other words, if it operates on some circumstance which really appertains to the State.<sup>3</sup>

Applying this principle in *Robinson*, Gibbs J. found no difficulty in considering the legislation valid, both because of its reference to things within off-shore waters and because of the historic significance of the wrecks.<sup>4</sup>

Of the approaches adopted in *Robinson*, it is submitted that that of Gibbs and Mason JJ. is preferable, in that the views expressed by their Honours are more in accord with the established line of authority derived from such cases as *Croft*, *Barcelo*, *Trustees Executors* and *Broken Hill South*. That test, however, while regarding the total expression 'for the peace, order and good government of the State' as the source of the doctrine, gives no particular operation to the words 'peace, order and good government'.

This has led Moshinsky<sup>5</sup> to express the view that the test adopted by Gibbs J. in the *Pearce* and *Robinson* matters constitutes a 'separate and specific requirement of a nexus with the enacting State',<sup>6</sup> independent of the words 'peace, order, and good government'. That commentator does not, however, identify the source of that nexus test. The better view, it is suggested, is that the reliance, evident in the decisions since *Croft v. Dunphy*, on empowering provisions which contain those words as the source of the limitation demonstrates that the doctrine has a constitutional origin located in those empowering provisions. This is supported by the observation of Gibbs J. in *Pearce* that the nexus requirement is to be regarded as a 'modern form'<sup>7</sup> of the limitation derived from those provisions in the earlier cases. Furthermore, this is the approach adopted in the most recent examination of the question of extra-territoriality by the full High Court in *Union Steamship Co. of Australia Ltd v. King*.<sup>8</sup>

However, the lack of operation given by the nexus test to the words 'peace, order and good government' would seem to support the proposition that, as Moshinsky points out, the limitation cannot now be seen as deriving from those words. The enquiry into the origin of the doctrine must look, therefore, to the other words in the empowering provision.

As has been seen, the most common form of empowering provision is typified by such provisions as s. 5 of the New South Wales Constitution Act 1902. That section provides that the legislature shall have power to make laws

for the peace, welfare, and good government of New South Wales.

It is submitted that the doctrine is best regarded as being derived, as Roberts-Wray pointed out,

from the first, or the first and the last words of that phrase; if a legislature does not mind its own business, it is exceeding its power to make laws 'for', or perhaps for the government 'of', its own country.<sup>9</sup>

<sup>3</sup> *Ibid.* 517.

<sup>4</sup> (1977) 138 C.L.R. 283, 304.

<sup>5</sup> Moshinsky, M., 'State Extra-territorial legislation and the Australian Acts 1986' (1987) 61 *Australian Law Journal* 779.

<sup>6</sup> *Ibid.* 782.

<sup>7</sup> (1976) 135 C.L.R. 507, 518.

<sup>8</sup> (1988) 62 A.L.J.R. 645, 648-50.

<sup>9</sup> Roberts-Wray, K., *Commonwealth and Colonial Law* (1966) 370; see Jennings, W.I., *Constitutional Laws of the Commonwealth Vol. 1* (1957) 53.

This point also seems to have been made by Dixon C.J., McTiernan, Taylor and Windeyer JJ. in *Clayton v. Heffron*<sup>10</sup> when they observed of s. 5 of the New South Wales Constitution Act that

The first paragraph confers a complete and unrestricted power to make laws with reference to New South Wales. There is doubtless a territorial limitation implied in the reference to New South Wales.<sup>11</sup>

This approach explains the apparent paradox evident in the application of the nexus test in relation to all the States despite the fact that Victoria's empowering provision does not use the phrase 'peace, order and good government'. It can be regarded as having been confirmed by the views expressed by the Judicial Committee in *Wallace Brothers and Co. Ltd v. Commissioner of Income Tax*.<sup>12</sup> That case concerned the question of the territorial limitations applicable to the Indian Legislature which was granted power, simply, to 'make laws for the whole or any part of British India' by s. 99(1) of the Government of India Act 1935 (Imp.). Their Lordships were of the view that

There is no rule of law that the territorial limits of a subordinate legislature define the scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depends on the proper construction of the statute conferring those powers.<sup>13</sup>

The doctrine can, therefore, be seen to have its origin nowhere other than in the grant of power reflected in the Commonwealth and State Constitutions to legislate for 'defined territory' and, as such, requires only a real and substantial nexus with that territory, rather than with the 'peace, order and good government' of that territory. Legislation may still be *ultra vires*, as Evatt J. pointed out in the *Trustees Executors* case, even where such a nexus exists, when a legislature, such as that of the Commonwealth, is granted legislative power only in respect to certain subject matters and the legislation does not relate to those subjects.

The requirement in all Australian Constitutions, save that of Victoria, to legislate for 'peace, order (or welfare) and good government' remains. Whether those words have any relevance to the scope of legislative power is considered next.

#### 4 EMPOWERING WORDS AS A GENERAL LIMITATION UPON LEGISLATIVE COMPETENCE

If the extra-territorial limitation is derived from the words 'for' and 'of the State' in the phrase 'for the peace, order and good government of the State', what function, then, do the words 'peace, order and good government' have?

Those words have been generally regarded as being of identical effect to the words 'peace, welfare and good government'<sup>14</sup> and the difference between these

<sup>10</sup> (1960) 105 C.L.R. 214.

<sup>11</sup> *Ibid.* 250.

<sup>12</sup> (1948) 75 I.A. 86.

<sup>13</sup> *Ibid.* 98-100.

<sup>14</sup> Moore, W. H., *The Constitution of the Commonwealth of Australia* (4th ed. 1910) 274; Roberts-Wray, K. *op. cit.* 369; *R. v. Lander* [1919] N.Z.L.R. 305, 336; *Union Steamship Co. of Australia v. King* (1988) 62 A.L.J.R. 645, 648.

phrases and the Victorian power to make laws 'in and for Victoria in all cases whatsoever' has been considered, in the words of Lumb, to constitute 'no legal significance'.<sup>15</sup>

It has also been said of both 'peace, order and good government' and 'peace, welfare and good government' that they are 'compendious means of delegating full powers of legislation, subject to any limitations which may be expressed and to any overriding legislation';<sup>16</sup> that they 'connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign';<sup>17</sup> that they 'are words of very wide import, and a legislature empowered to pass laws for such purpose has a very wide discretion';<sup>18</sup> that it 'would be almost impossible to use wider or less restrictive language';<sup>19</sup> that the words 'are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to'<sup>20</sup> and that they convey 'authority "as plenary and as ample" . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow'.<sup>21</sup> As a result of these expressions, the High Court has, in *Union Steamship*, adopted the similar view that

within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words 'for the peace, order and good government' are not words of limitation.<sup>22</sup>

If 'peace, order (or welfare) and good government' is of identical meaning to 'in and for Victoria in all cases whatsoever', the latter phrase must also have (and have been regarded by Cowen<sup>23</sup> as having) the function of granting plenary power. This, however, leads to a logical problem. If 'peace, order (or welfare) and good government' is essential for a grant of power to be regarded as plenary, as the Victorian Constitution does not use that expression then Victoria has received a lesser grant of power than the other States. On the other hand, if all the States and the Commonwealth are regarded as possessing plenary powers, then the phrase 'peace, order (or welfare) and good government' must have some alternative operation, unless it is mere verbiage.

It would seem that the first of these alternatives cannot be correct in that the cases, such as the recent decision in the *Union Steamship* case,<sup>24</sup> which have

<sup>15</sup> Lumb, R. D. *The Constitutions of the Australian States* (1977) 81, 26 n. 10; Cowen, Z., *op. cit.* n. 2, p. 65, 14; Keith, A. B., *op. cit.* n. 2 p. 65, 302; *Barcelo v. Electrolytic Zinc Company of Australia* (1932) 48 C.L.R. 391, 406 (where Rich J. seemed to be of the view that the Victorian legislature was empowered to make laws for the 'peace, order and good government of' that State.)

<sup>16</sup> Jennings, W. I., *op. cit.* n. 9, p. 69, 49.

<sup>17</sup> *Ibralebbe v. R.* [1964] A.C. 900, 923.

<sup>18</sup> *Attorney-General for Saskatchewan v. Canadian Pacific Railway Co.* [1953] A.C. 594, 613-4.

<sup>19</sup> *McCawley v. R.* [1920] A.C. 691, 712.

<sup>20</sup> *Riel v. R.* (1885) 10 App. Cas. 675, 678.

<sup>21</sup> *Hodge v. R.* (1883) 9 App. Cas. 117, 132, applied to 'peace, order and good government' in *Cobb & Co. Ltd v. Kropp* [1967] 1 A.C. 141, 155; *R. v. McChlery* [1912] A.D. 199, 216 (per Lord de Villiers C.J.), 219 (Innes J.); *Robtelmes v. Brenan* (1906) 4 C.L.R. 395, 404 (per Griffith C.J.), 421 (per O'Connor J.); *Attorney-General of Canada v. Cain* [1906] A.C. 542, 547; *Croft v. Dunphy* [1933] A.C. 156, 164; *British Coal Corporation v. R.* [1935] A.C. 500, 517-9; *British Columbia Electric Railway Co Ltd v. R.* [1946] A.C. 527, 541; *Giles v. Tumminello* [1963] S.A.S.R. 96, 100; *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129, 153 (per Knox C.J., Isaacs, Rich and Starke JJ.).

<sup>22</sup> (1988) 62 A.L.J.R. 645, 648.

<sup>23</sup> Cowen, Z. *op. cit.* n. 2, p. 65.

<sup>24</sup> (1988) 62 A.L.J.R. 645, 648.

regarded the function of 'peace, order and good government' as constituting a plenary grant of power generally cite two authorities, *Hodge v. R.*<sup>25</sup> and *R. v. Burah*,<sup>26</sup> neither of which dealt with constitutional provisions using those words. *Hodge's* case concerned s.92 of the British North America Act 1867 which grants to the Canadian Provincial Legislatures power to 'exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated' and *Burah's* case dealt with s. 22 of the Indian Councils Act<sup>27</sup> which empowered the Indian legislature, *inter alia* 'to make laws and regulations . . . for all places or things whatever within the territories'. In relation to the latter power, the Judicial Committee said

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe those powers. But, when acting within those limits, it . . . has, and was intended to have plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.<sup>28</sup>

It is submitted, therefore, that *Burah* and *Hodge* stand for the proposition that when a grant of legislative power is made to a colonial legislature, that legislature has, within the limits of that grant, plenary legislative power. In other words, the Commonwealth and the State legislatures have, by virtue of the grant of legislative powers, howsoever described, plenary powers of legislation. The words 'peace, order (or welfare) and good government', therefore, are irrelevant to the plenary nature of the granted power.

What function, then, do the words have in the Constitutions in which they are to be found? This question was, in fact raised by Inglis Clark and Lewis at the 1897 Constitutional Convention. Clark, who considered that the words were appropriate in s.52 of the Commonwealth Constitution as exclusive powers were granted by that section, but felt that their use in s.51 may lead to that section being regarded, like s.91 of the British North America Act 1867, as a residuary power, wrote that

It cannot be contended that they are required for the purpose of giving the parliament of the commonwealth full power to legislate with regard to all subjects mentioned in the sub-sections of [s. 51]; and, if they are not required for that purpose they must inevitably encourage the contention that they are inserted for some additional purpose. But if their insertion is not intended to add in any way to the powers of the parliament, in relation to the matters mentioned in the sub-sections of [s. 51], then *they violate the canon of drafting, which requires that no unnecessary words should be used in giving expression to the intention of the legislature*<sup>29</sup> [emphasis added].

On the other hand, Lewis appears to have expressed the view that the words may constitute a general limitation on the Commonwealth's power when he posed the question:

Might it not be contended that certain navigation laws were not for the peace, order, and good government of the commonwealth, and might there not be litigation upon the point? We are giving very full powers to the parliament of the commonwealth, and might we not very well leave it to them to decide whether their legislation was for the peace, order, and good government of the commonwealth? Surely that is sufficient, without our saying definitely that their legislation should be for the peace, order, and good government of the commonwealth. I hope the leader of the Convention will give the matter full consideration with a view to seeing *whether these words are*

<sup>25</sup> (1883) 9 App. Cas. 117, 132.

<sup>26</sup> (1878) 3 App. Cas. 889, 904-5.

<sup>27</sup> 24 & 25 Vict. C. 27.

<sup>28</sup> (1878) 3 App. Cas. 889, 904.

<sup>29</sup> Australian Federal Convention, *Official Record of Debates, Sydney* (1897) 1036-7; quoted in Quick, J. and Garran, R. R., *op. cit.* n. 14, p. 65, 514.

*not surplusage*, and whether, therefore, they had better not be left out of the bill altogether<sup>30</sup> [emphasis added].

As is apparent, neither suggestion was adopted by the Convention. The suggestions are, however, useful in that they provide three possible uses for the words. The first, that they constitute a plenary grant of power must, on the basis of what has already been said, be rejected. The second suggestion, that they are 'surplusage', should, it is submitted, also be rejected unless no other result is possible.

What, then, of the concern arguably expressed by Lewis, that they be read as a general limitation on legislative power? If this is so, it would bring into play an established principle that, as the Judicial Committee observed in *Bribery Commissioner v. Ranasinghe*<sup>31</sup>

a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign.<sup>32</sup>

This was the view adopted recently by two members of the New South Wales Court of Appeal in *Building Construction Employees and Builders' Labourers Federation of New South Wales v. Minister of Industrial Relations* (the *B.L.F.* case).<sup>33</sup> However, it is to be noted that that proposition was either rejected or doubted by the other members of the Court<sup>34</sup> and has recently been firmly repudiated by the unanimous *dicta* of the High Court in the *Union Steamship* case.<sup>35</sup> Street C.J., with whom Priestley J.A. appeared to agree, expressed the view that

I prefer to look to the constitutional constraints of 'peace, welfare, and good government' as the source of power in the courts to exercise an ultimate authority to protect our parliamentary democracy, not only against tyrannous excesses on the part of a legislature that may have fallen under extremist control, but also in a general sense as limiting the power of Parliament. I repeat what I have said earlier—laws inimical to, or which do not serve, the peace, welfare, and good government of our parliamentary democracy . . . will be struck down by the courts as unconstitutional.<sup>36</sup>

A similar approach was suggested by Murphy J. in *Sillery v. R.*<sup>37</sup> when he observed that

all the relevant express powers to make laws with respect to enumerated subjects are qualified by the words 'for the peace, order and good government of the Commonwealth' (see ss 51, 52). Generally these words are ignored as formal and not limiting . . . In the light of our constitutional history any law which requires or authorizes infliction of cruel and unusual punishment should be regarded as transcending the limits of power expressed in the words 'peace, order and good government'.<sup>38</sup>

The use of 'peace, order and good government' in this way, however, faces the formidable difficulty that it seems to have been accepted, by the courts and the commentators that, as Keith put it—

<sup>30</sup> Australian Federal Convention, *Ibid.* 1037; Quick, J. and Garran, R. R., *Ibid.*

<sup>31</sup> [1965] A.C. 172.

<sup>32</sup> *Ibid.* 197.

<sup>33</sup> (1986) 7 N.S.W.L.R. 372, 382-7 (*per* Street C.J.), 421-2 (*per* Priestley J.A.); this case is discussed in Fairall, P. A., 'Peace, Welfare and Good Government: Limitations on the Power of the New South Wales Parliament' (1988) 26 *Law Society Journal* 38.

<sup>34</sup> (1986) 7 N.S.W.L.R. 372, 413 (*per* Mahoney J.A.), 406 (*per* Kirby P.), 407 (*per* Glass J.A.).

<sup>35</sup> (1988) 62 A.L.J.R. 645, 648.

<sup>36</sup> (1986) 7 N.S.W.L.R. 372, 387.

<sup>37</sup> (1981) 35 A.L.R. 227.

<sup>38</sup> *Ibid.* 234.

the test is subjective, not objective, and no Court can substitute its views of what should be enacted for those of the legislature.<sup>39</sup>

This proposition would appear to derive from the decision of the Privy Council in 1885 in *Riel v. R.*<sup>40</sup> where, before their Lordships it was argued that

if a Court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order, and good government, that they would be entitled to regard any statute directed to those objects, but which a Court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.

Their Lordships are of the opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to.<sup>41</sup>

In *B.L.F.* both Street C.J. and Priestley J.A. drew attention to, what they regarded as, the lack of other authorities to support this proposition.<sup>42</sup> It is to be noted, however, that there is a line of authorities, the most recent of which is the *Union Steamship* case, which reject the use of 'peace, order and good government' as a general limitation. In *Robtelmes v. Brennan*<sup>43</sup> Griffith C.J. considered that

The Commonwealth Parliament has power to make whatever laws it may think fit 'for the peace, order and good government' of the Commonwealth with respect, among other things, to 'naturalization and aliens' . . . I cannot, therefore, doubt that the Commonwealth Parliament has under that delegation of power authority to make laws that it may think fit for that purpose; and it is not for the judicial branch of the Government to review their actions, or to consider whether the means that they have adopted are wise or unwise,<sup>44</sup>

Barton J. expressed similar views.<sup>45</sup> Similarly, White J. of the South Australian Supreme Court recently explicitly rejected the use of the words as a limitation on legislative power in *Grace Bible Church v. Reedman*<sup>46</sup> as did the South African Supreme Court in 1912 in *R. v. McChlery*.<sup>47</sup>

If, then, the words 'peace, order (or welfare) and good government' are not to be considered as superfluous and are also not to be regarded as a limit on power, can they be given any other operation? Keith seems to have anticipated this difficulty with his apparent acknowledgement that the words do constitute some form of limit, but that the test is 'subjective, not objective'.<sup>48</sup> This suggestion, if accepted, would give the words a unique operation in that they neither grant nor inhibit power, but operate as no more than a suggestion provided by the grantor of power as to the ends to which exercises of power should aim.

A similar proposition was also put by Moore with the observation, subsequently approved by Windeyer J. in *R. v. Foster; ex parte Eastern and Australian Steamship Co. Ltd.*,<sup>49</sup> that the words

<sup>39</sup> Keith, A. B. *op. cit.* n. 2, p. 65, 302; and see Jennings, W. I. *op. cit.* n. 9, p. 69, 48-49; Roberts-Wray, K., *op. cit.* 369; Lumb, R. D., *The Constitutions of the Australian States* (1977) 82; Lumb, R. D. *The Constitution of the Commonwealth of Australia, Annotated* (1986) 78.

<sup>40</sup> (1885) 10 App. Cas. 675.

<sup>41</sup> *Ibid.* 678.

<sup>42</sup> (1986) 7 N.S.W.L.R. 372, 384, 421.

<sup>43</sup> (1906) 4 C.L.R. 395.

<sup>44</sup> *Ibid.* 404.

<sup>45</sup> *Ibid.* 415.

<sup>46</sup> (1984) 36 S.A.S.R. 376, 386-7.

<sup>47</sup> [1912] A.D. 199, 215-6 (*per* Lord de Villiers C.J.), 220-1 (*per* Innes J.) and 225-6 (*per* Solomon J.).

<sup>48</sup> Keith, A. B., *op. cit.* n. 2, p. 65.

<sup>49</sup> (1959) 103 C.L.R. 256, 308.

do not in themselves confer any substantive power, nor do they, it is submitted, warrant the view that the matters enumerated [in s. 51 of the Commonwealth Constitution] are merely means towards an end. They simply express the fact that in 'a general and remote sense the purpose and design of every law is to promote the welfare of the community'.<sup>50</sup>

These suggestions of Keith and Moore, it is submitted, simply will not do as they beg the question whether or not the words are to have some operation. The effect of such propositions is, to adopt the words of Abel, to regard the words as a jingle eroded by time and repetition, like 'give, devise and bequeath' or 'love, honour and obey'.<sup>51</sup>

To accept that the words constitute no more than an expression of a gratuitous sentiment is to adopt a most unusual technique of constitutional interpretation in that this approach requires the creation of a specific exception to the principle of drafting requiring the avoidance of surplus words.

In this regard, it is worth recalling the principles of constitutional interpretation expounded by the Privy Council in *Burah's* case and in *Attorney-General for Ontario v. Attorney-General for Canada*<sup>52</sup> which were approved in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (the *Engineers' case*).<sup>53</sup> In *Burah*, the Judicial Committee expressed the view that a court has to look to the terms of the empowering instrument to see whether the prescribed limits have been exceeded:

*If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited . . . , it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions*<sup>54</sup> [emphasis added].

In *Attorney-General for Ontario* the Board said

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument . . . if the text is explicit the text is conclusive, alike in what it directs and what it forbids<sup>55</sup> [emphasis added].

In accordance with these principles, it is submitted that the words 'peace, order (or welfare) and good government', once the approach that they constitute a plenary grant of power or a territorial restriction on power is rejected, can only constitute an 'express condition or restriction by which the power is limited' and that the intermediate approach advanced by Keith and Moore cannot be accepted. The text, in this instance, is explicit and therefore conclusive, unless some justification can be demonstrated for not reading the words in their 'natural sense'.<sup>56</sup>

It may be argued that such justification can be found by looking to another principle of constitutional interpretation approved in the *Engineers' case*: that the meaning to be attached to the phrase is to be indicated by reading it

in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it.<sup>57</sup>

<sup>50</sup> Moore, W. H., *op. cit.* 274-5.

<sup>51</sup> Abel, A. S., 'What Peace, Order and Good Government' (1968) 7 *Western Ontario Law Review* 1, 4.

<sup>52</sup> [1912] A.C. 571.

<sup>53</sup> (1920) 28 C.L.R. 129, 149-50 (*per* Knox C.J., Isaacs, Rich and Starke JJ.).

<sup>54</sup> (1878) 3 App. Cas. 889, 904-5.

<sup>55</sup> [1912] A.C. 571, 583.

<sup>56</sup> *Vacher and Sons Ltd v. London Society of Compositors* [1913] A.C. 107, 113 (*per* Viscount Haldane L.C.); approved in *Engineers' case* (1920) 28 C.L.R. 129, 148-9.

<sup>57</sup> (1920) 28 C.L.R. 129, 152.

The argument would be that the words should not be read as a justiciable limitation on power, as the views expressed in cases and opinions, in relation to the words, at the time of the enactment of the Constitutions in which those words are to be found, did not regard them as a limitation.

This proposition cannot, it is submitted, be accepted. As has been discussed, these words have been incorrectly regarded as the touchstone of the doctrine of colonial extra-territorial legislative incompetence, an interpretation which was not, as has also been demonstrated, generally accepted at the time that any of the six Constitutions to which this discussion relates were drafted. None the less, as Mason J. observed in *Wacando v. Commonwealth*,<sup>58</sup> the recent cases

now demonstrate that the colonies could in the nineteenth century make laws which had an extra-territorial operation . . . To the historian it may seem strange that we can now enunciate the law in terms diametrically opposed to informed legal thinking in the nineteenth and the early part of this century. Our ability to do so rests on a clearer perception of what essentially was involved in the grant of power to make laws for the peace and good government of a colony, uninfluenced by restrictive considerations not expressed in the grant of power itself.<sup>59</sup>

There would seem to be no reason why, if the courts have been prepared to give the words an operation in relation to extra-territorial competence 'diametrically opposed to informed legal thinking' at the time of the enactment of the constitutional provisions, the general limiting operation suggested here should not be accepted. This is particularly so as the words have been demonstrated not to have the territorial relevance claimed for them, or to have any significance to the plenary nature of legislative powers.

A number of arguments, however, have been raised as to why the courts should not exercise this jurisdiction. The first is that it is not necessary for them to do so because an improper use of legislative power can, in most cases, be controlled by the courts through statutory interpretation. As Mahoney J.A. said in *B.L.F.*,

The courts have traditionally refused to construe legislation as having such an effect [*i.e.*, upon human rights] unless the legislation shows appropriately clearly that it was the intention of the Parliament that it do so. I do not doubt that, where the interference is sufficiently serious, the courts may refuse to infer such an intention and may give such an effect to the legislation only if the Parliament has taken the responsibility for that interference by saying so in terms.<sup>60</sup>

This, however, is no answer, for if the words constitute a limitation and it is contended that that limitation has been violated, the courts, as was said in *Burah*, 'must of necessity determine that question'.<sup>61</sup>

The use of 'peace, order and good government' as a general limitation will also be unnecessary if the *Union Steamship* decision was suggesting that the legislative sovereignty doctrine may not apply: *i.e.*, that acts of Parliament will be subject to fundamental principles of common law. In that case their Honours observed that

Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law . . . is another question which we need not explore.<sup>62</sup>

<sup>58</sup> (1981) 148 C.L.R. 1.

<sup>59</sup> *Ibid.* 21; see also *Bonser v. La Macchia* (1970) 122 C.L.R. 177, 225 (*per* Windeyer J.) and *Union Steamship Co. of Australia v. King* (1988) 62 A.L.J.R. 645, 650.

<sup>60</sup> (1986) 7 N.S.W.L.R. 372, 413.

<sup>61</sup> (1878) 3 App. Cas. 889, 904.

<sup>62</sup> (1988) 62 A.L.J.R. 645, 648.

The Court mentioned a number of decisions in which Cooke J. of the New Zealand Supreme Court had, in *dicta*, stated that

Some common law rights presumably lie so deep that even Parliament could not override them.<sup>63</sup>

These decisions are supported by authorities commencing with the 1610 decision of Coke C.J. in *Dr Bonham's case*<sup>64</sup> wherein his Honour stated that

in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void.<sup>65</sup>

The common law fundamental rights doctrine is, however, opposed by Dicey's theory of parliamentary sovereignty. Despite recent academic criticism,<sup>66</sup> Dicey's doctrine is, as Kirby P. observed in *B.L.F.*, in 'line with the mainstream of current constitutional theory as applied in our courts'.<sup>67</sup>

The High Court has also noted that the common law fundamental rights doctrine has been 'firmly rejected'<sup>68</sup> by Lord Reid in *Pickin v. British Railways Board*.<sup>69</sup> His Lordship has maintained that, if the common law contained fundamental principles which were not subject to statutory law,

since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.<sup>70</sup>

Despite this decision it is to be noted that, in addition to the New Zealand cases, a number of British cases appear to have applied the *Dr Bonham's case* principle after 1688.<sup>71</sup>

The High Court's attitude to this principle is, therefore, unclear although it may be that the reference to *Pickin's case* may well lead to the conclusion that it is not inclined to follow the New Zealand *dicta*. On the other hand, the fact that their Honours mentioned the subject, which had no relevance to the matter before them, and specifically left the question open, may indicate that there is some judicial support for fundamental common law principles. As a result, it is necessary to await a future consideration of the question of legislative sovereignty by the High Court before the common law renders it pointless for a general restriction to be derived from 'peace, order and good government'.

A further criticism of the use of the empowering phrase as a source of a general restriction is found in the following passage:

it is impossible that the Colonial Courts should have an over-riding authority to say when measures are, and when they are not, in the general interests of peace, order and good government. Such a task would be in the highest degree invidious and difficult,<sup>72</sup>

<sup>63</sup> *Taylor v. New Zealand Poultry Board* [1984] 1 N.Z.L.R. 394, 398; and see *Drivers v. Road Carriers* [1982] 1 N.Z.L.R. 374, 390; *Fraser v. State Service Commission* [1984] N.Z.L.R. 116, 121; *L. v. N.* [1979] 2 N.Z.L.R. 519, 527; *Brader v. Ministry of Transport* [1981] 1 N.Z.L.R. 73, 78; Caldwell, J. L., 'Judicial Sovereignty — A New View' [1984] *New Zealand Law Journal* 357.

<sup>64</sup> (1610) 8 Co. Rep. 114a; 77 E.R. 647.

<sup>65</sup> *Ibid.* 118a; 77 E.R. 647, 652.

<sup>66</sup> Walker, G. de Q. 'Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion' (1985) 59 *Australian Law Journal* 276.

<sup>67</sup> (1986) 7 N.S.W.L.R. 372, 404.

<sup>68</sup> (1988) 62 A.L.J.R. 645, 648.

<sup>69</sup> [1974] A.C. 765, 782.

<sup>70</sup> *Ibid.* 782.

<sup>71</sup> *City of London v. Wood* (1701) 12 Mod 669, 687; 88 E.R. 1592, 1601 *Green v. Mortimer* (1861) 3 L.T. 642; *R. v. Inhabitants of Cumberland* (1795) 6 T.R. 194; 101 E.R. 507; *MacCormick v. Lord Advocate* [1953] S.C. 396.

<sup>72</sup> *R. v. McChlery* [1912] A.D. 199, 220-1 (*per Innes J.*).

and there are suggestions by Kirby P. and Mahoney J.A. in *B.L.F.* and White J. in *Grace Bible Church* that the invidious nature of such a task derives from the fact that protection against legislative excesses is 'fundamentally, a political and democratic'<sup>73</sup> issue rather than one for the judiciary.

It is to be noted, however, that the judiciary is commonly placed in 'invidious and difficult' situations by being required to deal with issues of political controversy, as such cases as *Australian Communist Party v. Commonwealth*<sup>74</sup> and *Commonwealth v. Tasmania* (the *Dams case*)<sup>75</sup> demonstrate. Furthermore, as Dixon J. observed in *Melbourne Corporation v. Commonwealth*,<sup>76</sup> when rejecting the proposition that implications should not be derived from the Commonwealth Constitution as they involve 'political' considerations which the judiciary is ill equipped to deal with:

The Constitution is a political instrument. It deals with government and governmental powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.<sup>77</sup>

Another argument against interpreting the words as a general limitation upon legislative power is, as Kirby P. put it in the *B.L.F.* case,

By their history, purpose and language these words may not be apt to provide a limitation on what the legislature may enact.<sup>78</sup>

It is clearly true that, as has been seen, the majority of judicial and academic opinion relating to the meaning to be attached to the words does not support their use as a general limitation on power. However, the history of the use of the words may not be as opposed to their use as a limitation on power as Kirby P. suggests. It is well to recall, as has been mentioned, that the usage of the words in Constitution Acts seems to derive from the use of similar phrases in the commissions to colonial governors. For example, the governors of the pre-revolutionary American colonies were granted power, by their commissions,

to make, constitute and ordain Laws, Statutes and Ordinances for the Public Peace, Welfare and good Government of Our said Province.<sup>79</sup>

The purpose of such commissions was, in addition to granting power to governors, to control the use of those powers and it is suggested that the tenor of the commissions indicates that the reason for the use of the words 'public peace, welfare and good government' was to instruct the governors as to the limits of their powers and the purposes for which powers were to be used. Such a usage of the words would indicate, therefore, that their original use was to define and limit the scope of the powers granted.

This seems to have been the view adopted by Lord Mansfield in his judgment in *Campbell v. Hall*.<sup>80</sup> His Lordship, after quoting a proclamation issued under

<sup>73</sup> (1986) 7 N.S.W.L.R. 372, 406 (*per Kirby P.*), 413 (*per Mahoney J. A.*); (1984) 36 S.A.S.R. 376, 387 (*per White J.*).

<sup>74</sup> (1951) 83 C.L.R. 1.

<sup>75</sup> (1983) 158 C.L.R. 1.

<sup>76</sup> (1947) 74 C.L.R. 31.

<sup>77</sup> *Ibid.* 82.

<sup>78</sup> (1986) 7 N.S.W.L.R. 327, 406.

<sup>79</sup> See the examples in Labaree, L.W. (ed.) *op. cit.* n. 7, 65, 812, 819, 829.

<sup>80</sup> (1774) Cowp. 204; 98 E.R. 1045; a more complete account of this judgment appears in Keith,

the Great Seal of 7 October 1763 concerning Grenada and other colonies which referred to a power given to the governors of those colonies to 'summon and call general assemblies', then observed

And then follows the *directions for that purpose*. And to what end? 'To make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government of our said colonies . . . and of the people and inhabitants thereof, as near as may be agreeable to the laws of England'.<sup>81</sup> [emphasis added].

Lord Mansfield's characterization of the words as 'directions' to a particular 'end' would seem, therefore, to indicate that the history of the use of the words is not completely at odds with the proposition that they constitute a limit on the scope of legislative power.

Furthermore, the use of the words in the manner suggested is not completely without support. The cases concerning extra-territorial competence, again, provide examples of this in that, although those words cannot be regarded as the source of that doctrine, a number of the decisions regarding that issue have demonstrated a willingness to regard the words as a general restriction.

In *Trustees Executors*, for example, Evatt J. considered that

The Constitution then requires that it must be possible to *predicate of every valid law* that it is for the peace, order, and good government of, the Dominion with respect to a granted subject<sup>82</sup> [emphasis added],

and, later in his judgement, referred to the words in question as 'the words employed in the constitutional statute to define and *limit* the legislative power'<sup>83</sup> (emphasis added). It may be unwise to seek to derive too much support from his Honour's observations as it is clear that his comments were principally directed to the question of extra-territorial competence. Nonetheless, the passages quoted suggest that his observations were not necessarily intended to be limited to that issue alone.

The views of Barwick C.J. expressed in *Robinson's* case seem less ambiguous. It will be recalled that his Honour proposed a two stage test for determining the validity of extra-territorial legislation, *viz*

*laws must first be seen to be laws which are for the peace, order and good government of the State and thereafter when they answer that criterion they may operate extra-territorially so long as the extra-territorial operation is still something which can be said to be for the peace, order and good government of the State*<sup>84</sup> [emphasis added].

By adopting this two stage process, the Chief Justice seems to have taken the view that the words constitute, in the first instance, a limitation on all exercises of legislative power, as, according to his formulation, the extra-territorial operation of a challenged law is only relevant at the second stage of the test.

In *Foster's case*, Menzies J. seems also to have been of the view that the words 'peace, order and good government' constitute a general limitation when he said

*To be within power a law made under s. 51 must be 'for the peace, order and good government of*

A.B. (ed.). *Select Speeches and Documents on British Colonial Policy 1763-1917, Vol. 1* (1918) 35-52.

<sup>81</sup> Keith, A.B., *ibid.* 49. This passage does not appear in the report of the judgment.

<sup>82</sup> (1933) 49 C.L.R. 220, 236.

<sup>83</sup> *Ibid.* 240.

<sup>84</sup> (1977) 138 C.L.R. 283, 294-5.

*Australia* [sic] and must be authorized by one or more of the paragraphs (i) to (xxxix) . . . What the Statute [of Westminster] does is to require the validity of legislation with extra-territorial application to be determined in the same way as legislation the application of which is confined to *Australia*<sup>85</sup> [emphasis added].

Lumb also seems to support the use of the words as a general limitation on power, despite his approval<sup>86</sup> of Keith's approach to the issue. He has expressed the opinion that legislation altering State constitutional provisions so as to impose 'excessively rigid fetters in relation to the constitutional alteration process' so that they

make change impossible or at least from a practical view, impose over-rigid fetters, would probably not be regarded as legislation for the 'peace, order and good government of the State.'<sup>87</sup>

As an example he suggests that a constitutional manner and form provision 'requiring the [a] repealing bill be approved by ninety per cent of electors voting at a referendum' could be invalidated on that basis.<sup>88</sup>

Support for the use of the words in this way can be found in the decision of Wells and Jacobs JJ. and Williams A.J. of South Australian Supreme Court in *Gill v. State Planning Authority*.<sup>89</sup> In that case their Honours, when considering an Act which empowered the Governor, by proclamation, to amend or vary provisions of a particular Act, expressed the view that they had

grave doubts whether it can validly be characterized as a law for the peace, welfare and good government of the State and whether, therefore, it is *intra vires*.<sup>90</sup>

It would seem, then, that the principal difficulty with the proposition suggested by Lewis, Murphy J., Street C.J. and Priestley J.A. lies not in its lack of support, but with the method of its application. This problem was raised in the *Grace Bible Church* case where White J. considered that the limitation could not be applied due to its lack of a guiding 'constitutional yardstick'.<sup>91</sup> It is submitted, however, that the words 'peace, order (or welfare) and good government' are, themselves, the yardstick to be applied. Such a yardstick may be, as Gibbs J. said in relation to the usage of those words as an extra-territorial limitation, 'exceedingly vague and imprecise',<sup>92</sup> but this seems no reason why the words should not be given effect. The High Court, after all, has been prepared to read limitations into the legislative powers of both the federal and State legislatures on the basis of implications to be derived from the federal nature of Australia's system of government,<sup>93</sup> despite, as Gibbs J. observed in *Victoria v. Commonwealth* (the *Pay-roll Tax* case), 'the imprecision of the test'<sup>94</sup> derived from those

<sup>85</sup> (1959) 103 C.L.R. 256, 300-1.

<sup>86</sup> Lumb, R. D., *The Constitutions of the Australian States* (1977) 82; Lumb, R. D., *The Constitution of the Commonwealth of Australia, Annotated* (1986) 78.

<sup>87</sup> Lumb, R. D., 'Fundamental Law and the Process of Constitutional Change in Australia' (1978) 9 *Federal Law Review* 148, 179.

<sup>88</sup> Lumb, R. D., *The Constitutions of the Australian States* (1977) 112.

<sup>89</sup> (1979) 20 S.A.S.R. 580.

<sup>90</sup> *Ibid.* 589.

<sup>91</sup> (1984) 36 S.A.S.R. 376, 387.

<sup>92</sup> *Pearce v. Florenca* (1975) 135 C.L.R. 507, 517.

<sup>93</sup> *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31; *Victoria v. Commonwealth* (1971) 122 C.L.R. 353; *Queensland Electricity Commission v. Commonwealth* (1985) 159 C.L.R. 192; *State Chamber of Commerce & Industry v. Commonwealth* (1987) 73 A.L.R. 161; *Commonwealth v. Cigamatic* (1962) 108 C.L.R. 372.

<sup>94</sup> (1971) 122 C.L.R. 353, 424.

implications. How much more important is it, then, to ensure that words in a Constitution, which can have no operation, other than as a limitation on power, are given effect? The vagueness and imprecision of the 'yardstick' must, of course affect the way in which it is applied, but it cannot be regarded as a reason for denying the existence of the limitation.

What, then, can be said to fall within the scope of the limitation; or, to put the matter more precisely, what can be said to fall outside the scope of the legislature's powers to make laws for 'peace, order and good government'?

It has been argued, as White J. speculated in *Grace Bible Church*, that

If the Court could substitute its own opinion for the Parliament's opinion as to what is a law for the peace, welfare and good government of the State (or if a judge could uphold every man's opinion that a particular law was invalid because it was not a good law) we would not be living under the rule of law but in a state of chaos.<sup>95</sup>

While it is difficult to define the precise bounds of the limitation, White J.'s argument seems something of an over reaction in that, if for no other reason, it would be most unlikely for the courts to accept that the words require them, or grant them the freedom, to determine whether a challenged law is good or bad, or whether the 'Legislature has acted wisely or unwisely'<sup>96</sup> on the basis of the judge's, or a litigant's, personal opinion. As Priestley J.A. observed in *B.L.F.*:

Obviously, it would take a very extraordinary Act indeed to make a court consider whether it could and should decide that a Statute was not for the peace, welfare and good government of the State.<sup>97</sup>

Furthermore, it is submitted that the limitation imposed by the words requires, like any other constitutional expression, some objective definition so as to avoid the dangers of subjective interpretation suggested by White J. and, thereby, to allow uniformity of approach.

As a starting point in defining the limitation, it is probably true to say, as the Judicial Committee observed in *Attorney-General for Saskatchewan v. Canadian Pacific Railway Co.*,<sup>98</sup> that

a legislature empowered to pass laws for such purposes has a very wide discretion.<sup>99</sup>

The discretion is not absolute, but it would seem that the limitation imposed by the words, whatever its interpretation, can be confined to a very narrow range.

In *B.L.F.* Street C.J. seems to have considered that each of the words 'peace', 'order' and 'good government' constitute separate limitations. His Honour stated that he agreed with<sup>1</sup>, and would therefore adopt *mutatis mutandis*, the opinion of Abel, that the courts are required to ask

does this involve the peace of Canada? the order of Canada? the good government of Canada?<sup>2</sup>

However, he did not explain how the words are to be given a separate operation, and it is difficult to see how they could be so applied. Indeed, if they were to be so separately treated, it may mean that the test applicable in Western Australia

<sup>95</sup> (1984) 36 S.A.S.R. 376, 387.

<sup>96</sup> *R. v. McChlery* [1912] A.D. 199, 216 (*per* Lord de Villiers C.J.)

<sup>97</sup> (1986) 7 N.S.W.L.R. 372, 421.

<sup>98</sup> [1953] A.C. 594.

<sup>99</sup> *Ibid.* 613-4.

<sup>1</sup> (1986) 7 N.S.W.L.R. 372, 385.

<sup>2</sup> Abel, *op. cit.* n. 51 p. 71, 6.

would be different from that in New South Wales for, as Roberts-Wray has noted, "order" and "welfare" are far from synonymous'.<sup>3</sup>

Furthermore, if the proposition that each of the words constitutes an independent limitation on power is taken to its logical conclusion, the Commonwealth would arguably be prevented by the word 'peace' from enacting any legislation for the purpose of enabling it to engage in military hostilities. It is submitted, therefore, that such an approach would place an undue limitation on the scope of legislative power and an alternative approach to the interpretation must be found.

In this regard it is to be noted that, despite the observations quoted, the general thrust of the Chief Justice's argument was to treat the words as a 'package deal'<sup>4</sup> constituting a compendious means of excluding from the scope of legislative power laws inimical to the fundamental principles upon which the 'body politic' is founded. In his view,

The reference in s. 5 to 'New South Wales' is conceptual. It does not mean the geographic area of the State. Nor does it mean the people within that geographic area. It means the body politic known as New South Wales. The High Court has described it as both a territory and a people of that territory 'considered as a political organism': *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*<sup>5</sup> That body politic or political organism is essentially a parliamentary democracy — an entity ruled by a democratically elected Parliament whose citizens enjoy the great inherited privileges of freedom and justice under the protection of an independent judiciary.

I emphasise the conceptual character of 'New South Wales' in this constitution statute. Laws enacted by Parliament must, to be constitutionally valid, meet the test of being for 'the peace, welfare, and good government' of that parliamentary democracy as it is perceived at the time when the question arises. It rests with our courts to determine whether that test is met.<sup>6</sup>

The type of legislation which, on the 'body politic' basis, the legislature is prevented from enacting can be considered to be that which is 'manifestly arbitrary and unjust' and would include legislation which is inimical to any matter which 'inheres in the very substance of our parliamentary democracy' such as universal suffrage or 'such fundamental constitutional principles as the independence of the judiciary',<sup>7</sup> or that which allows the 'infliction of cruel or unusual punishment'<sup>8</sup> or 'literal compulsion, by torture for instance'.<sup>9</sup>

Other legislation which has been suggested as being sufficiently extreme so as to be regarded as not being for 'peace, order and good government', such as the imposition of over-rigid fetters on constitutional change<sup>10</sup> or legislation dictating that all blue eyed babies be killed<sup>11</sup> would also seem to be excluded on the basis of the 'body politic' approach to the limitation.

This formulation, however, does not greatly assist in resolving the difficulties inherent in applying the limitation in relation to less extreme legislation. For example, it was suggested by White J. in *Grace Bible Church* that

<sup>3</sup> Op. cit. 369.

<sup>4</sup> Abel, A. S., *op. cit.* n. 51 p. 71, 6.

<sup>5</sup> (1920) 28 C.L.R. 129, 147 (*per* Knox C. J., Isaacs, Rich and Starke JJ.).

<sup>6</sup> (1986) 7 N.S.W.L.R. 372, 382.

<sup>7</sup> *Ibid* 406 (*per* Kirby P.), 382 (*per* Street C. S.)

<sup>8</sup> *Shillery v. R.* (1981) 35 A.L.R. 227, 234 (*per* Murphy J.).

<sup>9</sup> *Taylor v. New Zealand Poultry Board* [1984] 1 N.Z.L.R. 394, 398 (*per* Cooke C. J.) quoted in (1986) 7 N.S.W.L.R. 372, 386.

<sup>10</sup> Lumb, R. D. 'Fundamental Law and the Processes of Constitutional Change in Australia' (1978) 9 *Federal Law Review* 148, 178; Lumb, R. D., *The Constitutions of the Australian States* (1977) 112.

<sup>11</sup> (1986) 7 N.S.W.L.R. 372, 420-1.

The appellant could logically have argued that a law which restricts freedom of religious expression and worship is an inherently bad law, and, by implication so bad that it could only tend to unrest, disobedience, even revolt, thus rendering it a law beyond the power of the Parliament which is restricted to making laws for the peace, welfare and good government of the State.<sup>12</sup>

While it is not, of course, possible to provide a detailed statement of the parameters of that limitation, or to resolve every borderline fact situation, it is suggested that, if the 'body politic' approach of Street C.J. is accepted, in the situation postulated by White J., such a law may fall outside of the scope of the legislative powers of the Parliament. This would not be because the law could, or even would inevitably, lead to civil disobedience. But if the law operated to effectively prevent, rather than merely restrict, freedom of religious expression and that freedom was regarded as fundamental to the 'peace, order and good government' of the body politic and no countervailing benefit to the body politic was apparent, such a law could be regarded as not being for 'peace, order and good government'.

On that basis laws imposing arbitrary restrictions or penalties upon persons because of their membership of certain groups, (*e.g.*, opposition members of Parliament or ethnic groups<sup>13</sup>) or interfering with the independence of the judiciary may also fall within the scope of the restriction.

The difficulty with the 'body politic' approach of Street C.J. is that it appears open to subjective interpretation of what 'inheres in the very substance of our parliamentary democracy'. Whether, therefore, the courts adopt this approach or find some other basis for giving effect to the limitation imposed by the words 'peace, order and good government', there is no doubt that the task of the judiciary in dealing with such issues will be a delicate one. There is, however, as Street C.J. put it,

no warrant for glossing these apparently important words out of the [Constitution] . . . and depriving them of their ordinary meaning and operation.<sup>14</sup>

However the words are interpreted, it is submitted that the limitation which they impose should operate essentially as a warning to the legislature that the scope of its powers is not absolute and that the courts can and will intervene to prevent abuse of power.

## 5. CONCLUSION

The foregoing discussion has demonstrated that the empowering phrases, 'for the peace, order (or welfare) and good government of' and 'in and for the' State constitute limitations on legislative powers in that:

- all States and the Commonwealth have been subjected to a limitation upon their extra-territorial legislative competence derived from the words 'for' and 'of the', or the words 'in and for the' State; and
- the Commonwealth and all the States, save Victoria, have been subjected to a

<sup>12</sup> (1984) 36 S.A.S.R. 376, 386-7.

<sup>13</sup> Note, however, that s. 25 Commonwealth Constitution appears to acknowledge the validity of racist electoral laws.

<sup>14</sup> (1986) 7 N.S.W.L.R. 372, 385.

general limitation upon their legislative powers by virtue of the words 'peace, order (or welfare) and good government'.

In reaching these conclusions, this article has sought to examine the mysteries attendant upon the seemingly innocuous phrase 'for the peace, order and good government of' a given jurisdiction.

Since the end of the nineteenth century, as has been demonstrated, those words have been invoked by the courts, including the current High Court in *Union Steamship*, as a kind of incantation giving rise to either a plenary grant of power and/or a restriction on extra-territorial legislative competence, but not to a general restriction of legislative powers. The courts, however, seem to have failed to notice that the effects said to be attributed to 'peace, order and good government' are also derived from constitutions which do not contain those words.

It has been attempted to show that this judicial approach to the words has been accompanied by little detailed analysis. It has been argued that such a close examination leads to the conclusion that the best function that can be given to the words is the one most opposed to conventional legal opinion, *i.e.*, that the words 'peace, order and good government' constitute a general limitation upon legislative competence, which acts as a basic constitutional protection of human and democratic rights.