《國家安全(立法條文)條例草案》：域外效力

本文討論－

(1) 《香港法令》中處理域外法例的條文；

(2) 建議的煽動叛亂罪具域外效力的範圍；以及

(3) 為何建議的顛覆及分裂國家罪可延伸適用於香港永久性居民的域外作為。

《香港法令》

2. 《香港法令》於 1985 年制定，訂明自 1997 年 7 月 1 日起，英國在香港任何地方都不再擁有主權或司法管轄權。

3. 法令的附表授予英女皇一些權力，包括可藉樞密院頒令，制定由該法令所產生的或與該法令的主要目的有關的，且看來有需要或有利的條文，讓香港的立法機構可制定具域外效力的法例。英女皇根據上述權力共作出了兩項樞密院頒令。

4. Peter Wesley-Smith 教授在“Constitutional and Administrative Law”一書中討論了上述條文的效力(見附件 1)。從該討論中可以清楚看到，香港立法機構制定具域外效力法例的權力，並不限於上述兩項樞密院頒令所涵蓋的範疇。

5. 因此，當局不認為該法令有助我們了解特區立法機構可制定具域外效力的法例的範圍。

煽動叛亂罪的域外效力

6. 任何人－

(a) 煽惑他人犯叛國、顛覆或分裂國家的罪行；或

(b) 煽惑他人在香港或其他地方進行會嚴重危害中華人民共和國的穩定的公眾暴亂，

即屬犯了建議的煽動叛亂罪。

7. 就上文第 6(a)段而言－

(a) 只有具香港永久性居民身分的中國公民方可在香港以外地方干犯叛國罪；

(b) 只有香港永久性居民方可在香港以外地方干犯顛覆或分裂國家罪。

因此，任何人在香港煽惑上述人士在香港以外干犯叛國、顛覆或分裂國家罪，即屬犯了煽動叛亂罪。然而，煽惑其他人士在香港以外作出叛國、顛覆或分裂國家的行為，則並非罪行。

8. 就上文第 6(b)段而言，有關的煽惑行為須在香港境內進行，儘管他人受到煽惑而進行的公眾暴亂是在其他地方發生。

顛覆罪和分裂國家罪的域外效力

9. 有議員要求當局解釋，為何認為將顛覆罪及分裂國家罪適用於香港永久性居民在香港以外地方的作為的建議，是符合關連驗證。

10. 與這有關的兩個主要香港案例為 *R v Lau Tung-sing* [1989] 1 HKLR 490 及 *Somchai Liangsiriprasert v Government of USA [1990] 1 HKLR 85*。在 *R v Lau Tung-sing* 一案中，上訴人因安排一名未獲授權入境的人士進入香港而被判罪名成立，而有關罪行是在中國內地發生的。《入境條例》第 37J 條規定"身在香港的人，可因全部或部分在香港境外所作出或發生的任何事情(假若在香港作出或發生本已構成本部所訂罪行者)而被檢控及定罪"。上訴法庭法官 Power 作出以下裁決－

> 問題的核心並非該法例是否在某程度上具域外效力，而是該法例是否為了殖民地的安寧、秩序和良好管治而制定的。法院必須考慮，獲轉授立法權力的殖民地立法機構，是否就應由其處理的事項立法。若是的話，則該法例便沒有超出其立法權限。
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> 毋庸置疑，對一名先安排未獲授權入境者進入香港，而後來其本人亦進入香港的人士施加法律責任的法例，與香港的安寧、秩序和良好管治有充分的關連。因此，有關的法例，並沒有超出立法權限。

同樣地，在 *Somchai Liangsiriprasert v Government of USA* 一案中，法院的裁決是，與危險藥物有關並以香港為目的或針對香港的作

為，“是立法機構須予處理的恰當‘事務’”，不論有關作為“是在香港發生；或在邊境外發生；或在更遠的地方發生…”

11. 在上述兩個案例中，由於受禁止的作為可能對香港造成影響，因此不論被告人的國籍或其他身分，有關的具域外效力的條文獲得法院肯定。

12. 附件 2 載列了在其他普通法司法管轄區的非主權立法機構的案例摘錄。該等案例顯示，在下列情況下，可有充分關連，以支持具域外效力的法例－

(a) 有關人士是以有關的司法管轄區為其居籍或是該司法管轄區的居民；或

(b) 有需要保障有關的司法管轄區的防務或公眾安全。

13. 當局在第 36 號文件第 8 段列出四個因素，以支持建議的顛覆及分裂國家罪中具域外效力的條文與香港有足夠的關連。基於上文提及的案例，當局重申其看法，認為立法會有權制定有關罪行。

14. 當局並不接受立法會在一些作為與計劃在香港進行的具損害性的活動有關的情況下，才可禁制在香港境外作出的該些作為這個說法。因為香港是中華人民共和國的一部分，即使這些具損害性的活動並非在香港進行，任何會嚴重危害中華人民共和國的穩定或領土完整的活動，亦會危害香港。

15. 上述觀點獲在新加坡裁決的一個案例 *Re Choo Jee Jeng* (1959) 25 MLR 77 支持。在該案例中，一條新加坡法例賦予若干權力，防止任何人士作出有損馬來亞安全或公共秩序的作為。馬來亞在當時的定義，是新加坡殖民地及馬來亞聯邦。當時有人以該條法例超出新加坡的非主權立法機構的權力範圍而對其提出挑戰。該挑戰被否定，而法例的域外效力亦基於維持新加坡的安寧、秩序和良好管治這個理由而獲得肯定。

律政司
二零零三年五月

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7.5 Extraterritoriality[117]

7.5.1 *The General Doctrine*

The Hong Kong (Legislative Powers) Order 1986, made under the *Hong Kong Act*, empowers the Hong Kong legislature to make laws having

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113 (1949) 33 HKLR 66.
114 See n 88 above.
115 [1957] HKLR 89.
116 See n 110 above.
117 See Peter Wesley-Smith, 'Extraterritoriality and Hong Kong' [1980] *Public Law* 150; and 'The Hongkong Bank and the Extraterritorial Problem, 1865–1890' in Frank HH King (ed), *Eastern Banking: Essays in the History of the Hongkong and Shanghai Banking Corporation* (London, The Athlone Press, 1983) ch 4.

extraterritorial operation relating to civil aviation, merchant shipping, and admiralty jurisdiction. The Hong Kong (Legislative Powers) Order 1989, also made under the *Hong Kong Act*, empowers the Hong Kong legislature to make laws having extraterritorial operation to the extent required in order to give effect to an international agreement which applies to Hong Kong, and for connected purposes (Chapter 3.4.3). Laws relating to other matters, it might be inferred, cannot have extraterritorial operation. The inference is incorrect, but there is a common law doctrine of uncertain extent which places some limitation on the ability of a colonial legislature to affect events outside its boundaries. The *Colonial Laws Validity Act* did not refer to this question and the common law still applies to Hong Kong.[118]

The cases establish the following propositions:

- The first question is always: did the legislature intend a statute to apply extraterritorially? There is a presumption of intraterritorial operation, whether for a colonial ordinance[119] or an Act of Parliament.[120] The presumption is of course rebuttable if clear words or necessary intendment leave no doubt.

- If the statute is found to apply to an event, fact, circumstance, or thing beyond territorial limits,[121] the competence of the legislature to enact the statute must be considered. National boundaries are of no consequence to the supreme Parliament, but dependent legislatures are in a different position.

- The general legislative powers of a dependent legislature like Hong Kong are derived from the grant of authority to make law for the peace, order, and good government *of the colony*, and this imports a limitation on the ability to make laws with effect anywhere else in the world.[122]

- The limitation does not deny all colonial legislation all operation beyond colonial boundaries: the statute will be valid if there is some point of contact, some 'nexus', between the colony and the provisions of the

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118 Unless s 5 abolishes the extraterritorial limitation: see Trindade, n 107 above, at 237–38.

119 *Veronica Ma Kit-ching v Attorney-General* (1983) CA, Civ App No 64 of 1983; *Hill v Circus Entertainment Management Ltd* (1985) Victoria DCt, Employee's Compensation Case No 67 of 1985; and *Ka Wah Bank Ltd v Low Chung-song* (1988) HCt, HCA No 4191 of 1987.

120 *Air-India v Wiggins* [1980] 1 WLR 815; *Holmes v Bangladesh Airlines* [1989] 1 AC 1112; and *Somchai Liangsiripunsert v Government of USA* [1990] 2 HKLR 612 (PC).

121 As to Hong Kong's territorial limits, see Wesley-Smith, 'Extraterritoriality and Hong Kong', n 117 above, at 150–55.

122 This is much debated. Is the extraterritoriality limitation a purely common law doctrine or does it arise from the terms of the grant of legislative authority? If the former it might be held to apply to the SAR legislature; if the latter it would not be applicable under the Basic Law (see Section 7.8 below). The limitation may of course owe its existence to both the common law and construction of the grant. For recent contrasting accounts, see Mark Moshinsky, 'State Extraterritorial Legislation and the Australia Acts 1986' (1987) 61 ALJ 779 at 781–85; Christopher D Gilbert, 'Extraterritorial State Laws and the Australia Acts' (1987) 17 *Fed LR* 25 at 26–27; and Killey, n 51 above, at 29–41. See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 82 ALR 43 at 50–51.

legislation.[123] Whether that nexus exists, and whether it is sufficient or too remote, are questions which are incapable of precise answers and which depend on the particular facts of each case. But ordinances to deport aliens, extradite fugitive offenders, or control smuggling are valid even though they necessarily involve action outside the territory. The test is whether the legislation bears a 'real or substantial relation' to the colony.[124]

- If a dependent legislation fails to 'mind its own business', if its legislature has no or little relevance to the territory over which it has authority, then that legislation will be struck down by the courts as ultra vires.

The Australian High Court has adopted a very liberal approach to the extraterritoriality doctrine. In *Wacando v Commonwealth*[125] reference was made to a report of the Law Officers in England, dated 25 August 1894, which stated that a colonial legislature could not annex territory because its laws could not have extraterritorial operation. Mason J said:

> The course of recent decisions in this Court denies the validity of the [above] proposition. *Bonser v La Macchia*,[126] *New South Wales v The Commonwealth* (the *Sea and Submerged Lands Case*),[127] *Pearce v Florenca*[128] and *Robinson v Western Australian Museum*[129] now demonstrate that the colonies could in the nineteenth century make laws which had an extra-territorial operation. The contrary view was founded not so much on judicial decision as on doctrines which gained currency in the opinions of the Imperial law officers and reflected Great Britain's Imperial, maritime and trading interests. The strength and persistence of the traditional view is [sic] attested by the declaration in s 3 of the Statute of Westminster 1931 (Imp) that the Dominions (but not the States or Provinces) had power to enact extra-territorial legislation. 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 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.[130]

123 As discussed, eg, in *Boath v Wynill* (1989) 85 ALR 621. See also *Port MacDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340 at 372–73.
124 See, eg, *Ashbury v Ellis* [1893] AC 339; *Attorney-General for Canada v Cain* [1906] AC 542; and *Croft v Dunphy*, n 62 above.
125 (1981) 148 CLR 1.
126 (1969) 122 CLR 177.
127 (1975) 135 CLR 337.
128 See n 107 above.
129 (1977) 138 CLR 283.
130 See n 125 above, at 21.

7.5.2 *The Piggott Doctrine*

There are several Hong Kong ordinances which permit the exercise of extraterritorial powers, though none has been found ultra vires. Sir Francis Piggott, Chief Justice 1905–12, developed a theory by which formal notification of the decision by the Queen not to disallow an ordinance transformed the ordinance into the Queen's own legislation which could not be challenged for any breach of the extraterritoriality doctrine.[131] Non-disallowance, according to Piggott's theory, is equivalent to ratification, approval, and adoption, and the Queen's power to legislate extraterritorially extends to statutes by the legislature she created in Hong Kong.

This approach has not been noticed anywhere else in the common law world. It would seem, as a matter of logic, to extend beyond the defect of extraterritoriality and the curative of non-disallowance: thus, for example, some other deficiency in an ordinance, such as inconsistency with the legislature's constitution, ought to be corrected either by non-disallowance or, if the bill had been reserved, by the Queen's assent. To go so far would be startling, at least, to traditional doctrine. In the *Winfat* case at first instance[132] Kempster J held that the ordinances under attack 'were ratified by non-disallowance amounting in law to express authorisation'. This was an extension of the Piggott doctrine from extraterritoriality to disobedience to Royal Instructions. The Court of Appeal said: 'we would not like it to be thought that we agree with it, since there must be grave objections in principle to attributing to the Crown, in its prerogative guise, power to give force to an otherwise invalid law, by the mere act of deciding not to disallow it.'[133] It was thus doubtful that the rationale for formerly protecting Hong Kong ordinances from invalidation on the ground of extraterritoriality would continue to be accepted by the courts.[134]

In 1988, indeed, Piggott's innovation was impliedly discarded. The appellant in *R v Lau Tung-sing* had been convicted of arranging passage to Hong Kong of an unauthorised entrant, the offence having taken place in China. Section 37J of the *Immigration Ordinance* provided that 'where any person is in Hong Kong, he may be charged and convicted in respect to anything which was done or which occurred wholly or partly outside Hong Kong that would have been an offence under this Part if it had been done or had occurred within Hong Kong'. Power JA held:

> The issue is not whether the law has some extra-territorial application but whether it was enacted for the peace, order and good government

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131 *Re Iu Ki-shing* (1908) 3 HKLR 20 and *Re Chan Yue-shan* (1909) 4 HKLR 128, see Wesley-Smith, 'Extraterritoriality and Hong Kong', n 117 above, at 162–66.

132 [1983] HKLR 211 at 225–26.

133 See n 51 above, at 50. Disobedience to Royal Instructions did not, of course, render the law 'otherwise invalid'. See also *Attorney-General v David Chiu*, n 55 above, at 105, citing *Cameron v Kyte* (1855) 12 ER 678 at 682.

134 See the first edition of this book, pp 274–75, for a discussion of the rather odd nature and ramifications of Piggott's doctrine, and W Harrison Moore, 'The Privy Council and the Australian Constitution' (1907) 23 LQR 373, esp at 380 for pertinent comments (though not based on anything said by Sir Francis Piggott)

> of the colony. What the court must ask is whether, given the delegated legislative power of the colonial legislature, it is making a law with regard to matters that are properly its business. If it is, then the law is *intra vires*.
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> We have no doubt that legislation which imposes liability upon a person who, having arranged the passage of unauthorised entrants into Hong Kong, then comes to Hong Kong is sufficiently connected with the peace, order and good government of Hong Kong to make it *intra vires* the legislative power.[135]

Similarly, in *Somchai Liangsiriprasert v Government of USA* it was held that conduct in relation to dangerous drugs aimed or directed at Hong Kong 'is properly "the business" of the legislature', whether it occurs 'just within Hong Kong; just across the border; or at [some] greater distance away... .' In relation to dangerous drugs the Hong Kong legislature was empowered to make law with extraterritorial effect and the *Dangerous Drugs Ordinance* was manifestly enacted with intent that it apply outside the jursdiction.[136]

7.5.3 *The Legislative Powers Orders in Council*

The court also disposed of a related argument that the Hong Kong legislature can only make law with extraterritorial effect on matters dealt with in the Orders in Council under the *Hong Kong Act*. The *Immigration Ordinance* 'is not "extra-territorial" in the sense in which that term is used in s 2(b) of the Hong Kong (Legislative Powers) Order 1986 nor in any sense that makes it an *ultra vires* exercise of power by the Hong Kong legislature'.[137] The rather startling consequence of this remark appears to be that Hong Kong can legislate extraterritorially on civil aviation, merchant shipping, and admiralty jurisdiction, or to give effect to an international agreement, whether there is any connection between the ordinance and the colony or not. The more likely reason for the grant of extraterritorial legislative authority by the Orders in Council is that the draftsman believed either that Hong Kong did *not* otherwise possess it or that there was room for doubt.

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135 [1989] 1 HKLR 490 at 500

136 [1990] 1 HKLR 85 at 105.

137 See n 135 above, at 500

What, then, is a law *for the colony*? There must be some point of contact, some nexus, between the colony and the provisions of the legislation. Whether that nexus exists, and whether it is sufficient or too remote, are questions which are incapable of precise answers and which depend on the particular facts of each case.[46] If there is a sufficient nexus, the circumstance that the law has an extraterritorial scope is immaterial to the issue of its validity.

The two cases usually cited in this connection are *Attorney-General for Canada* v. *Cain* [46] and *Croft* v. *Dunphy*.[47] In *Cain* it was pointed out that the Crown of England could expel or deport aliens and could delegate this power to the colonies. The colonial legislature was entitled to exercise such power in the same manner as the Crown could exercise it, and the fact that extraterritorial constraint was imposed to effect the expulsion was irrelevant. There are several subsequent cases in which the *vires* of deportation legislation has been upheld. A Commonwealth Act for the deportation of Kanaka labourers, for example, was valid as it came under a constitutional head of power, even though it involved executive action beyond the territorial sea.[48] Such extraterritorial effect should be attributed to a dependent legislature's deportation laws as is necessary to make deportation effective.[49] *Croft* v. *Dunphy* concerned anti-smuggling legislation which provided a 12-mile territorial sea for any vessel registered in Canada. The judgment contains this passage:

> "Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order, and good government of Canada, . . . their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than one applicable to the legislation of a fully sovereign State." [50]

'peace, order, and good government' did not overcome such incompetence": *op. cit.* p. 409.

[45] ". . . I cannot escape the conclusion that the decision of the present problem depends upon a consideration of matters of degree, or upon the exercise of a judgment"; *per* Lush J. in *Baker* v. *Norris* (1967) Supreme Court of Victoria, unreported but quoted by Trinade, *op. cit.* p. 238.

[46] [1906] A.C. 542.

[47] [1933] A.C. 156.

[48] *Robtelmes* v. *Brenan* (1906) 4 C.L.R. 395.

[49] *R.* v. *Secretary of State for Foreign Affairs and Secretary of State for the Colonies, ex parte Greenburg* [1947] 3 All E.R. 950; see also *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* [1947] A.C. 87 and *Zabrovsky* v. *General Officer Commanding Palestine* [1947] A.C. 246.

[50] [1933] A.C. 156, 163. *Cf.* the further comment by the Judicial Committee in *Wallace* v. *Commissioner of Income Tax, Bombay* (1948) 75 I.A. 86, 98: "There is no rule of law that the territorial limits of a subordinate legislature define the possible 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. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the legislature. Concern by a subordinate legislature with affairs or persons outside its own territory may therefore suggest a query whether the legislature is in truth minding its own business. It does not compel the conclusion that it is not." Quoted by Roberts-Wray, *Commonwealth and Colonial Law* (1966), p. 971.

If the *topic* is related to the government of the *territory*, extraterritorial effect is permissible if it is "ancillary" [51] or "auxiliary" [52] or the "complement of an admitted power" [53]: it is one of the "accessory incidents attached by necessary implication to main powers" if, without it, the power would be meaningless.[54] The additional implied power, however, is limited by what is necessary to effectuate the primary power.[55]

Taxing statutes, particularly those of the Australian States, provide a wealth of cases illustrating the nexus required. In Evatt J.'s formulation the general principle is correctly stated in *Ashbury* v. *Ellis* [56]: the question is whether the law can truly be described as being for the peace, order and good government of the colony. Does it, "in some aspects or relations, bear upon" the territory? If it bears a "real or substantial" relation, it is valid.[57] This was criticised by O'Connell as merely begging the question,[58] though Roberts-Wray supports it [59]; the test serves to indicate that there may be a territorial connection which is too remote, but the question remains "what is a 'real or substantial' relation?" The domicile of a deceased is sufficient to attract duty to his estate, though in respect of property outside the jurisdiction [60]; property inside the jurisdiction, of course, is eminently taxable, whatever the domicile of the deceased.[61] An owner domiciled or residing or carrying on business beyond territorial boundaries may be liable to charges imposed on a vehicle operated within those boundaries,[62] but not if he is merely an absentee director of an owner company incorporated outside the state.[63] There is a sufficient connection where money is secured by the mortgage of intraterritorial property to justify taxing the interest.[64] But if the property is not locally situate [65] and the taxpayer is not locally domiciled or

[51] *Zabrovsky* v. *G.O.C. Palestine* [1947] A.C. 246, 262.

[52] *R.* v. *Lander* [1919] N.Z.L.R. 305, 331.

[53] *Delaney* v. *Great Western Milling Co. Ltd.* (1916) 22 C.L.R. 150, 165.

[54] *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners Association* (1913) 16 C.L.R. 664, 690.

[55] *Hazelton* v. *Potter* (1907) 5 C.L.R. 445, 471–472.

[56] [1893] A.C. 339.

[57] *Trustees Executors and Agency Co. Ltd.* v. *F.C.T.* (1933) 49 C.L.R. 220, esp. 240–241.

[58] *Op. cit.* p. 330.

[59] *Op. cit.* p. 390.

[60] *Thompson* v. *Commissioner of Stamp Duties* [1968] 3 W.L.R. 875.

[61] *Johnson* v. *Commissioner of Stamp Duties* [1956] A.C. 331.

[62] *O'Sullivan* v. *Dejneko* (1964) 37 A.L.J.R. 456.

[63] *Welker* v. *Hewett* (1969) 43 A.L.J.R. 410, approved and applied in *Cox* v. *Tonai* [1972] A.L.R. 497.

[64] *Broken Hill South Ltd.* v. *Commissioner of Taxation (New South Wales)* (1936) 56 C.L.R. 337.

[65] *Commercial Cable Co.* v. *Attorney-General of Newfoundland* [1912] A.C. 820; *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago* [1945] A.C. 1, 7; *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694.

resident,[66] the territorial connection will usually be considered insufficient. For example, the estate of a person dying resident out of and domiciled out of the state could not validly include, for stamp duty purposes, shares held in an outside company carrying on some of its business within the state[67]; incorporation of a company within the state, however, would be enough.[68]

It may be too much to expect consistency in approach when other areas of the law are concerned. Whereas a statute authorising judicial proceedings in respect of contracts made or to be performed in the state against a defendant out of the jurisdiction is valid,[69] arbitration of a dispute involving officers on ships registered within the territory was outside the jurisdiction of the arbitration court.[70] Doubts were at one time expressed whether defence powers could be exercised extraterritorially, but "it is absurd to limit the effectual defence of Australia or any country to operations on its territory. Imagine the Navy confined to the three mile limit!"[71] Similarly, an ordinance for the public security of Singapore validly dealt with extraterritorial matters.[72]

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[66] *London and South American Investment Trust Ltd.* v. *British Tobacco Co. (Australia) Ltd.* [1927] 1 Ch. 107.

[67] *Commission of Stamp Duties (New South Wales)* v. *Millar* (1932) 48 C.L.R. 618.

[68] *Myer Emporium Ltd.* v. *Commissioner of Stamp Duties* (1967) 85 W.N. (Pt. 2) (N.S.W.) 115 (noted in (1967) 41 A.L.J. 462)).

[69] *Ashbury* v. *Ellis* [1893] A.C. 339.

[70] *Merchant Service Guild of Australasia* v. *Archibald Currie and Co.* (1908) 5 C.L.R. 737.

[71] *Sickerdick* v. *Ashton* (1918) 25 C.L.R. 506, 517; see also *Semple* v. *O'Donovan* [1917] N.Z.L.R. 273. *Cf. Brisbane Oyster Fishery Co.* v. *Emerson* (1877) Knox (N.S.W.) 80, 86; Keith, *The Constitution, Administration and Laws of the Empire* (1924), p. 19 (referring to imperial legislation removing supposed limitations on Dominion authority over navies).

[72] *Re Choo Jee Jeng* (1939) 25 M.L.R. 77. *Cf.* however, *Dato' James Wong* v. *Officer in Charge*, a case from Sarawak noted and discussed in [1975] J.M.C.L. 158. In *Ex p. Cousens; Re Blacket* (1946) 47 S.R. (N.S.W.) 145, 149 Jordan C.J. said: "much water has run beneath the bridge since *Macleod* v. *Attorney-General for New South Wales* was decided; and in view in particular of what was said by the Privy Council in *Croft* v. *Dunphy* [1933] A.C. 156 at p. 163 I do not regard it as obvious that the law of New South Wales is necessarily incapable of protecting the State from high treason so long as the treason is committed beyond the three mile limit . . ." (quoted in *Connor* v. *Sankey* (1976) 21 A.L.R. 317, 363–364).

[73] [1891] A.C. 455.

[74] Although some writers have sought to explain this case as the mere application of a restrictive principle of interpretation (*e.g.* Salmon, "Limitations of Colonial Legislative Power," *op. cit.* esp. p. 131, and Smith, *op. cit.*), it seems obvious that their Lordships would have declared the New South Wales Act *ultra vires* if it was to be given a necessarily extraterritorial scope.